UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILUM TEXTILE SERVICES CO.

and **Cases 28-CA-20898**
28-CA-20906
28-CA-20973
28-CA-21050
28-CA-21203

UNITE HERE!

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Table of Contents

I. INTRODUCTION 1
II. PROCEDURAL HISTORY 2
III. BACKGROUND 4
A. Respondent's Operations 4
B. The Union's Organizing Drive 5
1. The Union's Initial Steps 5
2. The Employees' March 4 Demand For Recognition 7
3. Post-March 4 Organizing Efforts 8
C. The Union's Publicity Campaign 9
D. The Union's Other Community Efforts 10
E. Respondent's Response to the Union's Organizing Drive 11
F. Respondent's Publicity Campaign 12
G. Respondent's Lawsuit and Motion for a Restraining Order 13
H. Respondent's Prohibition on the Wearing of Union Buttons and Suspension of Guzman 14
I. Discharges of Denise Knox and Soe Moe Min 15
J. Respondent's Installation of Security Cameras 16
K. Computer Video Presentation to Employees 17
L. *Johnnie's Poultry* Violations 17
IV. ANALYSIS 18
A. ALJ Erred in Refusing to Find That on March 4, Respondent Solicited Grievances and Promised Employees Benefits, Interrogated Employees, Threatened That it Would be Futile to Join or Support the Union, and Asked Employees to Report on Union Activities. 18
1. The ALJ's Decision 18
2. Respondent Unlawfully Solicited Grievances (Exception #1) 19
3. Respondent Unlawfully Asked Employees to Report on Union Activities (Exception #2) 21
4. Respondent Unlawfully Threatened that Employees' Organizing Efforts were Futile (Exception #3) 22
5. Respondent Unlawfully Interrogated Employees (Exception #4) 26
B. The ALJ Erred in Refusing to find that Respondent's Continued Prosecution of the Federal Lawsuit was a Violation (Exception #5) 27
1. The ALJ's Decision 27
2. Argument 28
C. The ALJ Erred in Refusing to find that Kayonnie Engaged in Illegal Surveillance (Exception #6) 32
1. The ALJ's Decision 32
2. Analysis 32
D. The ALJ Erred in Refusing to find that Respondent Interrogated Zulima Ruiz on June 27 (Exception #7) 35
1. The ALJ's Decision 35
2. Argument 35

E. The ALJ Erred in Refusing to find that Respondent acted Illegally by Attempting to Cause the Arrest of Union Handbillers (Exception #8) 37
1. The ALJ's Decision 37
2. Analysis 38
F. The ALJ Erred in Refusing to find that Respondent's Statement to Guzman Concerning Video Cameras Created the Impression of Surveillance (Exception #9) 39
1. The ALJ's Decision 39
2. Analysis 40
G. The ALJ Erred in Failing to find that Respondent's October Suspension of Minjarez Violated Section 8(a)(3) (Exception #10) 41
1. The ALJ's Decision 41
2. Analysis 43
H. The ALJ Erred in Failing to Find That Respondent's December Suspension of Guzman Violated Section 8(a)(3) (Exception #11) 45
1. The ALJ's Decision 45
2. Analysis 48
I. The ALJ Erred in Failing to Find That Guzman's January Probation Violated Section 8(a)(3) (Exception #12) 50
1. The ALJ's Decision 50
2. Analysis 52
J. The ALJ Erred in Failing to Order a Bargaining Order Remedy Pursuant to NLRB v. Gissel Packing Co. (Exception #13) 53
1. The ALJ Decision 53
2. Analysis 54
V. CONCLUSION 58

Table of Authorities

Abbey's Transport. Servs., 284 NLRB 698 (1987), enfd. 837 F.2d 575 (2d Cir. 1988) 55
BE&K Construction Co., 351 NLRB No. 29 (2007) 28
Benesight, Inc., 337 NLRB 282 (2001) 27
Beverly Health and Rehabilitation Services, Inc., 336 NLRB 332 (2001) 29, 30
Blue Star Services, Inc. 328 NLRB 638 (1999) 45
Burger King, 258 NLRB 1293 (1981) enfd. 709 F.2d 1509 (6th Cir. 1983) 19
Carpinteria Lemon Ass'n v. NLRB, 240 F.2d 554 (9th Cir. 1957) 23, 26
Center Service System Division, 345 NLRB No. 45 (2005) 19
Chartwells, Compass Group, USA, Inc., 342 NLRB 1155 (2004) 19, 21, 22
Christie Elec. Corp., 284 NLRB 740 (1987) 26
Continental Bus System, 229 NLRB 1262 (1977) 37
Corporate Interiors, Inc., 340 NLRB 732 (2003) 39
CWI of Maryland, 321 NLRB 698 (1996) 22
D&F Industries, 339 NLRB 618 (2003) 34
Daniel Construction Co., 145 NLRB 1397 (1964) 22
Dentech Corp., 294 NLRB 924 (1989) 19
Desert Toyota 1, 346 NLRB No. 3 (2006) 43
Dilling Mechanical Contractors, Inc., 348 NLRB No. 6 (2006) 23, 25
Dura Art Stone, Inc., 340 NLRB 977 (2003) 49
Elias Bros. Big Boy, Inc., 137 NLRB 1057 (1962) 53
Federated Logistics and Operations, 340 NLRB 255 (2003) 22
Fluor Daniel, 333 NLRB 427 (2001) 49
Garvey Marine, Inc., 328 NLRB 991 (1999) 56
George L. Mee Memorial Hosp., 348 NLRB No. 15 (2006) 18, 20
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 29
Geske & Sons v. NLRB, 103 F.3d 1366 (7th Cir. 1997) *cert. denied* 522 U.S. 808 (1977) 31
Graves Marine Inc., 328 NLRB 991 (1999) enfd. 245 F.3d 819 (D.C. Cir. 2001) 56
Horizon Air Services, 272 NLRB 243 (1984) 56
Huntington Hosp. Inc., 218 NLRB 51 (1975) 45
Huttig Sash and Door Co., 263 NLRB 1256 (1982) 32
Intercity Maintenance Co. v. Local 254, SEIU, 241 F.3d 82 (1st Cir. 2001) *cert. denied* 534 U.S. 818 (2001) 30
International Baking Co. & Earthgrains, 348 NLRB No. 76 (2006) 25
J. N. Ceazan Co., 246 NLRB 637 (1979) 33
K-Mart Corp., 336 NLRB 455 (2001) 21
Letter Carriers v. Austin, 418 U.S. 264 (1974) 28
Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966) 28, 30
Lord Jim's, 264 NLRB 1098 (1982) 49
M.J Metal Products, 328 NLRB 1184 (1999) 57
Meisner Elec., Inc., 316 NLRB 597 (1995) 40
Mid-Mountain Foods, Inc., 332 NLRB 251 (2000) 44, 53

National Steel Supply, Inc., 344 NLRB 973 (2005) 43, 53
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) 3, 4, 54, 55, 57
NLRB v. Jamaica Towing, 632 F.2d 208 (2d Cir. 1980) 56
NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938) 26
Norton Audubon Hospital, 338 NLRB 320 (2002) 36
Our Way Inc., 268 NLRB 394 (1983) 36
Overnight Transportation Co, 254 NLRB 132 (1981) 37
Overnite Transportation Co., 329 NLRB 990 (1999) 56
Panelrama Centers, 296 NLRB 711 (1989) 34
Parsippany Hotel Management, Co., 319 NLRB 114 (1995) 35
Parts Depot, Inc., 332 NLRB 670 (2000) 26
Penn-Dixie Steel Corp., 253 NLRB 91 (1980 33
Professional Real Estate Investors v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993) 28
Ready Mix, Inc., 337 NLRB 1189 (2002) 37
Rossmore House, 269 NLRB 1176 (1984) affd. 760 F.2d 1006 (9th Cir. 1985) 18, 27, 36
Ryder/Ate, Inc., 331 NLRB 889 (2000) 34
Sahara Datsun, Inc. v. NLRB, 811 F.2d 1317 (9th Cir. 1987) 56, 57
Sara Lee d/b/a International Baking Co. & Earthgrains, 348 NLRB No. 76 (2006) 23
Smithfield Foods, Inc., 347 NLRB No. 109 (2006) 48, 49
Standard Dry Wall Products, 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951) 32
United Scrap Metal, Inc., 344 NLRB No. 55 (2005) 55
Wild Oats Community Markets, 336 NLRB 179 (2001) 38, 39
Winkle Bus Co., Inc., 347 NLRB No. 108 (2006) 22

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I. INTRODUCTION

Tired of being mistreated at work, the employees at Milum Textile Services Company (Respondent) decided to unionize. After a core group of employees contacted representatives of UNITE HERE! (Union) about unionization, the Union started holding meetings and visiting Respondent's employees at home. During the last month of February 2006, the Union conducted a "blitz," trying to reach as many of Respondent's employees as possible to discuss the benefits of unionization. As part of the blitz, the Union circulated a petition among Respondent's employees, in which employees accepted membership in the Union and authorized the Union to bargain on their behalf.

Over 60 percent of Respondent's employees signed the petition and, on March 4, 2006,[1] Respondent's employees presented their demands to Respondent. Armed with their petition, Respondent's second shift employee stopped work and demanded to speak

[1] All dates are in 2006, unless otherwise indicated.

with Respondent's President and CEO Craig Milum (Milum). Employees presented Milum with the petition demanding he recognize the Union and told him that they wanted the Union to represent them. Rather than accepting the will of the majority of his employees, Milum initiated a campaign of unfair labor practices to steamroll his employees' selection of the Union. Respondent's unfair labor practices were so numerous, persistent, and pervasive that they cannot be remedied by the Board's traditional means.

II. PROCEDURAL HISTORY

The hearing on the Consolidated Compliant alleging that Respondent violated Section 8(a)(1) and (3) of the Act, and which was amended both before and during the hearing, was conducted before ALJ Joseph A. Gontram between March 5 and April 11, over 14 days of hearing. (GC 1(m); GC. 1(v); GC. 1(mm); GC 1(oo); GC 1(ww))[2] On July 18, 2007, Judge Gontram unexpectedly died. The parties waived their right to a trial de novo, and on August 7, 2007, the matter was transferred to ALJ Lana Parke to issue a decision based upon the record evidence. (ALJD slip op. at 1) As discussed more fully below, under these circumstances, ALJ Parke's factual findings are not always afforded the usual deference given to a trial ALJ's findings of fact; rather, the Board can independently review credibility determinations, because it is in an equal position to do so as the ALJ who authored the decision.

In her decision, ALJ Parke properly found that soon after the Union began its organizing drive, Respondent engaged in an extensive campaign of unfair labor practices intended to thwart its employees' rights to organize, including:

[2] References to the ALJD are designated as "ALJD" followed by the applicable page number. References to the General Counsel, Respondent, and Charging Party Exhibits are designated as "GC.," "R.," and "CP." respectively, followed by the applicable page number. References to the transcript will be designated as of the proceedings are designated as "Tr." with the appropriate page citations.

- Providing employees with benefits in March, in the form of nametags, to assuage employee complaints that Respondent's Production Manager, Angela Kayonnie, would clap and poke at them, rather than address them by name, in violation of Section 8(a)(1). (ALJD slip op. at 15, 27); (Tr. 440; GC. 31);

- In April, attempting to obtain injunctive relief against the Union in Federal court using a legal theory which was objectively baseless because it was preempted, and therefore in violation Section 8(a)(1). (ALJD slip op. at 16, 27);

- Unjustly prohibiting employees from wearing pro-Union buttons in June and again in July, in violation of Section 8(a)(1). (ALJD slip op. at 17, 27)

- Suspending Evangelina Guzman in July because she refused to remove a pro-Union button, in violation of Section 8(a)(3). (ALJD slip op. at 24, 27);

- Discharging Union activist Denise Knox and her coworker Soe Moe Min in July, in violation of Section 8(a)(3). (ALJD slip op. at 21-23, 27);

- Mandating that each employee watch a video presentation which contained a threat to employees that unionization would result in a reduction in their wages in December, in violation of Section 8(a)(1). (ALJD slip op. at 19-20, 27);

- In January 2007, installing a video surveillance camera in the employee lunchroom, a place where employees routinely engaged in Union activities, in violation of Section 8(a)(1). (ALJD slip op. at 19, 27); and

- In preparation for the hearing in this matter, illegally interrogating no less than 10 employees by failing to communicate to them the safeguards provided in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), in violation of Section 8(a)(1). (ALJD slip op. at 20, 27)

ALJ Parke found that traditional Board remedies were sufficient to remedy Respondent's conduct and, therefore, refused to recommend a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), as urged by the General Counsel. (ALJD slip op. at 26-28)

ALJ Parke dismissed the General Counsel's other allegations, including the claims that Respondent violated Section 8(a)(1) and/or 8(a)(3) by unlawfully:

- Soliciting grievances on March 4 (ALJD slip op. at 15);

- Asking employees to report if they were harassed into signing union cards on March 4 (ALJD slip op. at 15);

- Informing employees that their efforts supporting the Union were futile on March 4 (ALJD slip op. at 15);

- Interrogating workers on March 4 (ALJD slip op. at 14-15);

- Continuing to prosecute its Federal lawsuit against the Union through May (ALJD slip op. at 16);

- Attempting to instigate the arrest and/or removal of Union handbillers (ALJD slip op. at 17-18);

- Engaging in illegal surveillance (ALJD slip op. at 18);

- Creating the impression of surveillance. (ALJD slip op. at 19)

- Suspending Maria Minjarez in October 2006 and placing her on a 90-day probation (ALJD slip op. at 23-24);

- Suspending Evangelina Guzman in December 2006 and placing her on a 90-day probation (ALJD slip op. at 24-26); and

- Disciplining Guzman in January 2007, and placing her on a six-month probation in January 2007. (ALJD slip op. at 23-26)

The General Counsel takes exception to ALJ Parke's refusal to find the unfair labor practices described above and her refusal to issue, as a remedy, a *Gissel* bargaining order.

III. BACKGROUND

A. Respondent's Operations

Respondent operates a commercial laundry in Phoenix, Arizona, laundering both restaurant and healthcare linens, and provides pickup and delivery services to its area customers, including hospitals and restaurants. (ALJD slip op. at 2) The laundry is a large facility, occupying an entire city block and has been at its current location since 1956. (ALJD slip op. at 2); (Tr. 1901) In March 2006, Respondent's laundry employed about 70 production employees, who enter and leave the facility through the employee door located on

Sixth Avenue. (ALJD slip op. at 2); (Tr. 49, 1604, 1618, 1801-05); (GC. 29) Respondent's Phoenix employees have never been represented by a labor union. (Tr. 1901, 2202)

Craig Milum serves as Respondent's President and CEO, and has served in this capacity for about 24 years. (ALJD slip op. at 2); (Tr. 32) Respondent's facility is managed by Production Manager Angela Kayonnie and Production Supervisor Jaime Chavez. (ALJD slip op. at 2) Kayonnie, who reports directly to Milum, has worked for Respondent for about 21 years, serving as the Production Manager for one and a half years, and previously worked as a supervisor. (Tr. 667) Chavez, who reports to Kayonnie, has worked for Respondent since 1988, and has been a supervisor for about 13 years. (Tr. 823, 1724) Milum, Kayonnie, and Chavez, along with Respondent's Maintenance Engineer, Raphael Parra, and Respondent's former Office Manager, Lynn Roy, are admitted Section 2(11) supervisors. (GC. 1(vv))

Respondent's production department, which includes the finishing, washing, and sorting employees, operates Monday through Saturday and has two general shifts: 6:00 a.m.-2:00 p.m. and 2:00 p.m. until the work is completed for the day. (ALJD slip op. at 2) Respondent's washing and sorting employees generally start a few hours before the finishing employees. (ALJD slip op. at 2) Kayonnie works from 5:00 a.m. to 3:00 p.m., and Chavez arrives around noon. (Tr. 775, 1828)

B. The Union's Organizing Drive

1. The Union's Initial Steps

One of Respondent's employees first contacted the Union in early 2005, and in the months preceding the official launch of its campaign, the Union was in regular contact with a core group of Respondent's employees. (Tr. 906-07, 1622) The Union's campaign was

coordinated by organizing director Daisy Pitkin. (Tr. 878, 1620, 1622) Pitkin and Christina Aguilera, another organizer, together with two members from the Union's national office, were the key members of the Union's professional organizing team. (Tr. 1624-45)

The Union officially launched its organizing campaign by conducting a "blitz" during the weekend of February 24, 2006, and brought in organizers from throughout the country to help. (Tr. 841-42, 859-61, 867-69, 887, 951-52, 987-88, 1012-13, 1622. 1635) As part of the blitz, the Union organizers visited employees, speaking to them about their working conditions, educating them about the Union, and asking them if they would like to join the Union and authorize the Union to represent them in negotiations with Respondent. (Tr. 860); (GC. 28, 127) Employees who desired to be represented by the Union signed a petition (Petition) accepting membership in the Union and expressly authorizing the Union to bargain on their behalf. (GC. 28, 127) More specifically, the Petition, in both English and Spanish, stated:

> WE DEMAND TO JOIN WITH UNITE HERE AND 40,000 UNION LAUNDRY WORKERS ACROSS THE COUNTRY![3]
>
> I hereby accept membership in UNITE HERE, the international laundry workers' union, and authorize UNITE HERE to represent me in negotiations with my employer about wages, hours and all other conditions of employment.

(GC. 28, 127) After collecting individual employee signatures on the Petition, each organizer gave his or her copy with the employees' original signatures to Pitkin. (Tr. 846, 862, 872, 904, 967, 997, 1017) Pitkin and Aguilera then made photocopies of the original signatures, and cut and pasted them together, in order to have one document with full pages of employee signatures to present to Respondent. (Tr. 570, 905, 967); (GC. 28)

[3] The ALJ erred in noting that the petition said "UNITED HERE" instead of "UNITE HERE." (See, ALJD slip op. at 3) (GC. 28, 127)

After the blitz, on March 3, the Union sent a letter to Milum informing him of the organizing drive, and asking him to discuss participating in a process by which Respondent's employees could decide whether or not they wanted union representation in a fair and timely manner. (ALJD slip op. at 3); (GC. 33) Respondent declined, indicating that it believed the "process should be allowed to run its natural course." (GC. 34) Respondent's workers ultimately delivered the Petition to Milum during a work stoppage on March 4. (ALJD slip op. at 3)

2. The Employees' March 4 Demand For Recognition

After preparing the Petition by consolidating the signatures and by affixing a cover page, the Union delivered the Petition to Respondent's employees on March 4. (Tr. 905-06) The ALJ found that, as of March 4 a majority of Respondent's production employees -- at least 43 out of 70 -- had signed the Petition authorizing the Union to represent them. (ALJD slip op. at 3, 13, 26). At about 3:00 p.m., Evangelina Guzman, with Petition in hand, gathered employees around the time-clock. (Tr. 570-71, 905-06); (GC. 28) As the employees assembled, they asked Production Supervisor Chavez to notify Milum that the workers wanted to speak with him. (Tr. 571)

In her decision, the ALJ found that, when Milum arrived, an employee presented Milum with the Petition saying that the workers wanted the Union to represent them. (ALJD slip op. at 3) Upon receipt of the Petition, Milum asked the congregated employees why they wanted a union. (ALJD slip op. at 5) Some employees responded by complaining that Kayonnie did not treat them with respect and dignity and that she clapped her hands or poked at them instead of using their names. (ALJD slip op. at 5) Milum told employees that the process of getting a union could be long, there could be a lot of problems because the

employees could strike, and they might have to go to court to obtain a union election. Id. Milum then told the workers that there was no need for a union because he could resolve the problems at the plant, and asked workers what issues they wanted him to change. Id. (Tr. 572)

The ALJ also found that some employees suggested that Kayonnie be removed. (ALJD slip op. at 5) Milum told employees that she was a good supervisor, but assured them that he would speak to Kayonnie about treating employees better. (ALJD slip op. at 5, 15) According to the ALJ, when an employee suggested Respondent provide employees with nametags, Milum promised to do so, and he immediately set out to obtain name badges, expediting their purchase. (ALJD slip op. at 5); (GC. 30); (Tr. 56) The nametags, which were attached by a metal pin with a rotating enclosure, contained Respondent's logo and the first name of each employee, were distributed about a week after the work stoppage. (Tr. 440); (GC. 31, 32) Finally, the ALJ found that, toward the end of the meeting, Milum urged employees to report to him if they were being harassed into signing union authorization cards. (ALJD slip op. at 5); (Tr. 309)

3. Post-March 4 Organizing Efforts

The ALJ's decision describes the Union's extensive organizing efforts. Specifically, it finds that, at around the same time as the work stoppage, the Union began having biweekly meetings for employees that would occur before or after work and during breaks. (ALJD slip op. at 4); (Tr. 574-75, 883) These meetings would take place, among other places, outside the plant on the Sixth Avenue sidewalk or at the McDonald's restaurant across the street. (Tr. 574-75, 881) The Union also recruited a team of employees to distribute fliers inside Respondent's facility; organized a picket with Respondent's employees on the Sixth Avenue

sidewalk; circulated petitions for employees to sign relating to their working conditions; and handed out Union shirts, wrist-bands, stickers, and buttons, which many workers wore while working. (ALJD slip op. at 4); (Tr. 467-71, 1117, 1134-35); (GC. 45, 104, 134) Finally, in July, the Union organized a community forum in Tucson, Arizona where employees spoke about their working conditions. (ALJD slip op. at 4)

C. The Union's Publicity Campaign

As described in the ALJD, in conjunction with its activities focusing on Respondent's employees, on March 10, the Union started publicizing its organizing drive and employee complaints about their working conditions to the public. For example, the Union created a website entitled "milumexposed," on which safety and employee issues were discussed. (ALJD slip op. at 4) In early March, relying upon findings of governmental regulatory agencies and employee reports, the Union sent letters to some of Respondent's customers alerting them to Respondent's unacceptable health and safety practices. (ALJD slip op. at 4-5); (GC. 8 – attached letters); (Tr. 1693, 2252-54) Relying upon this same information, on April 24 the Union issued a press release repeating its criticism of Respondent's health and safety practices, and publicizing a report on these practices which was to be released on April 27. (ALJD slip op. at 4); (GC. 8 – attached press release); (Tr. 2256) The press release also alerted the public that the Union's president and Respondent's employees would present this report to restaurants using Respondent's services and the customers of those restaurants, and that Respondent's employees would speak about their working conditions. (GC. 8 – attached press release)

The ALJD also includes findings that, on April 27, the Union issued its report, including an analysis discussing the standards needed to protect linens from exposure to

microbial contamination, and explaining various working conditions described by Respondent's employees that lead to a danger of cross contamination. (R. 29), (GC. 5) The same day, Respondent's employees spoke to members of the public, and the Union's president met with one of Respondent's customers. (GC. 42)

D. The Union's Other Community Efforts

During this same time period, the Union started distributing informational leaflets publicizing its organizing efforts to members of the public. (Tr. 879) The leafleting generally occurred outside various restaurants using Respondent's services. (ALJD slip op. at 4); (Tr. 307-308)

In June 2006, a State Senator along with various community leaders signed a letter asking Respondent to respect its employees' rights to unionize and expressing solidarity with the employees. (GC. 43) Also in June, union representatives, community leaders, and employee supporters, came to Respondent's plant with a local television crew, and spoke to Respondent about working conditions at the plant and the employees' demand for union representation. (ALJD slip op. at 4); (Tr. 134-35) A news segment about this meeting ran that evening on a local television station. (Tr. 135)

On July 6, the Union sponsored a community forum in Tucson where some of Respondent's employees discussed their working conditions. (ALJD slip op. at 4); (GC. 9) A news segment about this meeting aired on the evening news in Tucson, showing Respondent's employees, accompanied by Union leaders, speaking about their working conditions. (ALJD slip op. at 4); (Tr. 302); (GC. 9) The segment also contained an interview with employee Denise Knox. (Tr. 302, 885); (GC. 9) Milum was in Tucson that day, in anticipation of being interviewed, but the interview did not take place. (ALJD slip op. 4 n.9); (Tr. 304-05)

E. Respondent's Response to the Union's Organizing Drive

Milum first became aware of the Union's organizing drive on February 27, when Kayonnie telephoned him and told him that the Union was distributing literature and speaking with Respondent's employees outside of the Sixth Avenue employee entrance. (Tr. 39) The Union had successfully organized other area laundries since 2002, and Respondent had been anticipating that the Union would attempt to organize its employees. (Tr. 40, 2040-43, 2055) Accordingly, Milum had warned his supervisors to be alert for the Union and to contact him if such activity occurred. (Tr. 1868)

After the Union's organizing drive started, Milum, concerned by his employees' interest in the Union, had his managers gather information about employee union support and discussed this information with them. For example, Milum met with Kayonnie every other day to discuss what was occurring with the Union organizing drive. (Tr. 73-4, 129) Kayonnie told him which employees were speaking with the Union organizers and whether the employees were treating her any differently. (Tr. 73-74) At the hearing, Milum admitted that, in one of these meetings, Kayonnie told him that some of Respondent's Burmese employees had joined the Union after speaking with organizers outside the plant. (Tr. 71-72, 92) Kayonnie also told him that at least one employee was speaking to organizers from inside the plant, through the plant window. (Tr. 143-44, 146) Similarly, Respondent's other supervisors kept Milum well-informed about the Union's activities amongst employees. For example, Milum learned from Raphael Parra, Respondent's Maintenance Engineer, that the Union was visiting employees at home and telephoning them late at night. (Tr. 308) Parra learned this directly from an employee. (Tr. 308)

Also, one week after the March 4 work stoppage, Milum met separately with a group of four Burmese employees, the majority of whom were political refugees, wanting to clarify to these employees what occurred at the work stoppage. (Tr. 64, 66, 145-46) He told these employees that the Union wanted to represent employees and, if this occurred they would be required to pay the Union dues. (Tr. 67-69)

F. Respondent's Publicity Campaign

Respondent attempted to engage in its own public relations counterattack to thwart the Union. Milum wrote various opinion pieces and was interviewed for newspaper articles regarding the Union. (GC. 37, 92) Some of these pieces were published. (GC. 92) In these articles, Milum compared the Union's organizing drive to an "organized crime shakedown" and blamed the Union for complaints made to various federal regulatory agencies. (ALJD slip op. at 7, 21); (GC. 92-attachment, 97) In another article, Milum falsely asserted that the Union would not accept a card-check agreement conducted by Respondent. (GC. 37); (Tr. 97-98) In fact, he never made such an offer to the Union. (GC. 98) In still another, Milum stated that union dues pay for lavish offices and salaries. (GC. 92-attachment; GC. 78-attachment) At the hearing, Milum testified that he believed that the Union was associated with the mafia. (Tr. 390); (GC. 5, p. 4) Respondent also tried to engage in a "counter-leafleting" campaign. (Tr. 381-82) More particularly, Milum drafted a leaflet he forwarded to some of his customers asking if they could be distributed at their restaurants. (Tr. 381-82); (GC. 78) Milum informed his customers that he had individuals ready to respond to any Union hand-billing in 30 minutes with his counter-leaflets. (GC. 80)

G. Respondent's Lawsuit and Motion for a Restraining Order

Based on ample record evidence, the ALJ found that Respondent, concerned about the Union's April 27 press conference and the report criticizing its practices, and anxious about the circulation of the customer letters, sued the Union in Federal Court, seeking to stop these actions from occurring.[4] (ALJD slip op. at 5-6); (GC. 8, 10) More specifically, on April 26, Respondent filed a verified complaint for injunction and damages (Complaint), and a motion for temporary restraining order (Motion), in Federal District Court, seeking temporary and permanent injunctive relief prohibiting the Union from contacting Respondent's customers or the customers of Respondent's customers. (GC. 8, 10) In support of the Complaint, Respondent attached two customer letters and the press release. (GC. 8) In support of the Motion, Respondent relied exclusively upon an affidavit from Milum, in which he analyzed the allegedly false statements in each Union document. (GC. 11) Respondent's Complaint alleged that the Union was engaged in an illegal secondary boycott, and also alleged several pendant state common law claims, including libel, intentional interference with economic relations, intentional interference with prospective economic advantage, and fraud. (ALJD slip op. at 6); (GC. 8) Respondent's Motion, however, was based solely on the illegal secondary boycott allegation. (GC. 10, 11, 12)

On April 27, after a hearing, the district court denied Respondent's Motion because the allegations were clearly preempted by federal law. (ALJD slip op. at 6); (GC. 12) The court also held that, to the extent Respondent's Motion relied upon any of the pendant state law claims, the evidence Respondent presented did not meet the test for "actual malice."

[4] Before filing its lawsuit, on April 3, Respondent filed a charge against the Union with the NLRB seeking an injunction, alleging that the customer letters constituted a secondary boycott. (ALJD slip op. at 5) As of the time of the April 24 press release, the charge was still pending. On April 28, Region 28 dismissed Respondent's charge against the Union, and the dismissal was upheld by the NLRB Office of Appeals on June 7. (ALJD slip op. at 5)

(GC. 12, p. 20) The ALJ had little trouble concluding, based on these facts, that Respondent violated the Act by seeking the injunction.

Despite the court's clear and unequivocal ruling, Respondent continued to maintain and prosecute its federal lawsuit against the Union, including the secondary boycott claim. On May 1, Respondent filed with the court the returned summons, and on the same date reminded the Union that its answer to the Complaint was due on May 18. (GC. 7, 15, 16) Respondent waited until May 26 to voluntarily dismiss its action, and did so only without prejudice. (GC. 18) Between April 27 and May 26, the Union incurred over $2,000 in legal expenses in preparing to defend the allegations contained in Respondent's lawsuit. (GC. 7, 129); (Tr. 880)

H. Respondent's Prohibition on the Wearing of Union Buttons and Suspension of Guzman

The ALJ also found that Respondent promulgated an unlawful rule prohibiting the display of Union buttons and disciplined an employee for violating this rule. More specifically, the ALJ found that, in late June, Respondent's employees started distributing Union buttons. On June 27, employee Zulema Ruiz, an order assembler, appeared at work wearing one of the round metal buttons, upon which the words "UNITE HERE!" were inscribed, and gave a button to a coworker. (ALJD slip op. at 6); (Tr. 414, 1629). Despite the fact that Respondent had just a few months before distributed to its employee nametags with a metal pin (GC. 32), and despite the fact that employees were still wearing these nametags (Tr. 702-03, 2236), Milum told Ruiz she could not wear the union buttons because the attachment pin posed a danger to employees. (ALJD slip op. at 6) Ruiz removed the button, and never wore one again. (Tr. 419)

The ALJ also found that, on July 4, Evangelina Guzman arrived at work wearing a Union button. Milum told her she could not work unless she removed the button because it posed a safety problem. Guzman protested, but Milum insisted that she could not work while wearing the button and told her that if she did not work she would lose the July 4 holiday pay. Guzman left work rather than remove the button, and never again wore the Union button at work. (ALJD slip op. at 6)

The record evidence showed, and the ALJ had little trouble concluding that, despite Milum's claims, the nametags Respondent distributed were no less hazardous to employees or equipment than the Union buttons it banned. (ALJD slip op. at 17) She also found that employees were allowed to wear a wide variety of jewelry without objection, including large and small earrings, watches, rings, necklaces, and chains. (ALJD slip op. at 7 n.9, 17); (Tr. 416, 444-45, 580, 698, 1146, 1225-26, 1574)

I. Discharges of Denise Knox and Soe Moe Min

The ALJ found that Denise Knox was one of the most active union supporters at Respondent's workplace. In so finding, the ALJ relied upon evidence showing Knox openly championed the union cause among employees, and assisted the Union in publicizing the organizing campaign to the community, appearing on television to vocally support the Union. (ALJD slip op. at 4, 9, 21) Her last television appearance was on July 6, two days before her discharge, during a Tucson television newscast. (ALJD slip op. at 9) The ALJ also found that Soe Min was also an open and active Union supporter, wearing Union t-shirts to work almost daily. Id.

The ALJ further found that Respondent unlawfully discharged these two very visible Union supporters on the pretext that they did not report to their work stations immediately

after clocking in, but instead stopped by the employee lunchroom. (ALJD slip op. at 9-10) In so finding, she relied upon evidence showing that the lunchroom was a draw for many employees who would stop work early, delay work, extend a break, or detour there during a restroom trip; Milum's admitted practice to give new employees engaged in such work evasion only a "stern discussion"; evidence that, prior to Knox and Min, no employee had ever received anything greater than a written warning for such misconduct; and evidence showing that other employees who had engaged in far more severe forms of work evasion simply received a written warning. (ALJD slip op. at 10 and n. 27)

J. Respondent's Installation of Security Cameras

When the Union campaign started, the Respondent's security system included seven or eight video cameras mounted at various locations, of which only a few were functional. (ALJD slip op. at 7) In January, before the Union started its organizing drive, Respondent's information technology director asked Milum if he wanted to replace the three year old security camera system with a new one, but Milum saw no need. However, by the end of 2006, after the Union organizing drive began, Milum authorized the change. (ALJD slip op. at 7-8) In late January 2007, Respondent installed about 15 new cameras throughout the facility, including, for the first time, in the employee lunchroom. (ALJD slip op. at 8, 19). The ALJ found that Respondent failed to proffer any valid reason for installing a camera in the lunchroom, a place where employee interaction, including Union activity, regularly took place, and that the installation of this camera violated the Act. (ALJD slip op. at 19)

As the surveillance cameras were being installed, Evangelina Guzman asked Respondent's Maintenance Engineer Raphael Parra about the installation. Parra laughed and

said that the cameras were being installed to keep her "in check" and that while all the other images would be in color, she would appear in black and white. (ALJD slip op. at 8, 19)

K. Computer Video Presentation to Employees

The ALJ further found that Respondent violated the Act when, in December, the Respondent showed each individual employee a company-created video that threatened employees with a drastic reduction in wages if they selected the Union and blamed the Union for asking various regulatory agencies to investigate the Respondent's activities. (ALJD slip op. at 8); (Tr. 101-05); (R. 71) [5] Notably, Respondent had Kayonnie or Chavez personally escort each employee to see this video. (Tr. 101)

L. *Johnnie's Poultry* Violations

In preparation for the hearing, Respondent's attorney and Milum interviewed a number of employees at the Respondent's facility, including: Maria Zambrano, Carlos Zambrano, Edgar Villagrande, Pat Goebel, Edel Davilla, Alvaro Munoz, Maria Martinez, Rosa Reyes, Maria Teresa Velasquez, and Lydia Roberts. Each of these employees testified, and the ALJ found, that before their respective interview, they were not told that their participation in the interview was voluntary or that no reprisals would be taken. Similarly, the ALJ found that, at the interview, neither Respondent's attorney nor any representative of the Respondent assured any employee that the meeting was voluntary and/or that no reprisals would be taken. (ALJD slip op. at 8, 20)

[5] In finding a threat to reduce wages, the ALJ erred in noting that experienced employees were paid between $8.00 and $9.25. The record evidence shows that experienced employees were paid between $8.50 and $10.65 per hour. (GC. 38) (ALJD slip op. at 8, 19-20)

IV. ANALYSIS

A. ALJ Erred in Refusing to Find That on March 4, Respondent Solicited Grievances and Promised Employees Benefits, Interrogated Employees, Threatened That it Would be Futile to Join or Support the Union, and Asked Employees to Report on Union Activities.

1. The ALJ's Decision

The ALJ found that, at the March 4 work stoppage, after employees presented Milum with the Petition and told him that they wanted the Union, Milum asked the congregated employees why they wanted a union to represent them. (ALJD slip op. at 3, 5) After hearing employees complain that Kayonnie would clap and poke at them, instead of addressing them by name, Milum told the workers that: unionization was unnecessary because he could resolve their work problems; he would speak to Kayonnie about treating employees better; there were other ways for Kayonnie to get their attention rather than clapping her hands; and there was no need for her to "press somebody pretty hard." (ALJD slip op. at 5, 15); (Tr. 59) The record is devoid of any evidence that Respondent had a pre-existing practice of soliciting employee complaints.

Noting that Milum rebuffed an employee suggestion to remove Kayonnie, and "made no express promises to employees" the ALJ dismissed the allegation that Respondent violated Section 8(a)(1) by soliciting employee grievances, citing *George L. Mee Memorial Hosp.*, 348 NLRB No. 15, slip op. at 3 (2006). (ALJD slip op. at 15) The ALJ also found that, because the employees stopped working to present Milum with the Petition demanding the Union, his words did not tend to restrain, coerce, or interfere with employees' statutory rights, and dismissed the allegation of interrogation, citing *Rossmore House,* 269 NLRB 1176, 1176-78 (1984). (ALJD slip. op. at 14) Finally, the ALJ dismissed the claims that Milum asked

workers to report on Union activities, and the futility allegation, finding these claims were not properly alleged by the General Counsel in the Complaint. (ALJD slip op. at 15)

2. Respondent Unlawfully Solicited Grievances (Exception #1)

In *Center Service System Division*, 345 NLRB No. 45 slip op. at 2 (2005), the Board held that an employer with no prior practice of soliciting employee complaints violates Section 8(a)(1) by instituting such a practice during an organizational campaign. That is precisely what happened here. The record is devoid of any evidence that Respondent had ever asked for, listened to, or responded to employee complaints until March 4, when its employees demanded to be represented by the Union. After the demand, Milum did the following: asked employees why they wanted a union; told them there was no need for a union; told workers that he could resolve the problems at the plant; and told employees he would speak to the offending supervisor Kayonnie. While the solicitation of grievances alone is not unlawful, it raises an inference that the employer is promising to remedy grievances. Id. Here, however, there is more than just an inference -- Milum expressly promised to remedy the employees' complaints by, among other things, speaking with Kayonnie. This violates the Act, and the ALJ erred by failing to so find. See *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1169 (2004) (violation where employer produced no credible evidence to rebut inference that employer impliedly promised to remedy grievances). *Burger King*, 258 NLRB 1293, 1297 (1981) enfd. 709 F.2d 1509 (6th Cir. 1983) (violation where employer solicited grievances by asking employees if they had any complaints, urging them to come to management with those complaints, and telling employees they do not need a union to speak for them). *Dentech Corp.*, 294 NLRB 924, 936 (1989) (company president

illegally solicited grievances, in part, by telling employees they could come to him with their problems instead of going to a union).

The ALJ erred in relying on *George L. Mee Memorial Hosp.*, 348 NLRB No. 15 (2006). In *George L. Mee*, during an employee meeting in the midst of an organizing drive, the CEO asked employees to "open up and talk to him about problems that might be solved." Id. slip op. at 3. Reversing the ALJ, a two-member Board majority found no violation. Id. slip op. at 3-4. Specifically, the Board found that the employer had successfully rebutted any inference that it was promising to remedy grievances because the CEO made no express promise at the meeting, and told employees that "he could not make any promises." Id. slip op. at 3. Thus, the Board found that any possible inference of a promise of benefits was specifically negated by the express "no promise" response to employee complaints, and "absent inconsistent conduct, that statement was sufficient to rebut any inference of a promise to remedy grievances even assuming that there was no prior instance in which [the CEO] asked employees for their questions or problems." Id. Moreover, the Board noted that the CEO proffered no solution to the only grievance raised, that he was intimidating. Id. Instead, the CEO simply said he was probably intimidating because he was tall, which the Board found was not the same as a promise to remedy a grievance. Id.

Here, in stark contrast, Milum never told employees that he could not make any promises. Instead, after employees complained that Kayonnie would clap and poke at them instead of calling them by name, Milum told employees that he would speak with Kayonnie, and that there was no need for her to clap at employees or poke at them. Thus, rather than rebutting any inference that he would remedy the problem, Milum expressly promised to address their concerns by telling employees that Kayonnie's behavior was uncalled for and he

would speak to her about it. Furthermore, Milum agreed with the employees' nametag suggestion and expedited the purchase of nametags which were distributed to employees shortly after the work stoppage. (Tr. 56) Accordingly, Respondent violated Section 8(a)(1) by soliciting employee grievances and the ALJ erred in refusing to find a violation. *Chartwells, Compass Group.*, 342 NLRB 1155 (2004).

3. Respondent Unlawfully Asked Employees to Report on Union Activities (Exception #2)

The Board has repeatedly held that asking employees to report if they have been harassed or pressured into signing union cards is unlawful. *Chartwells, Compass Group,* 342 NLRB at 1169; *K-Mart Corp.*, 336 NLRB 455, 455, 467 (2001). The Board has explained that such requests are illegal because they encourage employees to report any union solicitor who approaches them in a subjectively offensive manner and correspondingly discourages union card solicitors in their protected organizational activities. Id.

There is no dispute that this took place. Milum admitted telling employees to come forward and report to him if they have been harassed or pressured into signing union cards. (Tr. 309; ALJD slip op. at 5, 15) However, instead of finding a violation, the ALJ refused to address the merits of this claim, finding that it was not contained in the Complaint. (ALJD slip op. at 15) Her finding is wrong. During the hearing, ALJ Gontram granted the General Counsel's Motion to Further Amend the Third Consolidated Complaint. (GC. 1(ww)); (Tr.723-732, 734, 1046). This amendment, in part, added the following allegation to paragraph 5 of the Complaint:

> (i) On or about March 4, 2006, the Respondent, by Milum, at the Respondent's facility, asked its employees to disclose to the Respondent their Union membership, activities, and sympathies, and the Union membership, activities, and sympathies of other employees.

This allegation encompasses Respondent's unlawful request. In *Chartwells, Compass Group*, 342 NLRB at 1169, the Board sustained an identical violation where the complaint alleged that "Respondent directed its employees to inform it of their union activities as well as the union activities of their coworkers in violation of Section 8(a)(1) of the Act." Thus, this allegation was properly pled in the amendment to the Third Consolidated Complaint, and ALJ Parke erred in finding otherwise.

ALJ Parke further erred in refusing to address the merits of this allegation, and in failing to find a violation. Milum admitted directing employees to report to him if they were being pressured or harassed into signing union cards. The Board has found such statements are clearly illegal. *Chartwells, Compass Group,* supra.; *Winkle Bus Co., Inc.*, 347 NLRB No. 108 slip op. at 1-2 (2006). Accordingly, this allegation was properly set forth in the Complaint, and Respondent's actions, as set forth above, clearly violated Section 8(a)(1).

4. Respondent Unlawfully Threatened that Employees' Organizing Efforts were Futile (Exception #3)

Similarly, the record is clear that Milum threatened employees with futility by telling them that unionization could take years and could lead to strikes and lawsuits, and that these threats violated the Act. See *Federated Logistics and Operations,* 340 NLRB 255, 256 (2003) (unsupported employer predictions that unionization will lead to strike and plant shutdown unlawful); *Daniel Construction Co.,* 145 NLRB 1397, 1410 (1964) (comments relating to delay due to litigation, coupled with threats, unlawfully conveyed the impression that selection of a union would be futile); *CWI of Maryland,* 321 NLRB 698, 707 (1996) (same).

ALJ Parke sidestepped this issue by finding that neither the Complaint allegations nor the presentation of evidence put Respondent on notice that these statements were at issue,

citing *Sara Lee d/b/a International Baking Co. & Earthgrains*, 348 NLRB No. 76 (2006), and *Dilling Mechanical Contractors, Inc.*, 348 NLRB No. 6 slip op. at 9-10 (2006). (ALJD slip op. at 5, 15)

Paragraph 5(b)(1) of the Third Consolidated Complaint (GC. 1(ww)) alleges:

> In or about mid-March 2006, more precise dates being unknown to the General Counsel but particularly within the knowledge of the Respondent, the Respondent, by Milum, at the Respondent's facility:
>
> (1) informed its employees that it would be futile for them to select the Union as their collective-bargaining representative.

This paragraph encompasses the futility allegation. ALJ Parke's finding to the contrary -- that that the variance between the dates of the "mid-March" complaint allegation and the March 4 proof requires dismissal -- ignores Section 102.15 of the Board's Rules and Regulations, which set forth the Board's notice pleading requirements. Among other things, the Rules merely require the pleading of the "approximate date" of the unlawful act, which is the case here. See *Carpinteria Lemon Ass'n v. NLRB*, 240 F.2d 554, 558 (9th Cir. 1957) (court dismisses employer's claim as meritless that variances in dates between complaint allegations and proof, which ranged from 5 days to 10 weeks, were fatal to the findings).

However, even if the Complaint had not comported with the Board's pleading requirements, this allegation was properly addressed and litigated by all parties during the hearing. To support the finding of a violation, the General Counsel relied upon the testimony of the following witnesses:

> Evangelina Guzman: Milum told employees that unionization would be a long process which many times requires an election; (Tr. 572-73)
>
> Luz Acosta: Milum told employees if they wanted the Union it would be a long process, that it could take many years; (Tr. 558)
>
> Zulema Ruiz: Milum told workers that unionization would be a long process and that employees could go on strike; (Tr. 417, 417)

> Maria Minjarez: Milum told workers if they decided to unionize there were going to be a lot of problems because employees could strike and may have to go to court to determine which way to vote. (Tr. 507)

See Exhibit A (*General Counsel's Brief to the ALJ*, at pp. 14-17, 21-23).

Neither at hearing nor in its post-hearing brief did Respondent ever assert that its due process rights were violated by the futility allegation, or that it did not have notice of the claim. Instead, at hearing Respondent cross-examined the General Counsel's witnesses extensively regarding what occurred at the March 4 work stoppage, elicited testimony during cross examination from Zulima Ruiz regarding Milum's futility statements to employees (Tr. 425), and elicited testimony from Milum as to what he supposedly told employees at the work stoppage. (Tr. 2069-70). Moreover, in its brief to the ALJ, Respondent fully addressed this allegation, citing the same testimony relied upon by the General Counsel from witnesses Guzman, Acosta, and Ruiz. See Exhibit B (*Respondent's Brief to ALJ*, at 78).

Respondent defended this allegation by claiming that Milum's statements merely constituted his opinion about unionization and were therefore protected by Section 8(c) of the Act. Id. Respondent further asserted that this allegation was precluded by Section 10(b) of the Act, because no charge was filed within six months of the March 4 work stoppage specifically noting a futility claim. Id. at pp. 76-78. Respondent's claim that no proper charge was filed within the 10(b) period is simply wrong, since the Union filed an amended charge on August 29, 2006, alleging, in part, that "within the past six months [Respondent] . . . inform[ed] employees that it would be useless to have the union represent them." (GC. 1(k)). The evidence shows that the unlawful action occurred on March 4, well within the six-month limitation period.

The ALJ's reliance on *International Baking Co. & Earthgrains* and *Dilling Mechanical Contractors, Inc.*, as support for her decision to dismiss is misplaced. In *International Baking Co. & Earthgrains*, 348 NLRB No. 76 slip op. at 2 (2006), the ALJ, sua sponte, found that the employer's manager engaged in a series of 8(a)(1) violations, finding the conduct was closely related to the complaint and was fully litigated. In overturning the ALJ, and finding the respondent was not provided notice that the manager's conduct was at issue, the Board noted that the compliant failed to allege any of the manager's conduct as a violation. Id. Furthermore, in his brief the General Counsel did not argue that the manager's conduct constituted a violation, and the respondent's brief specifically stated that the employer would not address the manager's conduct. Id

In *Dilling Mechanical*, the ALJ found an 8(a)(3) refusal to hire/consider violation where the complaint only alleged an 8(a)(1) claim for entering into a settlement agreement with no intent of honoring its terms. Id. Noting that the evidence presented was only relevant to the 8(a)(1) allegation, the Board overturned the 8(a)(3) violation, finding that the conduct in question was not fully and fairly litigated as a Section 8(a)(3) claim. Id., slip op. at 8. The Board noted that, had the employer known of the 8(a)(3) allegation, and that the motivation surrounding its hiring decision was at issue, it would have likely altered the presentation of its case at the hearing. Finally, the Board observed that none of the parties addressed the 8(a)(3) allegations in their post-hearing briefs.

The facts of these cases are inapposite to this matter. Paragraph 5(b)(1) of the Complaint specifically alleged that Milum, at Respondent's facility in March 2006, informed employees it would be futile for them to select the union. The General Counsel's post-hearing brief specifically argued that Milum's futility statements violated the Act, and

Respondent relied upon these same statements to argue that Milum's comments were expressions of opinion protected by Section 8(c) of the Act. Respondent has never asserted that it suffered from a lack of due process, nor has it claimed it would have altered the presentation of its case where Milum denied making such statements.[6]

Accordingly, the ALJ erred by sua sponte finding that Respondent's due process rights were violated because the Complaint alleged that Milum's unlawful conduct occurred in mid-March 2006 instead of March 4. At no time during this matter was there any misunderstanding as to the basis of the futility allegation. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938) (due process claim rejected when "at no time during the hearings was there any misunderstanding as to what was the basis of the Board's complaint"); *Carpinteria Lemon Ass'n v. NLRB*, 240 F.2d 554, 558 (9th Cir. 1957).

5. Respondent Unlawfully Interrogated Employees (Exception #4)

While it is not always unlawful to ask open union supporters why they want a union, it is when the questions are accompanied by other threats, promises, or other forms of coercion. See *Parts Depot, Inc.*, 332 NLRB 670, 674 (2000). Such is the case here. In addition to asking why employees wanted the Union, Milum also solicited and promised to remedy employee grievances, asked employees to report if they were being harassed or pressured into signing with the Union, and told employees that it was futile for them to support the Union. Thus, Milum's questioning employees regarding their union support, combined with his other coercive statements, constitutes an illegal interrogation. *Christie Elec. Corp.*, 284 NLRB 740, 741 (1987) (questioning of open union supporter constitutes illegal interrogation when accompanied by unlawful threat of refusing to bargain); *Parts Depot, Inc.*, supra (employee

[6] Other than asking employees "what is this union stuff all about" and then explaining to them that Union sought to represent them in exchange for employees paying dues, Milum denied saying anything to employees about the Union. (Tr. 50, 58, 2069-2070).

unlawfully interrogated open union supporter when questioning was coupled with implied threat of unspecified reprisals); cf. *Benesight, Inc.*, 337 NLRB 282, 287 (2001) (supervisors statement to employees during work stoppage of "what are your gripes" unaccompanied by threats or coercion was lawful). Accordingly, Respondent violated Section 8(a)(1) by interrogating employees and the ALJ erred in refusing to find a violation. *Rossmore House*, 269 NLRB 1176 (1984) (interrogation of employees violates section 8(a)(1) if, under all the circumstances, it reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act).

B. The ALJ Erred in Refusing to find that Respondent's Continued Prosecution of the Federal Lawsuit was a Violation (Exception #5)

1. The ALJ's Decision

As discussed above, on April 26, Respondent sought temporary and permanent injunctive relief prohibiting the Union from contacting Respondent's customers, or the customers of Respondent's customers, and unspecified damages. (ALJD slip op. at 5-6); (GC. 8, 10) Respondent's Federal Complaint set forth five causes of action: illegal secondary boycott, intentional interference with economic relationships, intentional interference with prospective economic advantage, libel, and common law fraud. (ALJD slip op. at 6) In support of its Federal Complaint, Respondent relied solely upon the customer letters and press release, attached to its pleadings. See, Section III G, supra. In support of the Motion, Respondent relied upon an affidavit from Milum, in which he attached the press release and the customer letters, and analyzed the allegedly false statements in each document. (GC. 11) At no time during the pendency of this litigation did the Respondent ever show, or make an attempt to show, actual malice or actual damages. (GC. 7-18)

On April 27, Respondent's request for injunction was denied by the District Court on the grounds that the issues were preempted by federal law. (ALJD slip op. at 6) The District Court also noted that Respondent made no attempt to show actual malice. (GC. 12, p. 20) Despite this reversal, Respondent continued to maintain and prosecute its lawsuit until May 26 when it obtained voluntary dismissal of the action without prejudice. Id. As a result of the lawsuit, the Union incurred legal expenses. Id.

Although the ALJ properly found that Respondent violated Section 8(a)(1) by attempting to obtain injunctive relief on its Federal Court lawsuit alleging an illegal secondary boycott (ALJD slip op. at 16), she refused to find that Respondent's continued prosecution of the suit, including the pendant state law claims, violated the Act. Id. The ALJ found that, because Respondent voluntarily dismissed its lawsuit before an outcome was reached, the General Counsel failed to show that the lawsuit had no reasonable basis in fact or law. (ALJD slip op. at 16)

2. Argument

To violate Section 8(a)(1) of the Act, a lawsuit must be objectively baseless. *BE&K Construction Co.*, 351 NLRB No. 29 slip op. at 1 (2007) (filing and maintaining lawsuit reasonably based in law and fact does not violate the Act). A lawsuit is objectively baseless, lacking a reasonable basis in law or fact, if no reasonable litigant could realistically expect to succeed on the merits. Id. slip op. at 7 citing *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993). With respect to Respondent's state law tort claims, Respondent was required to show "actual malice" on the part of the Union, *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 61-65 (1966); *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974), and prove actual damages. *Beverly Health and Rehabilitation*

Services, Inc., 336 NLRB 332 (2001). Here, even though the undisputed record shows that Respondent did neither, the ALJ failed to make any such findings.

a. The ALJ Erred by Failing to find that Respondent did not show Actual Malice

To prove the Union acted in reckless disregard for the truth, it was incumbent for Respondent to show, by clear and convincing evidence, that the Union acted with a "high degree of awareness" of the probable falsity. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974). The ALJ erred by failing to find that Respondent did not meet this standard here. (GC. 12 p. 20) Indeed, the record is clear that Respondent was well aware that the Union's statements were accurate and truthful.

In its lawsuit, Respondent asserted that the following claims in the customer letters and press release were maliciously false: that Respondent mixed restaurant and hospital linens; that government investigators found dirty and dangerous conditions that could present a risk; that Respondent jeopardized the separation of soiled and clean linen by using the same bins for both; that Respondent did not train workers on quality control procedures; and that Respondent had shown a disregard for blood borne pathogen exposure controls standards. (GC. 11, Ex. C). The ALJ ignored ample record evidence demonstrating that Respondent knew or should have known that the Union's statements were not false, including:

- In 2002, Respondent received a citation for 16 serious and 16 non-serious violations from the Department of Labor, Occupational Safety and Health Administration (OSHA), including citation for six blood borne pathogen violations. (GC. 61 pp. 9-14)
- In 2002, the Arizona Department of Environmental Quality (ADEQ) issued Respondent a Notice of Violation finding that Respondent used a vehicle to transport bio-hazardous waste that did not meet the applicable leak-proof construction requirements, and failed to maintain an emergency procedure for handling spills or accidents. (GC. 139, pp. 11-12). The photographs accompanying the Notice of Violation show that Respondent uses the same bins for transporting soiled and clean linens. (GC. 139, p. 10)

- Milum testified that the same bins are used for transporting clean and soiled linens. (Tr. 1909)

- In May 2006, Respondent received a number of citations from the Arizona OSHA involving five serious and four non-serious violations. (GC. 137-38). These violations included the failure to provide readily accessible handwashing facilities to employees who are exposed to blood borne pathogens; the failure to provide employees with appropriately-sized protective gloves; the failure to decontaminate the soil sort area conveyors or floor after contact with blood or other potentially infectious material; the failure to timely provide Hepatitis B vaccinations to employees exposed to potentially infectious material; the failure to provide blood borne pathogen training in all appropriate languages; the failure to review or update Respondent's exposure control plan; the failure to use the appropriate air compression levels for cleaning machines; and the failure to provide other certain required training. (GC. 137-38)[7]

- Respondent's witnesses, Patricia Goebel, and Respondent's Production Supervisor Chavez, admitted that they find restaurant linens mixed in with hospital linens during the soiled sorting process. (Tr. 1532-33, 1754)

- The Union issued a report as part of its press release, which included a discussion on the standards needed to protect clean linens from exposure to microbial contamination, and various conditions described by Respondent's employees that lead to a danger of cross contamination. (R. 29; GC. 5) The record establishes that Respondent's employees did in fact make such reports to the Union, including reports that the Respondent mixed restaurant linens with medical linens in their washers. (Tr. 1693, 2252-54)

b. The ALJ Erred by Failing to find that Respondent did not Prove Actual Damages

In addition to actual malice, a plaintiff asserting tort claims such as those Respondent asserted in its Federal Court lawsuit must provide explicit proof of injury, not just a presumption of damages. *Linn*, 383 U.S. at 65; accord *Intercity Maintenance Co. v. Local 254, SEIU*, 241 F.3d 82, 89-90 (1st Cir. 2001) *cert. denied* 534 U.S. 818 (2001); *Beverly Health and Rehabilitation Services, Inc.*, 336 NLRB 332 (2001). Again, despite compelling evidence that Respondent failed to meet this burden, the ALJ failed to make any finding.

[7] Ironically, these violations were reported during the very period that Respondent's federal court lawsuit was pending; the citation and notification of penalty issued May 4, and was based upon an inspection that occurred between April 7 and April 27, 2006. (GC. 138)

Instead, the record demonstrates that Respondent filed and then dismissed its lawsuit without even the barest shred of evidentiary support of any monetary or other recognizable harm. Indeed, the record contains Respondent's multiple admissions that, even after the lawsuit had been filed and dismissed, it had not lost any business because of the Union's conduct. These admissions include a July 2006 newspaper article which quotes Milum as saying that "business hasn't been hurt" by the Union's actions (GC. 78, attached Tucson weekly article); a September 2006 e-mail in which Milum states that Respondent "is growing rapidly despite the union's best efforts to get its customers to drop its service" (GC. 90, ¶4); and a January 2007 letter Milum wrote to a his customer stating that Respondent's weekly sales had increased and that the "union has been unsuccessful in getting our customers to change" laundries. (GC. 83, attached letter).

c. The ALJ Erred by Failing to Conclude that the Federal Lawsuit was Baseless

By failing to find that Respondent lacked any evidence of actual malice or damages as part of the inquiry into the baselessness of Respondent's federal lawsuit, the ALJ abdicated her responsibility to "examine the plaintiff's evidence to determine whether it raises any material question of fact." *Geske & Sons v. NLRB*, 103 F.3d 1366, 1376 (7th Cir. 1997) *cert. denied* 522 U.S. 808 (1977). A respondent cannot, as the ALJ permitted here, avert a violation by simply claiming it had "lots of other evidence" to support its lawsuit, none of which is presented during the suit or during the hearing. Id. Accordingly, the ALJ erred by failing to find that Respondent violated Section 8(a)(1) of the Act by continuing to prosecute its federal lawsuit.

C. The ALJ Erred in Refusing to find that Kayonnie Engaged in Illegal Surveillance (Exception #6)

1. The ALJ's Decision

Respondent's Production Manager Angela Kayonnie testified that she ate lunch with her husband outside the plant on Sixth Avenue; that she watched employees who were meeting with Union agents as she did so; and that she reported this information directly back to Milum. (ALJD slip op. at 7) (Tr. 692) ALJ Parke found that Kayonnie had a practice of eating her lunch at that location that pre-dated the employees' union activities. She therefore dismissed the surveillance allegation because Kayonnie's observation and report of open union activity in the course of her normal routine cannot constitute surveillance. (ALJD slip op. at 18)

2. Analysis

ALJ Parke's factual findings on this issue are simply not supported by the evidence where the record is unequivocal that Kayonnie gave conflicting testimony about her lunch practice. She initially testified that she started eating lunch outside the plant only after the Union appeared to organize. (Tr. 693) Later, she did an about face, claiming that she had been eating lunch outside with her husband every single day since she started working at the plant, which would have been for 21 years. (Tr. 667, 694) While in ordinary circumstances, the Board will adopt Administrative Law Judge's credibility resolutions unless the clear preponderance of all relevant evidence shows that they are incorrect, *Standard Dry Wall Products*, 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951), this is not an ordinary case. After the hearing, the trial judge died, and the decision was written by ALJ Parke based solely on the transcript. In these circumstances, an ALJ's credibility findings are not afforded the usual deference. *Huttig Sash and Door Co.*, 263 NLRB 1256, n.1 (1982); *Penn-Dixie*

Steel Corp., 253 NLRB 91, n.1 (1980) Rather, the Board has held consistently that when "credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility." *J. N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979).

Such an independent evaluation here shows that ALJ Parke erroneously credited Kayonnie's assertion that she had always eaten lunch outside. First, the ALJ's conclusion that Kayonnie's inconsistent statements were somehow a product of her not fully understanding English is not borne out by the record. The evidence shows that during the investigation of this matter Kayonnie provided the Board with at least four English language affidavits which she reviewed, made corrections to in English, and signed. (Tr. 665) At work, Kayonnie speaks to, and interacts with, employees exclusively in English (Tr. 584, 665-66), using a coworker to translate into Spanish when necessary. (Tr. 1837-38) Kayonnie wrote and signed numerous disciplinary notices, exclusively in English, and kept an attendance log in English. (GC. 109 attachments, GC. 111-125); (R. 48); (Tr. 668, 1829-30) She also wrote notes about employee conduct in English. (GC. 113); (Tr. 772) The hearing record shows that Kayonnie listened attentively to the questions posed to her, and asked that they be repeated if she needed clarification, and proceeded to answer the question without a problem. (Tr. 688, 1811, 1811, 1815, 1817, 1865) The only time she did not was when she was caught in an obvious lie. (Tr. 1863-64) Significantly, <u>not once</u> during her testimony did Kayonnie answer that she did not understand a question posed to her. The ALJ's conclusion that the transcript shows that Kayonnie did not always clearly understand the questions posed is wrong and unsupported by the record.

Second, ALJ Parke's decision ignores the consistent and more plausible testimony of other witnesses, including Maria Theresa Velasquez. Valasquez, a four-year employee called by Respondent, testified that it was "really rare" Kayonnie would eat lunch outside in her husband's automobile, and that she only did so "sometimes." (Tr. 1101-02)

Third, ALJ's Parke's decision utterly ignores record evidence that Kayonnie repeatedly provided evasive answers, was repeatedly impeached by her affidavits, (Tr. 689-91, 702-03, 708-09, 711, 1879) and blatantly violated the sequestration rule by discussing testimony with another one of Respondent's witnesses/supervisors during a break in the hearing. (Tr. 261, 1747-49) More specifically, Respondent's production supervisor Jaime Chavez admitted that, during a break in the hearing, Kayonnie showed him an exhibit admitted into evidence, which they discussed, in violation of the ALJ's sequestration order. (Tr. 1747-49) When confronted, the record is clear that Kayonnie was evasive, and then simply lied, denying she showed Chavez the exhibit or discussed her testimony with him. (Tr. 1860-65) See *D&F Industries*, 339 NLRB 618, 626, n. 4 (2003) (wide discretion is allowed in dealing with violations of sequestration orders, including considering such violations when assessing a witnesses credibility).

Finally, ALJ Parke erred in not considering the inherit improbability of Kayonnie's testimony when assessing her credibility. *Panelrama Centers*, 296 NLRB 711 n. 1 (1989) (where demeanor is not determinative, credibility may also be based, in part, on inherent probabilities, and reasonable inferences drawn from the record as a whole); *Ryder/Ate, Inc.*, 331 NLRB 889, 890 n.3 (2000) (inherent probability of the testimony used to assess credibility). After initially testifying that she started eating lunch outside only after the Union started organizing, Kayonnie then abruptly changed her testimony to avoid a violation. The

problem is that her changed testimony – that she had eaten lunch outside with her husband everyday since she started working – for 21 straight years – defies common sense. (Tr. 667, 694) The more plausible version is what Kayonnie testified to originally, and what other employees similarly testified to. Accordingly, the ALJ erred by failing to find that Kayonnie engaged in illegal surveillance. See *Parsippany Hotel Management, Co.*, 319 NLRB 114, 126 (1995) (engaging in out of the ordinary conduct to view open union activity a violation).

D. The ALJ Erred in Refusing to find that Respondent Interrogated Zulima Ruiz on June 27 (Exception #7)

1. The ALJ's Decision

The ALJ found that, on June 27, Zulema Ruiz came to work wearing a union button, and gave a similar button to a coworker. (ALJD slip op. at 6) Kayonnie saw this incident occur, and immediately reported it directly to Milum, who came to the production floor and had a conversation with Ruiz. (Tr. 696) The ALJ credited Ruiz's testimony that Milum "told me if I was handing buttons over to employees during work hours." (ALJD slip op. at 6 n. 16) The ALJ, however, dismissed the interrogation allegation, finding that Milum's comments did not interfere with Ruiz' statutory rights. (ALJD slip op. at 15) ALJ Parke reasoned that Milum "merely asked whether her open distribution of a union button in the workplace occurred on work time" and said nothing to dissuade her from distributing the Union buttons. (ALJD slip op. at 15) Notably, in her findings of fact, ALJ Parke correctly determined that Milum asked Ruiz if she was distributing buttons during "work hours," not "work time." (ALJD slip op. at 6); (Tr. 414-15).

2. Argument

It is well established that interrogations of employees about their protected activities are not per se unlawful, but must be evaluated under the standard of whether "under all the

circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House,* 269 NLRB 1176, 1177 (1984) affd. 760 F.2d 1006 (9th Cir. 1985). In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, and whether the employee is an open and active union supporter. *Norton Audubon Hospital,* 338 NLRB 320, 320-21 (2002).

Applying these factors, there can be no question that the ALJ erred in failing to find an unlawful interrogation. While the questioning occurred in an open area, it was conducted by Milum, Respondent's highest-ranking official. Moreover, Milum asked Ruiz if she was handing out Union buttons to employees "during working hours" (ALJD slip op. at 6 n. 16); (Tr. 414-15), a time when employees are free to solicit and distribute information on behalf of the Union. *Our Way Inc.*, 268 NLRB 394, 394-95 (1983) (rules prohibiting employees from distributing union literature or soliciting other employees during "working hours" are presumptively invalid). Milum never advised Ruiz about any legitimate reason for his inquiry, never told her why he needed this information, and gave her no assurances that his question need not be answered. All of these are relevant factors to consider, but were ignored by the ALJ in her decision. *Norton Audubon Hospital*, 338 NLRB at 321. The ALJ also failed to consider the effect of Milum's contemporaneous order to Ruiz that she could not wear the Union button, a coercive and illegal rule prohibiting the wearing of the very Union button Ruiz was distributing. (ALJD slip op. at 17)

Therefore, under the totality of the circumstances, and the fact that the questioning occurred against a background of Respondent's other unfair labor practices, the ALJ erred in failing to find that Milum's question reasonably tended to restrain, coerce, or interfere with

rights guaranteed by the Act. *Ready Mix, Inc.*, 337 NLRB 1189, 1190 (2002) (supervisor interrogated employee by saying he had "heard you were passing out union cards"); *Continental Bus System*, 229 NLRB 1262, 1264-65 (1977), (manager interrogated employee by saying "I heard that you [were] getting people signed up for the Union"); *Overnight Transportation Co*, 254 NLRB 132, 132 (1981) (supervisors statement "I hear you are involved with the Union," even without accompanying threats, was unlawful).

E. The ALJ Erred in Refusing to find that Respondent acted Illegally by Attempting to Cause the Arrest of Union Handbillers (Exception #8)

1. The ALJ's Decision

The record, and the ALJD, leaves little doubt that Milum sought to have his customers have the Union handbillers arrested and charged with trespassing when they were handbilling at his customers' locations. (GC. 63, 64, 88, 90, 102); (ALJD slip op. at 7) In furtherance of this plan, Milum repeatedly approached law enforcement authorities to have them force the handbillers to stop and encouraged his customers to do the same, providing them with explicit directions on how to contact the police. (ALJD slip op. at 7, 17-18); (Tr. 63, 88, 90, 91, 102, 329-30) The record establishes that Milum actually contacted the police 10-20 times in an attempt to have handbillers arrested, even though he lacked any property interest, did not know if his customers had any property interest, and received no authorization from his customers or the actual property owners to contact the police on their behalves. (Tr. 310-11, 316, 329-30) Finally, the record establishes that Milum's campaign was at least partially successful. On at least one occasion the police caused Union handbillers to leave the location of one of Respondent's largest customers. (ALJD slip op. at 18); (Tr. 332-33) In another instance, the police responded to union leafleting across the street from a shopping center housing another of Respondent's customers. (Tr. 1072-73) On a third occasion, based upon

Milum's personal request, the police responded to Union handbilling at another customer's restaurant, but arrived after the handbilling had ceased. (Tr. 396); (GC. 91) During this time period the police also responded on three or four separate occasions to lawful union activity occurring at Respondent's facility (Tr. 1079), including a Union picket occurring on a public sidewalk. (Tr. 1073, 1080)

The ALJ held that these facts did not establish a violation because there was no evidence that protected rights were impacted, and no legal authority exists suggesting that discussing police intervention with law enforcement or customers interferes with protected rights. (ALJD slip op. at 17-18)

2. Analysis

The ALJ's analysis is wrong. It disregards the Board's holdings that that an employer who indirectly asks the police to remove individuals engaged in protected activity from property in which they hold no lawful property interest interferes with employee Section 7 rights. *Wild Oats Community Markets*, 336 NLRB 179, 180-81 (2001). In *Wild Oats*, the employer operated a grocery store located in a shopping center, which was owned by a third party. When union representatives began peacefully picketing and distributing leaflets in front of the employer's grocery store, the employer contacted the center's manager to report the picketers and inquired as to the owner's policy regarding picketing in the owner's parking lot. The manager then sought to have the police remove the picketers. The Board found that the employer, who had no property interest in the parking lot, violated the Act by initiating a chain of events that ended with the attempted removal of union representatives engaged in lawful protected activity. Id. at 180. The Board found that the employer's actions were

illegal because they constituted an "indirect attempt to expel the union representatives and, consequently, constituted interference with the employee Section 7 rights." Id. at 181.

The Board has also held that an employer violates the Act merely by calling the police to have union organizers and picketers removed and/or arrested where the employer lacks any property right. *Corporate Interiors, Inc.*, 340 NLRB 732, 745-746 (2003) Significantly, in *Corporate Interiors, Inc.*, there was no impact on the picketers' rights. When the police arrived, they did nothing other than remind the picketers where the public easement was. Id. at 740. Nonetheless, the Board found a violation.[8] Id. at 746.

This case is similar to *Wild Oats* and even more compelling than *Corporate Interiors*. Milum repeatedly sought to have the Union handbillers arrested, coached his customers on how to do the same, and his efforts were rewarded on several occasions with police action and the removal of Union handbillers. Contrary to the ALJ's analysis, there is ample precedent for finding that Milum's conduct – initiating a chain of events designed to cause police interference with employees' Section 7 rights at locations where he has no property interest – violated the Act.

F. The ALJ Erred in Refusing to find that Respondent's Statement to Guzman Concerning Video Cameras Created the Impression of Surveillance (Exception #9)

1. The ALJ's Decision

ALJ Parke found that Raphael Parra, Respondent's Maintenance Engineer, told Union activist Evangelina Guzman that the security cameras he was installing was to keep her "in check." However, she found no violation because Parra's statement were "jocular" and

[8] The Board also found a subsequent violation, based upon another incident, when the same employer actually caused the arrest of the picketers.

because there was no evidence that Parra knew of Guzman's union activities or discussed them with her. (ALJD slip op. at 19)

2. Analysis

The ALJ's determination that Parra was simply "jocular" is not supported by the record, particularly where the record contains evidence that Parra's testimony in this regard was scripted by Respondent's lawyer. More specifically, the record establishes that Parra testified consistent with a two-page script prepared by Respondent's lawyer, which called for Parra to claim he was simply "joking" when he spoke to Guzman. (Tr. 1652-54); (GC. 136) Notably, the record is utterly devoid of any evidence that Guzman and Parra had such a relationship to suggest that such "joking" took place. Further, this so-called joke occurred when Parra was installing a video camera.

The error in the ALJ's decision is also underscored by the complete lack of support for her conclusion that Parra had no knowledge of Guzman's union activities. On the contrary, the record shows the opposite. Parra served as Milum's translator the day Guzman was suspended for refusing to remove her Union button. (Tr. 579) The record further shows that Milum characterized Guzman as the "number one" Union supporter, and that he discussed the union activities of his employees with Parra. (Tr. 308); (GC. 86) Under these circumstances, the ALJ erred in not finding a blatant statement that Respondent was watching a union supporter to violate the Act. See *Meisner Elec., Inc.*, 316 NLRB 597, 607 (1995) (employer violated the Act by telling employees that the company would have a video camera where a union meeting was scheduled to "keep an eye" on employees because of the union).

G. The ALJ Erred in Failing to find that Respondent's October Suspension of Minjarez Violated Section 8(a)(3) (Exception #10)

1. The ALJ's Decision

Maria Minjarez was originally hired by Respondent in January as a production worker, but she quit her job in May. (Tr. 467); (GC. 20, 57) Minjarez then reapplied for employment with Respondent and was hired as a new employee in July, at which time she received a new employee number and a new personnel file. (Tr. 277-78); (GC. 2 ¶ 15, 19, 21, 22) In early October, Minjarez started actively supporting the Union, distributing fliers near the time-clock, in the washroom, in the breakroom, and outside the facility. (Tr. 468-69); (GC. 105) The ALJ acknowledged that Minjarez engaged in extensive union activities, and Milum knew her to be a firm Union supporter. (ALJD slip op. at 23)

On October 16, Minjarez became ill and left work without asking anyone for permission. Minjarez' mother notified Chavez the following day that she was sick and would not be at work. Minjarez returned to work on October 18, but Kayonnie sent her home, telling her she had quit. Minjarez returned again that afternoon and spoke to Chavez, who told her that Kayonnie said she had quit and was "very problematic." (ALJD slip op. at 11) As found by the ALJ, Minjarez then waited several hours to speak to Milum, who told her that Kayonnie had reported she was a "troublemaker." (ALJD slip op. at 11) Milum also told Minjarez that she was a slow worker, despite the fact that Respondent had never previously complained about the pace of her work, and had refused her previous transfer request, telling her she was a very good worker. (ALJD slip op. at 11)

Despite the fact that Minjarez had no prior record of discipline, on October 19, Respondent suspended Minjarez until October 24, and placed her on a 90-day probation. (ALJD slip op. at 11); (GC. 56) While the record shows that other employees received

disciplinary warnings for leaving work without authorization, only Minjarez was suspended and placed on probation for this type of violation. For example, an employee named Sylvia Tovar, who like Minjarez was a rehire, left work on two separate occasions without authorization and received only a verbal warning. (Tr. 773-77); (GC. 113) Two other employees also left work on separate occasions, without telling their supervisors, and neither were suspended or received probation. Instead, both simply received a written warning. (GC. 125 pp. 3-4); (Tr. 797-98)

Milum testified that he personally "audited" the suspension and made sure the notice was typed. (Tr. 280, 294, 296) He discussed the issue with Chavez and Kayonnie, instructing them not to allow Minjarez' union support to affect their disciplinary decision. (Tr. 276-77) Contrary to Milum, however, Chavez denied that he spoke with Milum about Minjarez' suspension. (Tr. 833) Rather, Chavez testified that it was his decision to suspend Minjarez, and that he and Kayonnie reviewed Minjarez' personnel file before making this decision, taking into consideration one or two warnings in the file. (Tr. 833) Notably, the record establishes that Minjarez' file contained no prior warnings. (Tr. 295-96); (GC. 58) Chavez also claimed that he decided to suspend Minjarez because "[i]f a person begins to fail, begins to leave without permission, we <u>have</u> to give them probation." (Tr. 834) (emphasis added) However, the record shows that opposite is true. (GC. 113, 125)

Also contrary to Milum, Kayonnie denied that she ever discussed that Minjarez was a union supporter with Milum. (Tr. 759-60) Instead, Kayonnie testified Milum simply deferred the disciplinary decision to them, and Kayonnie delegated it to Chavez. (Tr. 759) Kayonnie also testified that, whenever Chavez issues a warning, he always puts the offending employee

on probation. (Tr. 761) Again, the record shows the opposite is true. (R.45, pp. 6-8, 83, 104, 105)

Based on these facts, the ALJ found that the General Counsel established a prima facie case that Minjarez' union activities was a motivating factor for her October suspension. (ALJD slip op. at 23) However, the ALJ refused to find a violation, accepting the Respondent's position that Minjarez was not treated any differently than any other similarly situated employee and that it would have disciplined Minjarez despite her Union activity. (ALJD slip op. at 23) To support her conclusion the ALJ found that, when Respondent rehired Minjarez in July 2006, it did so upon the condition that she would notify Respondent every time she was going to be absent from work. (ALJD slip op. at 11, 23-24) Therefore, when Minjarez left work on October 16 without permission, the ALJ found that her infraction was a "flagrant abrogation of her commitment to the Respondent" and therefore differed from the leave infractions of other employees. (ALJD slip op. at 24). ALJ Parke further noted that the Board cannot substitute its judgment for that of an employer in deciding what constitutes appropriate discipline. (ALJD slip op. at 25)

2. Analysis

In dismissing this allegation, ALJ Parke neglected to recognize that it is the Board's duty to evaluate whether the reasons proffered by an employer for discipline are the actual reasons or mere pretext. *Desert Toyota 1*, 346 NLRB No. 3, slip op. at 3-4 (2006). In making this determination, the Board looks at factors such as inconsistencies between the proffered reasons for discipline and other actions of the employer, deviations from past practice, and proximity in time of the discipline to the union activity. *National Steel Supply, Inc.*, 344 NLRB 973, 975 (2005)

ALJ Parke failed to properly apply these factors. The record shows that other employees received disciplinary warning notices for leaving work without authorization, but only Minjarez was suspended and placed on probation for such a violation. For example, Sylvia Tovar, who like Minjarez was a rehire, left work on two separate occasions without authorization and received only a verbal warning. Two other employees also left work early on separate occasions, without telling their supervisors. Both received only a written warning. Contrary to the ALJ, the record does not support the conclusion that Minjarez was subject to a different standard because of her previous employment. When asked this question by ALJ Gontram, Minjarez denied that, when she was rehired, Respondent ever told her that she could never be absent without notice. (Tr. 492-93) Minjarez' testimony on this point is supported by Respondent's separation form which it filled out when Minjarez quit her job in May. This form states that Minjarez was eligible for rehire, and does not list any restrictions. (GC. 57) Minjarez' testimony is further supported by the complete absence of any documentation memorializing that she was rehired subject to any special conditions relating to her attendance. If this were truly an issue, and if Respondent truly anticipated any attendance problems that would require discipline, this is exactly the type of condition that would be memorialized in writing.

Additionally, ALJ Parke's decision overlooks the undeniable fact that Minjarez' discipline immediately followed her union activity in early October, where she distributed Union fliers and collected signatures on a Union petition. (ALJD slip op. at 11); (Tr. 467-69, 471-72); (GC. 104-05). ALJ Parke's decision also overlooks Respondent's wildly conflicting testimony concerning the circumstances leading up to Minjarez' suspension. See *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 264 (2000) (conflict in testimony among respondent's

supervisors supports finding of pretext). Specifically, as described above, Milum and his supervisors repeatedly contradicted one another about who spoke with whom during the decision-making process; who made the decision; what materials were considered; and what practices and policies applied to these situations. Indeed, Respondent claimed to consider materials that did not even exist, i.e., prior disciplinary warnings in her personnel file. [9] Finally, ALJ Parke's decision overlooks Milum's statement that Minjarez was a "troublemaker" and Kayonnie's statement that she was "problematic." These are code words for union activist, especially where there is, as here, other evidence of union animus. *Blue Star Services, Inc.* 328 NLRB 638, 639 (1999); *Huntington Hosp. Inc.*, 218 NLRB 51, 57 (1975)

Accordingly, the ALJ erred by failing to apply the Board's established framework for determining whether an employment action was pretext, and the Board should find that Respondent violated Section 8(a)(1) and (3) of the Act by suspending Minjarez and placing her on probation.

H. The ALJ Erred in Failing to Find That Respondent's December Suspension of Guzman Violated Section 8(a)(3) (Exception #11)

1. The ALJ's Decision

Evangelina Guzman worked for Respondent as a production worker during three separate periods (in 2005, in 2006 until September 28, and from October through the date of the hearing). (ALJD slip op. at 12) Guzman's second period of employment ended on September 28 because her work permit expired. (ALJD slip op. at 12) By this date, Guzman

[9] The record also reflects that Minjarez' suspension was typed. When asked about this, Chavez testified that he has all of his warnings typed by the front office. However, his testimony is refuted by the documentary evidence which shows that, other than the disciplines issued to Guzman and Minjarez, virtually no other employee received a type-written warning. (GC. 114-125); (R. 48) This is further evidence of pretext.

had been involved in significant union activities and had been suspended for wearing a union button. Respondent was well aware that she was a strong union supporter. (ALJD slip op. 12, 24-26)

While awaiting the renewal of her work permit, on October 2, Guzman presented Respondent with a letter from Congressman Raul Grijalva that the renewal was forthcoming and filled out a new employment application. (GC. 2 ¶10, GC. 24) When Guzman presented Respondent with her renewed work permit on October 10, Respondent rehired her as a new employee, giving her no credit for her previous work history. In other words, Guzman was treated as a completely new employee, which included not being eligible for health insurance coverage for a new 9 month period. (ALJD slip op. at 12); (GC. 2); (Tr. 278)

Along with her other duties, Guzman worked in restaurant orders on Mondays and Wednesdays, substituting for the regular employees in this department. (Tr. 626-27) Employees working restaurant orders are allowed to leave work when their orders are finished. (Tr. 645-46, 763, 1559, 1577) For example, Maria Martinez, a restaurant orders employee, testified that if Respondent asked her to stay after her she has completed her restaurant orders, she would stay if she could but "almost always goes home." (Tr. 1577) Kayonnie had previously instructed Guzman that she could also go home when she finished her restaurant order work. (Tr. 618)

Because Christmas fell on a Monday, Guzman was assigned to work restaurant orders that day, along with coworker Maria Torres. (Tr. 581, 762, 624) Guzman began work at 9:00 a.m. and Torres started work at 1:00 p.m. (GC. 99, 126 p. 2) Consistent with any other day she worked in restaurant orders, Guzman planned to leave after she finished her orders. (Tr. 618) Upon completing her orders, Guzman told Kayonnie that she was leaving because she

had finished and that her ride home had arrived. Kayonnie told Guzman she had to stay until the entire production was finished. (ALJD slip op. at 12) Guzman protested, but Kayonnie told her that if she left she would lose her job. (ALJD slip op. at 12) Guzman nonetheless clocked out after having worked a total of 7 ¾ hours. (GC. 99) In contrast, Maria Torres worked only 6 hours that day. (GC. 126 p. 2)

When Guzman returned to work the following day, Kayonnie met her at the plant entrance and informed her that she could not work because she left the previous day. (Tr. 582) Guzman returned later that day and spoke to Milum with Kayonnie present. (ALJD slip op. at 12) Kayonnie denied telling Guzman she was fired, but instead said she was planning to give Guzman a warning. (Tr. 583) Later that afternoon, Kayonnie issued Guzman a three-day suspension for leaving work on December 25, along with a 90-day probation. (ALJD slip op. at 12); (GC. 98)

The record evidence shows that a number of Respondent's employees have ignored a work order and simply left work and were never suspended or placed on probation. For example, employee Manuel Flores ignored an order to work in the washroom, and instead left work without permission. He only received a written warning, despite the fact that it was his second warning for a similar work rule violation, having flouted Kayonnie's order to work in the washroom a few months earlier. [10] (Tr. 795-96); (GC. 125 p. 1); (R. 48, p. 31) Similarly, employee Travis Dell was only given a written warning for leaving early without finishing his work even though, according to Kayonnie, Dell left work early not once but three times before getting a warning. (Tr. 796); (GC. 125 p. 2) Likewise, employee Christina Gracia disobeyed her supervisor's instructions by leaving before her work was done, was absent from

[10] While Flores was sent home the first time he disobeyed a work order, he was never suspended nor placed on probation.

work without approval, and was caught talking on her cell phone instead of working. For all these violations, Gracia simply received a written warning. (GC. 125 p. 6)

Although the ALJ found that the General Counsel established a prima facie case, she found no violation, citing *Smithfield Foods, Inc.*, 347 NLRB No. 109 (2006). (ALJD slip op. at 24-25) In support of her decision, the ALJ found the fact that Respondent rehired Guzman in October 2006, after her work permit had expired a few weeks earlier, and some months after Guzman's public union activities started, "vitiates the significance [that Respondent's] animosity towards her union support might otherwise have." (ALJD slip op. at 26) Based on this finding, the ALJ held that Respondent met its burden to show that Guzman would have been suspended and placed on probation absent her protected conduct and dismissed the allegation. Id.

2. Analysis

The ALJ erred in placing any significance on the fact Guzman was hired back, as a new employee, after her work permit was renewed. The simple fact of the matter is that Respondent had no choice but to hire her back. Guzman was a known Union supporter and was a named discriminatee in an pending unfair labor practice complaint that had issued in September. (GC. 1(m)) Thus, when Guzman presented Respondent with her renewed work permit, Respondent had no valid reason to not re-hire her. It faced a Hobson's choice: it could decline to hire Guzman and assuredly face an 8(a)(3) and 8(a)(4) refusal to hire charge, or it could hire Guzman and wait for an opportunity to begin disciplining, and ultimately

discharge her.[11] Respondent chose the latter. Therefore, the ALJ erred in placing any significance on the fact that Respondent rehired Guzman in October 2006, much less using this event to find that Respondent met its burden to establish that it would have suspended Guzman absent her protected conduct. See, *Fluor Daniel*, 333 NLRB 427, 431, 454 (2001) (employer hired union applicants in an attempt to avoid issuance of unfair labor practice complaint).

Again, ALJ Parke neglected to evaluate whether the reasons proffered for Guzman's discipline are the actual reasons or mere pretext and failed to apply any of the Board's factors for determining pretext, including the ample evidence that similarly-situated employees were treated far less severely. ALJ Parke's reliance on *Smithfield Foods, Inc.*, 347 NLRB No. 109 (2006), to support her finding that Respondent met its burden of showing it would have disciplined Guzman regardless of any protected activity is unavailing. In *Smithfield Foods*, a two-member panel of the Board reversed the ALJ and found that the employer legally terminated a vocal union supporter for leaving work early, despite being specifically told to stay. In so finding, the Board noted that the employer discharged another employee for leaving early on the same day, and had previously discharged employees for leaving early in the past. Id. slip op. at 7. Here, by contrast, there is no evidence that Respondent suspended employees for three days or placed them on a 90-day probation, as a result of their first infraction for disobeying a supervisor's order and leaving work early. In fact, the evidence shows the opposite. Several employees engaged in this very same conduct but only received a written warning. Unlike *Smithfield Foods*, Respondent presented no evidence that any

[11] Respondent ultimately did discharge Guzman on March 5, 2007. Her discharge is subject of an unfair labor practice charge which is currently being investigated. See, Exhibit C (unfair labor practice charge in Case 28-CA-21489); *Lord Jim's*, 264 NLRB 1098 n.1 (1982) (Board may take administrative notice of its own files); *Dura Art Stone, Inc.*, 340 NLRB 977 n.3 (2003) (administrative notice taken of the filing of an unfair labor practice charge).

employee, except Guzman, received a three day suspension and 90 day probation as a result of their first offense for leaving work early or disregarding a supervisor's instructions.

The pretextual nature of Guzman's discipline is further illustrated by Respondent's sudden departure from its longstanding practice of allowing employees working in restaurant orders to leave after their restaurant orders are completed. The record shows that the only departure from this practice occurred with Guzman, a Union supporter targeted by Respondent. Thus, the ALJ erred by failing to find that Respondent violated Section 8(a)(1) and (3) by suspending Guzman and placing her on probation in December.

I. The ALJ Erred in Failing to Find That Guzman's January Probation Violated Section 8(a)(3) (Exception #12)

1. The ALJ's Decision

According to the ALJD, Guzman was unable to work her scheduled January 20, 2007 shift because her car broke down. (ALJD slip op. at 12) Guzman called work and left a voice mail message that she was unable to come to work because of her car troubles. Id. (Tr. 585, 693, 647) Guzman returned to work on January 22, 2007. She brought with her an mechanic's invoice to confirm her car troubles, which she tried to show Kayonnie.[12] (ALJD slip op. at 12); (Tr. 585); (GC. 107) Kayonnie told Guzman to show the invoice to Chavez.[13] Because she believed that Chavez had received the telephone message she left on Saturday, Guzman did not do so and worked the remainder of that day without incident. Id.

[12] The ALJ erred in stating that Guzman presented the invoice from Gordito's to show her car had been repaired the preceding Saturday. (ALJD slip op. at 12) Guzman specifically testified that she did not have her car repaired at Gordito's because it was too expensive, and that her car was still broken. (Tr. 639-40). She further erred in finding that the invoice evidences no malfunction, as there was no testimony as to the significance of the automobile problems delineated on the invoice. (ALJD slip op. at 13 n.34)

[13] In this portion of her decision, ALJ Parke inadvertently refers to Respondent's Production Supervisor Jaime Chavez, as "Mr. Garcia." (ALJD slip op. at 12, lines 39-40)

The following day Chavez told Guzman that he was going to give her a warning for her absence the preceding Saturday. After explaining that her car had broken down and Kayonnie had refused to look at the mechanic's invoice, Guzman asked Chavez if he received the telephone message she had left on Saturday. (ALJD slip op. at 13) Chavez replied that he had not, and that he was giving her a third warning. Guzman responded that it was inappropriate to give her a third warning since she had been rehired as a new employee. (ALJD slip op. at 13) Chavez told her to speak with Kayonnie, and issued her a type-written discipline, which included a six-month probation. Chavez claimed he wrote the discipline by hand, and took it to the front office for typing. (ALJD slip op. at 13); (Tr. 838)

The record establishes that Respondent's witnesses told wildly conflicting stories about the events leading to Guzman's discipline. Chavez testified that, before disciplining Guzman, he discussed this matter with Kayonnie, who told him that Guzman had missed work in order to buy a car (Tr. 836-37) However, Kayonnie testified the opposite was true, that it was Chavez who told her that Guzman missed work in order to purchase a car. (Tr. 769-70) Contrary to Chavez, Kayonnie denied any involvement in this incident, testifying that she did not even work on the day in question, January 20. (Tr. 686, 769-70) Chavez, on the other hand, testified that it was Kayonnie who told him that Guzman failed to report to work on January 20, and did not call.[14] (Tr. 1755)

[14] Chavez and Kayonnie originally testified in March, and were recalled to the stand by Respondent in April. During the intervening period between their original testimony and being recalled, Kayonnie and Chavez violated ALJ Gontram's sequestration order, discussing Guzman's January 2007 discipline, and reviewing a trial exhibit regarding the matter. (Tr. 261) Chavez admitted violating the sequestration order, testifying that Kayonnie showed him the trial exhibit and discussed aspects of Guzman's January 20 discipline with him. (Tr. 261, 1747-50); (GC. 107) Caught red-handed with Chavez' admission, Kayonnie became evasive, and then simply lied, denying she ever discussed her testimony with Chavez. (Tr. 1860-65)

Chavez also denied discussing the matter with Milum. (Tr. 837-38) Milum, however, testified that he personally typed up Guzman's January 2007 discipline, and that he discussed the matter with both Chavez and Kayonnie on the production floor. (Tr. 405)

The record also establishes that a number of Respondent's employees engaged in the same type of misconduct with which Guzman was charged, but were never placed on any sort of probation. For example, employee Genova Padilla missed work without calling in, but only received a written warning. (GC. 115) To make matters worse, Kayonnie admitted that she gave this employee three verbal warnings before issuing her a written warning. (Tr. 781) Similarly, another employee missed two days in a row without calling-in before receiving a written warning. He too was not placed on probation, despite the fact he had previously missed even more days. (GC. 116); (Tr. 782-83) The record includes evidence of four other similarly-situated employees who did not report to work, none of whom were placed on probation. (Tr. 783-788); (GC. 117-120)

Although the ALJ found that the General Counsel established a prima facie case, she again relied upon the fact the Respondent rehired Guzman in October 2006, to nullify the significance of Respondent's animosity towards her union support.

2. Analysis

For reasons already addressed, the ALJ erred in relying upon Respondent rehiring of Guzman in October 2006, to rebut the evidence of Respondent's illegal motive. As with the other Section 8(a)(3) allegations she dismissed, the ALJ neglected to evaluate whether the reasons proffered for Guzman's discipline are the actual reasons or mere pretext, and failed to apply any of the Board's factors for determining pretext, including the ample evidence that at least six similarly-situated employees were treated far less severely and the conflicting

testimony surrounding the issuance of the discipline. See *National Steel Supply, Inc.*, 344 NLRB at 975 (deviations from past disciplinary practices evidence of pretext); *Elias Bros. Big Boy, Inc.*, 137 NLRB 1057, 1075 (1962) (conflicting testimony is evidence of pretext); *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 264 (2000) (same).

Accordingly, the ALJ erred by failing to find that Respondent violated Section 8(a)(1) and (3) by suspending Guzman and placing her on probation in January 2007.

J. The ALJ Erred in Failing to Order a Bargaining Order Remedy Pursuant to NLRB v. Gissel Packing Co. (Exception #13)

1. The ALJ Decision

ALJ Parke found that, as of March 4, 43 of Respondent's 70 production workers had authorized the Union to represent them. (ALJD slip op. at 13) She also found that, because of Respondent's unfair labor practices, support for the Union amongst Respondent's employees soon dissipated. (ALJD slip op. at 14, 26) For example, before Guzman's suspension, and the unlawful discharges of Knox and Min, the Union held biweekly meetings with an average attendance of between 10 to 15 employees. (ALJD slip op. at 14) Following the suspension and discharges, employee attendance at Union meetings decreased, and the Union's two August meetings were attended by only one and two employees, respectively. Before the suspension and discharges, employees voluntarily distributed union flyers to other employees inside the plant; afterwards, they declined to do so. Similarly, after the suspensions and discharges, employees declined to accept the Union buttons. One employee told union representatives that he no longer wanted to wear Union paraphernalia because he was afraid he would be fired. Id.

The Union's devastating loss of support is not subject to serious debate. Milum himself estimated that by February 2007, only one of the 40 employees who participated in

the March 4 work stoppage still supported the Union. (ALJD slip op. at 14) That lone employee was Guzman, who has since been fired. Id.

ALJ Parke nonetheless refused to issue a bargaining order because Respondent's many unfair labor practices, including "hallmark" violations, were "tempered" by the fact that Respondent did not discourage certain protected Section 7 activity such as openly meeting with Union representatives outside its facility, wearing prounion stickers, distributing literature, and keeping a pro-union banner and microwave in its lunchroom. (ALJD slip op. at 26-27) In the ALJ's words, Respondent's "partial respect for employees' Section 7 rights . . . suggest[s] that the coercive effects of Respondent's conduct can be adequately remedied by the Board's traditional remedies." Id.

2. Analysis

a. The *Gissel* Standard

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the United States Supreme Court held the duty to bargain can arise without a Board election where an employer undermines majority support for a union through unfair labor practices. The Supreme Court identified two types of employer misconduct that may warrant the imposition of a bargaining order: "outrageous and pervasive" unfair labor practices (category I); and less extra ordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine the majority strength and impede the election processes (category II). Id. at 613-615

The Court explained that in determining the appropriateness of a bargaining order:

> such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority ... the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future.

Id. The Court further stated in *Gissel* that the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign, by means of a bargaining order.

Once the General Counsel introduces competent evidence showing the size and composition of the bargaining unit, it becomes incumbent upon Respondent to present some specific evidence or argument supporting a contrary conclusion. *United Scrap Metal, Inc.*, 344 NLRB No. 55, slip op. at 2 (2005), citing *Abbey's Transport. Servs.*, 284 NLRB 698, 703 (1987), enfd. 837 F.2d 575 (2d Cir. 1988).

Here, the unit alleged in the Complaint is a wall-to-wall unit of Respondent's production employees, and the Respondent does not contend that the unit alleged is inappropriate. The ALJ properly found that well over a majority of Respondent's employees had authorized the Union to represent them as of March 4, and that that the Union's majority support was dissipated, at least in part, by Respondent's unfair labor practices. Therefore, the only issue to be decided is whether these unfair labor practices can be remedied by traditional means and make a future fair election possible.

b. The ALJ Erred in Failing to Find That Respondent's Barrage of Unfair Labor Practices Make a Fair Election Impossible

The unfair labor practices committed by Respondent are of a nature and were committed in a manner that precludes the possibility of a fair election, thus warranting a remedial bargaining order. The evidence shows that, since the Union demanded recognition, Respondent has engaged in a course of conduct to root out Union supporters to "send a message" to other employees. This illegal conduct involves "hallmark" violations of the Act, including the discharges of two high-profile union supporters and the suspension of two others,

which have been widely disseminated to other employees. See *Garvey Marine, Inc*., 328 NLRB 991, 994 (1999) ("public and dramatic discharge" of discriminatee).

In addition to the two unlawful discharges and the unlawful suspensions, Respondent committed numerous other violations of the Act. Respondent interrogated employees, up through and including the time of the hearing in this matter. Respondent spied on employees as they met with Union organizers and installed a camera in the lunchroom to spy on them during their breaks. Respondent also solicited employee grievances, promised benefits, granted benefits, attempted to effectuate the arrest of Union activists, and prohibited employees from wearing Union buttons. Finally, Respondent drove home its anti-union message by showing a video to every employee, on an individual basis, indicating their efforts to unionize would likely cause their wages to decrease anywhere from 21 to 37 percent. Under these circumstances, a fair election is impossible, and employees' wishes are better gauged by the Union's majority as shown on the March 4 Petition. See *Sahara Datsun, Inc. v. NLRB,* 811 F.2d 1317, 1321-22 (9th Cir. 1987); *Graves Marine Inc.,* 328 NLRB 991 (1999) enfd. 245 F.3d 819 (D.C. Cir. 2001); *Overnite Transportation Co*., 329 NLRB 990 (1999).

In these circumstances, the Board's traditional remedies, including a notice posting and offers of reinstatement, are wholly inadequate. First, the Board has held that "hallmark" violations, such as the discipline and discharge of key union supporters like Knox, Soe Min, Minjarez, and Guzman, are highly coercive unfair labor practices that are likely to have long-lasting and substantially inhibiting effects on employees. See *Horizon Air Services*, 272 NLRB 243 (1984); see also *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980). Second, the Board has also held that where the unfair labor practices are committed by high-ranking company officials, their effects are highly coercive and unlikely to be forgotten. See *M.J*

Metal Products, 328 NLRB 1184, 1185 (1999) ("when the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten") That is the case here. Milum, Respondent's highest level management official, involved himself in every violation. This involvement included personally participating in every unlawful interrogation, soliciting grievances and promising to remedy employee complaints, threatening employees that selecting the Union would be futile, scripting the anti-Union video threatening employees with decreased wages, banning Union buttons at work, suspending an employee for refusing to obey this unlawful rule, discharging Denise Knox and Soe Min, and monitoring the disciplines meted out to Minjarez and Guzman.

Incredibly, the ALJ suggests that the effects of Respondent's conduct are somehow mitigated because it sometimes, whether on purpose or by accident, obeyed the law. The ALJ cites no authority, and the General Counsel is aware of none, that holds a *Gissel* remedy is inappropriate where a respondent does not violate the Act in every way known to man. Moreover, in this case, the ALJ failed to consider the effect of Respondent's unfair labor practices on the types of Section 7 activities allowed by Respondent. Simply stated, Respondent could afford not to ban its employees from engaging in certain protected activities where its surveillance, threats, and discharges had the desired effect of quashing any desire to engage in such activity.

As a result of Respondent's unfair labor practices, the Union has likely lost the support of Respondent's employees forever. The ALJ erred in failing to order a *Gissel* remedy under these circumstances, and the Board should enter an order requiring Respondent to recognize and bargain with the Union. See *Sahara Datsun, Inc., v. NLRB*, 811 F.2d 1317, 1321-1322 (9th Cir. 1987).

V. CONCLUSION

Based on the foregoing, Counsel for the General Counsel respectfully requests that the Board reverse the ALJ's erroneous rulings as set forth above, and find that Respondent committed additional violations of Section 8(a)(1) and (3) as delineated herein. Moreover, the Board should find that Respondent's unfair labor practices are so severe that the Board's traditional remedies will not erase their coercive effects, rendering a fair representational election impossible and warranting a bargaining order.

Dated at Phoenix, Arizona, this 30th day of November 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in MILUM TEXTILE SERVICES CO., Cases 28-CA-20898 et al., was served via postpaid regular mail, on this 30th day of November 2007, on the following:

The original and seven copies on:

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