

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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**In the Matter of:**

**MILUM TEXTILE SERVICES COMPANY,**

**Respondent,**

**And**

**UNITE HERE!**

**Charging Party.**

**Case Numbers:**

**28-CA-20898**

**28-CA-20896**

**28-CA-20973**

**28-CA-21050**

**28-CA-21203**

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**BRIEF IN SUPPORT OF  
RESPONDENT'S RESPONSE TO THE EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION  
FILED BY THE GENERAL COUNSEL AND THE UNION**

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**Gregory A. Robinson  
Laurie A. Laws  
Farley, Robinson & Larsen  
6040 North 7<sup>th</sup> Street  
Suite 300  
Phoenix, Arizona 85012  
602-265-6666**

**Attorneys for Respondent  
Milum Textile Services Company**

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This brief is filed in response to the Exceptions Briefs filed by the General Counsel and by counsel for UNITE HERE! [hereinafter referred to as the “Union”]. The Union states in its brief that it relies primarily on, and incorporates by reference, the General Counsel’s Exceptions Brief. In addition, the Union’s Exceptions Brief provides additional argument with respect to the legality of the lawsuit filed by Milum in federal court and whether a *Gissel*<sup>1</sup> bargaining order should be granted in this case. Specific references to the Union’s arguments will be made with respect to the arguments advanced by the Union that differ from or expand those advanced by the General Counsel.

**I. Analysis of the Introduction, Background and Factual Information Set forth in the General Counsel’s and the Union’s Exceptions Briefs**

While Counsel for the Union is selective in the facts that it sets forth in its Introduction and Statement of Facts<sup>2</sup> for purposes of argument, the Introduction and Background sections of the General Counsel’s Exceptions Brief is rife with misstatements.<sup>3</sup> The more flagrant misstatements are analyzed as follows:

Misstatement One: The General Counsel states, “Tired of being mistreated at work, the employees at Milum Textile Services Company (Respondent) decided to unionize.”<sup>4</sup> Notably there is not a reference to the transcript because there is no evidence in the record that the employees were “mistreated”: absolutely no unfair labor practice charges were filed or alleged to have occurred prior to 3 March 2006.

Misstatement Two: The General Counsel states, “Rather than accepting the will of the majority of his employees, Milum initiated a campaign of unfair labor practices to steamroll his

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<sup>1</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969).

<sup>2</sup> Union’s Exceptions Brief at 1-14. The inclusion of additional evidence is objected to in section I. 2, *infra*.

<sup>3</sup> General Counsel’s Exceptions Brief at 1-17

<sup>4</sup> General Counsel’s Exceptions Brief at 1

employees' selection of the Union.”<sup>5</sup> The record clearly shows that there was not a “campaign” of unfair labor practices. In fact, the Union’s campaign spanned a time period of more than one and one-half years and the alleged unfair labor practices were few and far between:

4 March 2006: Work stoppage<sup>6</sup>

Four (4) month period of time when nothing occurred

27 June 2006: Zulema Ruiz is asked to remove a metal union pin while working

4 July 2006: Evangelina Guzman asked to remove a metal union pin

8 July 2006: Discharge of Denise Knox and Soe Min for Time Theft

Three and one-half (3½) month period of time when nothing occurred<sup>7</sup>

19 October 2006: Disciplinary Warning issued to Maria Minjares

Two (2) month period of time when nothing occurred

19 December 2006 Milum filed the RM Petition and created Video

25 December 2006 Disciplinary Notice issued to Guzman for leaving work early

One and one-half (1½) month period of time when nothing occurred

5 March 2007 Hearing began

What the record does reflect is the fact that Craig Milum believes that the employees have an “unfettered right” to organize except while they are supposed to be working, and he let them do so. [Tr. 2136]<sup>8</sup> The fact that Craig Milum is honest and admits that he personally prefers no union at his company, does not mean that he is willing to deny the employees the right to

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<sup>5</sup> General Counsel’s Exceptions Brief at 2

<sup>6</sup> There was a variety of conflicting, and not credible testimony regarding miscellaneous allegations of rather odd behavior attributed to Craig Milum – the nature of which could have been taken from a union organizer’s wish list for employer tactics.

<sup>7</sup> This would have been a two month break if the disciplinary notice that Guzman received in September 2006 had been included in the Complaint.

<sup>8</sup> References to the Transcript are designated “Tr.” with the page number; references to the General Counsel’s Exhibits are designated “GC” with the page number; references to the Respondent’s Exhibits are designated “R” with the page number.

organize. [Tr. 2136–2137]

Craig Milum went to great lengths to insure that the employees' rights were not infringed upon., and as he testified, when he became aware of the fact that the Union was organizing other commercial laundry operations in Phoenix, he started to prepare himself and the supervisors so that they would not violate the rights of the employees and commit unfair labor practices. Commencing in 2002, Craig Milum contacted the manager of Mission Linen which had been targeted by the same union to obtain more information. [Tr. 2040–2041] In 2002, Craig Milum also contacted a local labor attorney, Larry Katz, and requested his assistance in “insuring that we were prepared in the event of a union campaign with our employees.” [Tr. 2041–2042] Katz toured the plant and discussed the operation. [Tr. 2041] A few weeks later, Katz conducted a seminar for Craig Milum and the four (4) members of Milum's production management and service management. [Tr. 2041-2042] Katz prepared and presented a Power Point presentation at this seminar. [R 55] Katz stepped through the power point presentation and they discussed the points that Katz felt would be helpful in preparing for a unionization effort. [Tr. 2042] In August 2005 Craig Milum again discussed what to do and what not to do with respect to unions with supervisors Angela Kayonnie and Jaime Chavez.<sup>9</sup> [Tr. 2057] In February 2006, Craig Milum made more calls to people in the textile service industry who had experience in dealing with the Union's organizational campaigns, obtained written materials that referenced the Union<sup>10</sup> and researched on the Internet. [Tr. 2043-2044] One of the books that Craig Milum discovered was entitled, “Solidarity for Sale,” by Robert Fitch.<sup>11</sup> [Chapter 9 of that book is R 65]

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<sup>9</sup> Craig Milum testified that the Union's campaign to his knowledge started in June 2005 when union organizer Martha Chacon first applied for work at Milum. [Tr. 2061-2062] and when he was told by employee Maria Salas that if he did not fire supervisor Angela Kayonnie that something “really big” was going to happen. [Tr. 2061–2062]

<sup>10</sup> One of the booklets that contained references to UNITE HERE! was entitled, Trends in Union Corporate Campaigns, and was published by the U.S. Chamber of Commerce. [R 66-rejected]

<sup>11</sup> This is the book that contains the material regarding Edgar Romney's [UNITE HERE! official] affiliation to organized crime, an affiliation that Craig Milum referenced in his testimony. [Tr. 2047-2049]

During 2005 Craig Milum decided on a “strategy” of sorts with respect to dealing with the Union: he decided to adhere to his perception of the NLRB’s model for appropriate employer behavior during a campaign and to let the Union have an uninhibited campaign through the point of securing an election, and then engaging in a campaign when an NLRB election was actually scheduled.<sup>12</sup> [Tr. 2057] The record clearly shows that Craig Milum’s actions with respect to the campaign involving the employees at Milum were consistent with that “strategy” from June 2005 through 19 December 2006<sup>13</sup> – a period of eighteen (18) months:

1. It is undisputed that although Craig Milum was approached by companies who specialize in creating and executing anti-union campaigns, he has not engaged their services at any time since the Union arrived at Milum. [Tr. 2064]

2. The General Counsel stipulated to the fact that when the large 9 X 4 foot “Unite” banner was put on the wall in the lunch area in March 2006 that Milum left it there, and that it remained there through the date of this hearing. [R 2]

3. The General Counsel stipulated to the fact that when the microwave oven covered with Unite stickers was placed in the lunch area in March 2006 that Milum left it there, and that it remained there through the date of this hearing. [R 4]

4. From June 2005 through December 2006 when Milum filed the RM Petition, Milum did not distribute any written material to the employees about the Union. [Tr. 2065]

5. Aside from the 4 March 2006 work stoppage, from June 2005 through December 2006 Craig Milum did not speak to the employees about the Union.<sup>14</sup> [Tr. 2065]

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<sup>12</sup> Such a strategy is not unheard of. In the case of *Delco-Remy Div., General Motors Corp. v. NLRB*, 596 F.2d 1295 (5<sup>th</sup> Cir. 1979), the Court pointed out that the company went to extraordinary pains to educate its supervisors against inadvertent infractions of the National Labor Relations Act, and played a very passive part in the Union organizing campaign.

<sup>13</sup> The RM Petition was filed with the NLRB on 19 December 2006.

<sup>14</sup> The 4 March 2006 work stoppage was not a discussion initiated by Craig Milum and his only comments about the Union during that meeting were in direct response to a direct question from an employee.

6. From June 2005 through December 2006 Craig Milum did not conduct any meetings with the employees to discuss the Union. [Tr. 2065]

The bottom line is that Milum specifically did not engage in an anti-union campaign involving the employees. This is clearly not the record of a company initiating a campaign of unfair labor practices or an “extensive campaign of unfair labor practices” as alleged by the General Counsel.<sup>15</sup> Nor is it a record of a company attempting to “steamroll” the employees’ selection of the Union. It cannot be overemphasized that it was Milum – not the Union – that filed a Petition for an election.<sup>16</sup>

Misstatement Three: The General Counsel alleges:

“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 24) Respondent’s workers ultimately delivered the Petition to Milum during a work stoppage on March 4. (ALJD slip op. at 3)<sup>17</sup>

The reality is that the Union conducted its organizing blitz starting 24 February 2006. [Tr. 887, 906-907] Then on the 4<sup>th</sup> of March 2006, the employees engaged in a work stoppage and presented the petition that was signed during the blitz to Milum. [Tr. 906] On the 3<sup>rd</sup> of March 2006 the Union mailed a letter to Milum requesting a card check neutrality agreement – it did not “ask” to “discuss participating” in a process by which Milum’s employees could decide whether or not they wanted union representation in a fair and timely manner. [GC 33] That letter was not received by Milum until after the work stoppage had occurred,<sup>18</sup> and one would have to be

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<sup>15</sup> General Counsel’s Exceptions Brief at 2

<sup>16</sup> The RM Petition was filed with the NLRB on 19 December 2006.

<sup>17</sup> General Counsel’s Exceptions Brief at 7

<sup>18</sup> The letter was sent from New York via the U.S. mail on 3 March 2006. It is only reasonable to believe that the letter was not received the next day in Arizona prior to the work stoppage.

patently naïve to believe that it constituted anything other than a demand for a card check neutrality agreement. Thus, as stated by the General Counsel, the employees did not “ultimately deliver” the petition to Milum – they delivered it to Milum at the outset and without notice of or reference to the letter from the New York office of the Union.

Misstatement Four: The General Counsel alleges that the ALJ found that “as of March 4 a majority of the Respondent’s production employees – at least 43 out of 70 – had signed the Petition authorizing the Union to represent them.”<sup>19</sup> As set forth in the ALJ’s decision, the ALJ did not state that “at least 43” of the employees had signed the petition. The ALJ found that there were the “signatures of 42 individuals” on the petition [ALJD slip op. at 3], and then stated that there “43 of the production employees had authorized the union to represent them.” [ALJD slip op. at 13]

Misstatement Five: When referring to what occurred during the work stoppage on 4 March 2006, the General Counsel states the following:

“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)<sup>20</sup>

What the General Counsel conveniently left out of this summary is the ALJ's phrase in the same paragraph of her decision, was the statement that “Mr. Milum said that he could not tell the employees anything for or against the Union.” [ALJD slip op. at 5]

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<sup>19</sup> General Counsel’s Exceptions Brief at 7

<sup>20</sup> General Counsel’s Exceptions Brief at 7

Misstatement Six: The General Counsel states that “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)”<sup>21</sup> The text of the ALJ's decision actually states, “In response to an employee's description of union persistence in urging a relative to sign an authorization card, Mr. Milum told employees they should report such conduct.” Once again, the General Counsel misstated the facts. Furthermore, the actual testimony of Craig Milum at the hearing supports neither interpretation, and shows that Craig Milum did not urge the employees to report anything to him:

Q [to Craig Milum] She just volunteered that to you?

A It was after somebody had asked me, what is a union, what is this all about with the union, and so there was a discussion on it kind of among the employees after that subject came up and Luz brought that up. Another employee brought up that an organizer had insisted that this person sign a card and that she didn't want to and so there was a conversation back and forth and finally the union organizer said, fine, if you won't sign I will sign it for you. That also came up in that work stoppage. That also came up in that work stoppage.

Q Again, just on its own, you didn't ask any questions that prompted this?

A No, I didn't.

Q And what was your reply to that, if any?

A I said, that shouldn't happen. Absolutely, that shouldn't happen. [Tr. 76]

And, Craig Milum further testified as follows:

“Q How about employees; did you urge any of your employees to come forward and tell you if they were being harassed or pressured into signing union cards?

A I think I said in that meeting, that work stoppage, that, regarding the person who said that -- she said that her niece had an incident with an organizer where the organizer was asking her to sign a card and she refused and went back and forth and back forth, and, finally, the organizer, she reportedly said, fine, I'll sign it for you. I think that I indicated that is wrong and I might have, I don't really remember, but, if I heard something like that, yeah, I think I probably did tell people that you should report that, that's wrong.” [Tr. 309]

Misstatement Seven: The General Counsel sets forth the Union's other community efforts

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<sup>21</sup> General Counsel's Exceptions Brief at 8.

as follows: “During this same time period, the Union started distributing informational leaflets publicizing its organizing efforts to members of the public. (Tr. 879)”<sup>22</sup> This is a clear misstatement of the facts. First, the evidence clearly shows that the so-called “informational leaflets” did not publicize the unions organizing efforts in the traditional sense. In fact, the leaflets did not even mention the fact that the Union was trying to organize the employees at Milum. [GC 77] Instead, the leaflets were directed at Milum’s customers -- the restaurants that used its linens and the customers of its customers – and were designed to exert pressure on the restaurants to cease doing business with Milum, and to cause the customers of the restaurants not to dine there. [GC 77] As Craig Milum testified regarding the distribution of the leaflets:

A Yeah. My understanding was that she had distributed leaflets that said that we were mixing linens, health care and food and beverage, and that our **linens were not safe to use** and that **she was confronting the diners of the customers, of our customers, and attempting to persuade those customers that we were not a good company to be providing linens and that they're -- they might be in physical danger simply by having lunch or dinner at the restaurant.** [Emphasis added; Tr. 323]

Craig Milum went on to testify that the leaflets “degraded their restaurant or attempted to degrade the restaurant”. [Tr. 388]

Misstatement Eight: The General Counsel states that “Accordingly, Milum had warned his supervisors to be alert for the Union and to contact him if such activity occurred. (TR 1868)”<sup>23</sup> There is no evidence in the record that Craig Milum warned the supervisors to “be alert for the Union and to contact him if such activity occurred.

Misstatement Nine: The General Counsel states that “At the hearing, Milum admitted that, in one of these meetings, Kayonnie told him that some of Respondent's Burmese employees

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<sup>22</sup> General Counsel’s Exceptions Brief at 10; the reference to the informational leaflets appears at Tr. 878, not 879.

<sup>23</sup> General Counsel’s Exceptions Brief at 11

had joined the Union after speaking with organizers outside the plant. (Tr. 71-72, 92)”<sup>24</sup> This is not what Craig Milum said. His actual testimony was as follows:

“Q BY MR. GIANNOLOUPOS: Let me ask you, if you would go down to the third line where it says, “We have seen employees who speak foreign languages that the organizers do not speak, sign cards put in front of them in the early stages of the campaign before these employees had any idea of what the issues were about.”

A Right.

Q When have you seen that happen?

A Angela Kayonnie, our production manager, for years she has been in the habit of having lunch with her husband in their personal vehicles during the 30-minute lunch break and parking on 6<sup>th</sup> Avenue and having lunch. So during one lunch Angela told me that she was sitting there having lunch with her husband and that she saw a union organizer confront – I think it was a couple Burmese people, might have been three, and as they were trying to walk into the building the union organizer stepped in front of them and then started conversing or trying to converse in English. The Burmese people appeared to have listened and then the person – the organizer put the cards in the hands of the Burmese employees and gave them a pen and then the Burmese employees apparently sign the cards.

Q And Angela referred this back to you?

A She did.

Q And that is what you were describing here?

A Yes, that is correct.

Q Any other incidents?

A No, sir. [Tr. 71-72]

Misstatement Ten: The General Counsel states that “Milum wrote various opinion pieces” and “some of these pieces were published.”<sup>25</sup> In reality the evidence shows that there was a single “opinion piece” published, GC 37, which was a letter to the editor.<sup>26</sup> The General Counsel goes on to state, “In these articles, Milum compared the Union's organizing drive to an 'organized crime shakedown.....’ First, there is no reference to “an organized crime shakedown in

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<sup>24</sup> General Counsel’s Exceptions Brief at 11

<sup>25</sup> General Counsel’s Exceptions Brief at 12

<sup>26</sup> Craig Milum testified that this was only a part of the whole editorial that he had written about the corporate campaign: “It wasn't about going to employees and asking them to sign cards and then asking for an election. It wasn't about that, not at all. It was about the corporate campaign, the pressuring us to make that decision, in effect, for the employees...That was the whole subject of that editorial and that's the context in which that sentence was made. [Tr. 392-393]

the letter to the Editor. [GC 37] To the contrary, the letter involves statements regarding Milum's desire for a "federally supervised, secret ballot election" rather than being forced to agree to a card check neutrality agreement. [GC 37] Second, there was one article in which these words or similar were used that was published in the Arizona Republic newspaper article dated 21 February 2007. [GC 97] The reference to this language relates to the Union's corporate campaign – not the employee campaign. The article reads as follows: "the union is trying to get Milum's best customers to drop their cleaning contracts with him and use union-friendly commercial laundry services. 'This whole thing is like an organized-crime shakedown,' Milum said." [GC 97] Milum's testimony during the hearing further clarifies this point:

Q And you were pleased that this article was published?

A I thought it was a reasonably accurate article that publicized what was happening.

Q And, if you go to the eighth paragraph down, it say, "This whole thing is like an organized crime shakedown, Milum said." Do you agree with that?

A Yes.

Q What whole thing are you talking about; the union's organizing drive, correct?

A The **corporate campaign** for the -- not the part that is with the employees, but the part is, you know, the organized employer part. The pressure -- pressuring us to by-pass the election, to retract the right of the employees to make the decision.

Q It says here the whole thing.

A That's the -- you asked me what I was referring to and I said the whole thing and that's the whole thing that I'm talking about.

Q I see. Let me have you turn to the last -- to the back page. It's a two page document.

A If you'd like, I could elaborate a little bit on that, the context in which that sentence came from.

Q Sure. The whole thing?

A Yeah. That was part of a editorial that I had written and submitted to The Arizona Republic and so that was, that whole editorial, was about the **corporate campaign**. It wasn't about going to employees and asking them to sign cards and then asking for an election. It wasn't about that, not at all. It was about the **corporate campaign**, the pressuring us to make that decision, in effect, for the employees.

Q Isn't it --

A That was the whole subject of that editorial and that's the context in

which that sentence was made.

Q During this **corporate campaign**, however, haven't some of your employees been involved in handbilling? At least, one that you know of?

A At least, one that I know of.

Q Brandy Ybarra?

A That's correct.

Q Would you consider your employees being involved in handbilling your customers part of the whole thing, part of the organized crime shakedown?

A I don't know. I'd have to think about that. I certainly wasn't thinking about that at the time I wrote it, but, you know, sitting here right now, I'd have to think about that, whether -- how exactly I think that relates to that sentence.

Q Let me have you turn to the second page. The top sentence says Brian Kalatchy, UNITE HERE organizer based in Phoenix, said the union would keep its efforts "as long as it takes." And it says Milum said, "The union intends to keep at it until I go out of business or give up and I'm not giving up." What did you mean by that?

A I told the reporter -- I don't think I said that. I think I said the union intends to just keep at it until we go out of business and give up and we're not giving up. And you want to know what I meant when I said that?

Q Yes, please.

A That we're not going to agree that employees will not get an opportunity to make their vote. We're not going to make the decisions -- that decision for the employees. That decision is going to be made by the employees. We're not giving up on that. [Emphasis added; Tr. 392-394]

Misstatement Eleven: The General Counsel further states, "In another article, Milum falsely asserted that the Union would not accept a card-check agreement conducted by Respondent."<sup>27</sup> First, this statement is set forth in the letter to the editor in the Arizona Republic dated 2 March 2007 that was discussed above – not "another article". Once again, it would be patently naïve to believe that the Union would accept the results of an employer conducted card check, and such a card check would fly in the face of the NLRA. The actual testimony regarding this concept is as follows:

Q BY MR. GIANNOPOULOS: Let me have you look at this. This is from the Arizona Republic dated Friday, March 2<sup>nd</sup>, 2007, page B, 6. Do you recognize that as the editorial that you wrote? (General Counsel's Exhibit 37 is marked.)

A A letter to the Editor.

Q A letter to the Editor. Correct.

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<sup>27</sup> General Counsel's Exceptions Brief at 12

A Right.

Q Now, in the letter to the Editor, the top -- the last paragraph -- the top sentence, last paragraph says: The union wouldn't accept an Employer conducted card check.

Is that what it says right there?

A I remember writing that. Yeah, it says that.

Q You just testified that you didn't want a card check.

A I met a union conducted card check and I wasn't suggesting that we have an Employer conducted card check. I was making the point that the union wouldn't want an Employer conducted card check.

Q Well, did you ever offer the union to have an Employer conducted card check?

A No.

Q So, the sentence: The union wouldn't accept an Employer conducted card check --

A Correct.

Q What does that mean?

A It would mean a card check that was conducted by the Employer.

Q And you're saying here the union wouldn't accept that.

A That's my belief.

Q But you never offered them that, did you?

A I didn't.

Q So, how could you say that in a letter to the Editor? If you never offered the union the chance to have an Employer card check, how could you write that in a letter?

A Well, I didn't offer them the chance to jump off a cliff, either and I didn't ask them about that before I said they wouldn't want to.

Q But you didn't write that in the letter, did you?

A I only had 200 words. [Tr. 97-98]

Misstatement Twelve: The General Counsel also misstates the facts regarding the wearing of the metal union buttons. The General Counsel alleged that Ruiz removed the button, and never wore one again. (Tr. 419)<sup>28</sup> If one examines the testimony on page 214, there is no testimony to the effect that Ruiz removed her button or never wore one again.

Misstatement Thirteen: The General Counsel also misstates and mischaracterizes Soe Min's union activity. The General Counsel stated, "The ALJ also found that Soe Min was also an open **and active** Union supporter, wearing Union t-shirts to work almost daily, Id." [Emphasis

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<sup>28</sup> General Counsel's Exceptions Brief 14

added]<sup>29</sup> The ALJ, however, makes no mention of Soe Min being an “active” union supporter. The ALJ merely states, “Mr. Min, a Burmese-speaking employee, also openly supported the Union, wearing tee shirts enscribed “UNITE-HERE” to work almost daily.” [ALJD slip op. at 9]

Misstatement Fourteen: The General Counsel misstates the ALJ’s decisions. The General Counsel states, “In so finding, she relied upon evidence showing that...; 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)[Emphasis added]<sup>30</sup> In the decision, however, the ALJ does not find that other employees engaged in far more severe forms of work evasion simply received a written warning. The actual statements made by the ALJ are as follows:

Ms. Knox replied that everyone, including Ms. Zambrano, went to the lunchroom after clocking in.” [ALJD slip op. at 10]

In January, Ms. Kayonnie issued a written warning to an employee who, among other work violations, left his work station to visit the restroom every 15 minutes after reporting to work. Two months prior to the discharges, an employee who twice left work for smoking breaks was issued a written warning. [ALJD slip op. at 10]

Misstatement Fifteen: The General Counsel misstated the testimony regarding the testimony of Milum’s Information Technology Director, Jason Myer, regarding the replacement of the old security camera system. The General Counsel states that “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.”<sup>31</sup> First, the ALJ did not make such a finding. Further, the IT Director did not testify that “Milum saw no need” to replace the security camera

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<sup>29</sup> General Counsel’s Exceptions Brief at 15

<sup>30</sup> General Counsel’s Exceptions Brief at 16

<sup>31</sup> General Counsel’s Exceptions Brief at 16

system in January 2006.<sup>32</sup> The testimony of Jason Myer regarding the replacement security cameras is as follows:

“A Yeah. I asked if I could let it run for a few weeks. It was running great. I asked him. I said this camera's working. Would you like me to install some more? And **he determined it's just not the right time.**

Q Did you initiate that conversation or did Craig Milum?

A I did.

Q And do you recall when that was?

A That was January, 2006.

Q Did you have any conversations after that date with Craig Milum regarding the cameras?

A In November of 2006.

Q And did you initiate that conversation?

A Yes.

Q And what did you tell him?

A I was back in Phoenix. You know, having already moved to Dallas in March, 2006. So November, 2006 I was back in Phoenix for a week doing some coding and some different things and I went to check on the camera to see if it was still working and it wasn't. So I went to it physically and it was unplugged. So I plugged it back in. It was working. I got excited that it worked for a year outside and I -- should I keep going??

Q Uh huh.

A So I got excited that it had been working for a year. So I went to Craig. Almost a year. Ten months. And went to Craig and said this outdoor camera's great. It's been working for ten months. And there was still the possibility of buying a bunch of them for a low amount of money. They were still \$299.00. They were still -- they hadn't sold at that price. They were still at a very low price. And I asked about, again, about setting up -- you know, installing cameras at that location.

Q And what did Craig respond?

A He was happy that the camera was working. **He said that volume was up, business was good, and that it might be good time to do it.**

Q And that conversation was in what month of what year?

A November, 2006.

Q And what did Craig say?

A He gave me the go-ahead to go ahead and start researching what cameras, indoor and outdoor, that we would buy, how much it would cost, the cabling, the switches. There's a lot involved with setting it up.” [Tr. 1413]

Thus, Craig Milum never stated that he “saw no need”. To the contrary, Craig Milum informed Myers that January “was not the right time”. Later when the camera had proven to be effective

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<sup>32</sup> The General Counsel does not include a year in this section, but we can conclude that he is referring to January 2006 based upon Jason Myer’s testimony as set forth in this section.

and durable, and the price of the replacement security camera system dropped dramatically and “business was good”, Craig authorized the purchase of the replacement cameras.

Misstatement Seventeen: The General Counsel misstates the ALJ’s decision. The General Counsel writes the following:

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.<sup>33</sup>

First, in her decision, the ALJ found only that the video statement regarding possible reduced wages violated the Act, and she did not comment any other aspects of the video including the Union’s part in encouraging regulatory agencies to investigate Respondent’s activities. Second, the actual text of the audio portion of the video concerning the latter topic stated as follows: “Unite Here has prompted a request to various Government Agencies to investigate many of the Company’s activities.” [Tr. 104]

**II. Milum’s Response to the Arguments Set Forth in the General Counsel’s and the Union’s Exceptions Briefs.**

**A. The ALJ Did Not Err 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. Milum Neither Solicited Employee Grievances Nor Promised Increased Benefits**

The General Counsel alleges that the ALJ erred when she found that Milum neither solicited employee grievances nor promised increased benefits during the course of the work stoppage that occurred on 4 March 2006. The General Counsel’s argument is based upon that the single fact that Milum asked the employees during the work stoppage why they wanted a union

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<sup>33</sup> General Counsel’s Exceptions Brief at 17

constituted the solicitation of employee grievances.<sup>34</sup> As the ALJ found, the statements were made during the course of an open discussion at the time of the work stoppage,<sup>35</sup> the work stoppage was initiated by and involved open and active union supporters, and that Milum did not make any express promises to the employees. Further, the ALJ found that the employee responded to Milum's inquiry by proposing that he get rid of an unpopular supervisor, and Milum refused to do so. Thus, Milum neither solicited employee grievances nor promised increased benefits.

The General Counsel takes exception to the ALJ's reliance on *George L. Mee Memorial Hosp.*, 348 NLRB No.15 (2006). First, *George L. Mee* dealt with a situation where the employer initiated the meeting, and based upon the ALJ's decision, the Board assumed that the CEO of the company asked the employees to open up and talk to him about problems that might be solved. Second, the Board found that the Respondent successfully rebutted any inference that it was promising to remedy grievances because the CEO did not make any express promises at the meeting, but rather stated that he could not make any promises. The Board, however, did not hold that to avoid a violation the employer must specifically state that he could not make any promises. In this case the ALJ found that Milum specifically refused to get rid of an unpopular supervisor, and that is evidence that Milum did not promise a remedy of the employees'

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<sup>34</sup> The General Counsel argues at the end of this section that Milum agreed to the employees' name tag suggestion and obtained such name tags. It is illogical that any employee would consider a company name tag to be worn on their uniform to constitute a "benefit". Minjares testified that not all of the employees even wanted a name tag: "A lot of people said, yes. I [sic] lot of people said, no." [Tr. 497] And, the use of the company name tags was short-lived: Evangelina Guzman testified that she used it for a short time and lost it [Tr. 604-605]; Zulema Ruiz testified that she did not even want a name tag and only wore it four (4) days before she lost it. [Tr. 424, 440-441]; and Lydia Roberts also testified that she did not wear the company name tag "because I thought it was better not to wear anything because it can get stuck in a machine or something." [Tr. 1225] Most importantly, however, is the fact that even before Milum distributed the company name tags, Daisy Pitkin testified that she distributed paper name tags with the union insignia on the Tuesday after the work stoppage on 4 March 2006. [Tr. 880-881] Thus, any value that the company name tag might have had dramatically decreased when the Union distributed its paper name tags. Further, if the company name tag does not constitute a benefit, then the distribution of the company name tags could not violate the Act.

<sup>35</sup> Teresa Velasquez indicated that there was an open discussion between the employees themselves at this meeting. [Tr. 1089]

grievance.

The General Counsel erroneously relies on cases that involve distinct factual situations different from those in this case – cases in which the employer acted affirmatively to solicit employee grievances. In *Center Service System Division*, 345 NLRB No. 45 (2005), for the proposition that an employer with no prior practice of soliciting employee complaints violates §8(a)(1) by instituting such a practice during a union organizing campaign. *Center Service* dealt with a situation where shortly after the union organizing campaign began an employee was advised that he had to pick up his paycheck from the president of the company which he had never been required to do in the past. When the employee complied with the request, the president spoke about the history of the union’s prior organizing efforts, and told the employee that the company had gotten rid of the union. During the course of this forty-five (45) minute meeting, the president asked the employee if he had any questions or concerns about his job. The employee indicated that he was not receiving health insurance, and the president responded that sometimes things fall through the crack. The president also informed the employee that if he had any problems he was to discuss them with the president. Prior to the union organizing campaign, if an employee had a grievance, he was required to first approach the employee’s immediate supervisor with the grievance – not the president. Thus, the entire situation involved a dramatic departure from past practice. In this case, Milum the employees initiated the meeting, the meeting was open and involved open and active union supporters, and Milum neither solicited any grievances nor promised increased benefits.

In *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155 (2004), the Board dealt with a situation where the employer initiated and conducted an unprecedented mandatory meeting with the employees immediately after an organizational campaign started at the school. At this

meeting the supervisor informed the employees that if they had any workplace concerns that they could take them to the school board, and the supervisor informed the employees that she was open to discussing any questions or concerns that the employees had. Prior to this time, the employees testified that their concerns could not be taken to the board, and that their employer had never solicited their concerns about their employment.

The case of *Burger King*, 258 NLRB 1293 (1981), involved a situation where from the day the union requested recognition and through the entire pre-election campaign the employer regularly asked the employees to submit any problems that they had to the employer, and informed the employees that they “really didn’t need a union to speak for [them]”, that they “would not need a middleman to help them”, and that “management would take care of all such problems.” [*Id.* at 1297] The ALJ found that the grievances were not only “assiduously solicited” by the employer, but such conduct was unprecedented. [*Id.* at 1297] In light of those facts, the ALJ held that the nature and circumstances surrounding these inquiries implied that a resolution would be forthcoming, and the employer violated the act by soliciting grievances.

The case of *Dentech Corp.*, 294 NLRB 924 (1989), similarly involved a situation where the president of the company acted affirmatively to conduct group meetings with the employees. During these company initiated meetings, the president informed the employees that he was disappointed with them because they had not come to him with their problems, that the employees could come to him with their problems instead of going to a union, and that the employees could do better without the union and probably have higher wages later on. [*Id.* at 936] The president not only distributed an employee handbook at one of these meetings, but granted wage increases and initiated monthly meetings with the employees. [*Id.* at 936]

In order for an employer to violate the Act through the solicitation of grievances, the

solicitation must be accompanied by implied promises of benefits specifically aimed at deterring union activity. *Multi-Ad Servs. v. NLRB*, 255 F.3d 363 (7<sup>th</sup> Cir. 2001)

The case of *Multi-Ad Servs. v. NLRB*, *supra*, dealt with a situation where there was a true solicitation and a grant of an actual benefit. In *Multi-Ad Servs.* one of the company's managers asked one of the employees why he wanted to form a union. When the employee expressed interest in a different job position, the company arranged for an immediate interview for that position, even though there was not such an opening. The Court ruled because the manager arranged for the job interview during a conversation about the need for a union, it was reasonable for the Board to conclude that the manager's statements constituted an implied promise of benefits to dissuade or deter the employee from contacting the union.

The General Counsel and the Union argue that Milum's statements should be given more weight because Milum issued a name tag after the 4 March 2006 work stoppage. In comparison to the factual situations set forth in the cases analyzed in this section, the company issued name tag clearly is not the type of "benefit" envisioned by the Act. ALJ Gontram was surprised by the General Counsel's concept of the nametag as a significant employee benefit, and asked, "How is that -- in other words, having a nametag is a benefit?" [Tr. 423] Further, the record shows that the employees at Milum were not even sure that they wanted a name tag<sup>36</sup>: as Maria Minjares testified, "A lot of people said, yes. I lot of people said, no." [Tr. 497] And, once issued, their usage was extremely short-lived: some of the employees never wore the company name tags, some employees wore them for a day or two, and a small percentage wore them for three (3) or four (4) days [Tr. 2074, 2078, 2236]; fewer than five (5) employees were wearing the nametags within a week from their distribution. [Tr. 2074]

Based upon the foregoing, the company did not solicit complaints or grievances, did not

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<sup>36</sup> Zulema Ruiz testified that she did not even want a name tag. [Tr. 424]

promise a “benefit”, and did not distribute a benefit to the employees.

## 2. Milum Did Not Ask Employees to Report on Union Activities

The General Counsel alleges that the ALJ erred in not finding that during the work stoppage on 4 March 2006, Craig Milum unlawfully asked employees to report on union activities to him. The ALJ found that neither the Complaint nor the evidence presented by the General Counsel put Milum on notice that these statements were at issue. The complaint was in fact amended during the hearing to include an allegation that Milum asked its employees to disclose their union membership and activities. The General Counsel, however, did not present any evidence to support this allegation. The General Counsel argues that the evidence to support this allegation is set forth in Craig Milum’s testimony. The General Counsel, however, misstates the testimony in order to substantiate this claim. The General Counsel states that Milum “admitted telling employees **to come forward and report to him** if they have been harassed or pressured into signing union cards.” [Emphasis added; GC Ex 21] This is simply not true. The uncontradicted testimony shows that what Milum said was that if a union organizer signed a card for an employee when the employee refused to do so, that behavior should be reported:

Q [to Craig Milum] How about employees; did you urge any of your employees to come forward and tell you if they were being harassed or pressured into signing union cards?

A I think I said in that meeting, that work stoppage, that, regarding the person who said that -- she said that her niece had an incident with an organizer where the organizer was asking her to sign a card and she refused and went back and forth and back forth, and, finally, the organizer, she reportedly said, fine, I'll sign it for you. I think that I indicated that is wrong and I might have, I don't really remember, but, if I heard something like that, yeah, I think I probably did tell people that you should report that, that's wrong. [Tr. 309]

Thus, Craig Milum merely stated that such behavior was wrong and should be reported just as one might say that if one witnesses or is involved in a crime, that one should report it – to the

appropriate authorities. It is important to note that this statement was made in response to a statement made by one of the employees during the course of the open discussion during the work stoppage. [Tr. 309] There is no evidence that Craig Milum asked the employees to report to any incidences directly to him or to disclose their union membership and activities to him.

The General Counsel cites *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1293 (1981), in support of his argument. *Chartwells*, however, dealt with a different set of facts from those in the instant case. In *Chartwells*, the a Director of the employer wrote a letter to the employees in response to the union's organizing campaign stating, "As I stressed at the [February 8] meeting I held, those of you who choose not to be involved in this activity have every right to do so without ANY FEAR for your job. If you feel pressured or coerced in any way, please report it to me immediately." *Chartwells* at 1156. There is no question in the letter that the employees are directed to make any reports directly and immediately to the Director.

The General Counsel also cites *Winkle Bus. Co., Inc.*, 347 NLRB No. 108 slip op. at 1-2 (2006) to support his position. The decision in *Winkle*, however, does not support the General Counsel's position. *Winkle* dealt with a situation where the employer sent a letter in which it stated, "If you are being threatened or coerced by employees or the Union, please contact the National Labor Relations Board's Hartford office at [telephone number] immediately or tell me." This type of behavior is distinctly different from the statement made by Milum in response to a statement made by an employee during the work stoppage.

For the sake of argument, the only other evidence in the record that could even possibly be related to this allegation was the testimony of employee Evangelina Guzman that Craig Milum asked the employees in favor of the Union to so indicate by a show of hands or by moving to one side. As the ALJ found, no other witnesses testified regarding this alleged

incident which would reasonably have been expected to excite recall, and the ALJ gave the testimony no weight. [ALJD slip op. at 5, footnote 11]

Therefore, the ALJ did not err in finding that Milum did not unlawfully ask employees to report on their union activities, and the ALJ's dismissal of this allegation should be upheld.

**3. Milum Did Not Threaten that the Employees' Organizing Efforts Were Futile.**

The ALJ found that the Complaint alleges that in **mid-March 2006** Craig Milum informed employees that it would be futile for them to select the union as their collective bargaining representative, but that no evidence was presented by the General Counsel in support of this allegation. As the ALJ stated, although the Complaint sets forth the allegation, it places its occurrence in **mid-March** and clearly contemplates statements separate from those made on 4 March 2006 during the work stoppage. [ALJD slip op. 15] Therefore, the ALJ dismissed the allegation.<sup>37</sup> [ALJD slip op. 15] If one looks at the Third Consolidated Complaint, which on page 4, there is a clear delineation between the events that were alleged to have occurred on 4 March 2006, and those events that were alleged to have occurred in mid-March:

5. (a) On or about March 4, 2006, the Respondent, by Craig Milum, herein called Milum, at Respondent's facility:

(1) interrogated its employees about their Union membership, activities, and sympathies;

(2) by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if the employees refrained from selecting the Union as their bargaining representative.

(b) 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 from them to select the Union as their collective-bargaining representatives....

The General Counsel misstates the facts. Contrary to the General Counsel, in its brief,

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<sup>37</sup> The ALJ indicated in her decision that because of her dismissal she did not address the 10(b) argument that Milum made in its brief. [ALJD slip op. 15, footnote 37]

Milum did in fact struggle to find any evidence that correlated with the allegation in **mid-March**. In its brief Milum clearly states that “[t]here is not an unfair labor practice charge in the record that alleges that Milum informed its employees that it was futile to select the union as their bargaining representative at the work stoppage on 4 March 2006.” [Respondent’s Brief to ALJ at 78] Milum further stated in its brief:

The General Counsel alleges that Craig Milum told the employees that it was futile to select the Union as a bargaining representative. The only testimony in the record, however, is the alleged statement “it would be a long process”. As Evangelina Guzman stated:

[H]e, also, asked us if we knew what the union was about. The majority of us said, yes, because we had been -- it had been explained to us. It had been explained to us prior to our signing the document and he told us that in order to belong to the union or for the union to come in, it would be a long process, that there were times where you had to go to – to hold an **election**.... [Tr. 572–573]<sup>38</sup> [Respondent’s Brief to ALJ at 78]

It would have been imprudent for Milum to ignore the General Counsel’s anticipated argument in its brief. Thus, in its brief to the ALJ Milum addressed the evidence that it could locate in the record that in any way related to the allegation even if the time period alleged did not coincide with the testimony.<sup>39</sup> That does not, however, change the fact that the General Counsel failed to prove up its allegation.

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<sup>38</sup> Zulema Ruiz also testified that Craig Milum said “what would you want a union for and it is a long process.” [Tr. 416–417] Luz Vertila Acosta testified that Craig Milum said it was “a very long process.” [Tr. 557]

<sup>39</sup> The analysis set forth in Milum’s Brief to the ALJ includes the following analysis: “In the event that the Administrative Law Judge finds that a charge was timely filed, then the following analysis applies”...“In *Kinney Drugs v. NLRB*, 74 F.3d 1419 (2<sup>nd</sup> Cir. 1996), the Court reiterated the fact that pursuant to Section 8(c) of the Act an employer has a First Amendment right to communicate his views about unionism or about a specific union as long as the communication does not contain a threat of reprisal or force or a promise of a benefit. The Court went on to state that such communications aid the employees by allowing them to make informed decisions. Further, under section 8(c) of the Act, employers and supervisors may openly express anti-union sentiment without committing an unfair labor practice provided their expressions contain no threat of reprisal or force or promise of a benefit. *Carry Cos. v. NLRB*, 30 F.3d 922 (7<sup>th</sup> Cir. 1994); *Monfort, Inc. v. NLRB*, *supra*. Second, there is no evidence that would support a finding that this statement was coercive or constituted a threat of any kind. As set forth in *Sunnyside Home Care Project, Inc.*, 308 NLRB 346 (1992), the question is whether the statement reasonably tended to interfere with the employees’ section 7 rights. The General Counsel has failed to sustain his burden of proof that the statement constituted an unlawful threat. [Respondent’s Brief to the ALJ at 78-79]

The General Counsel argues that the ALJ's reliance on *Sara Lee d/b/a International Baking Company*, 348 NLRB No. 76 (2006), is misplaced. As set forth in *Sara Lee*, the ALJ found violations of the act with respect to a specific supervisor, *sua sponte*. The Board held that the respondent did not have notice that the conduct was at issue, even though it had in fact called the supervisor as a witness during the hearing. The Board dismissed the allegation citing the following: (1) the precise nature of the other allegations in the complaint including the date that the acts alleged occurred and the description of the substance of the acts, and (2) the fact that the General Counsel amended its complaint during the course of the hearing involving another matter, but made no such motion with respect to the conduct of the supervisor. In this case, the General Counsel framed the complaint utilizing the "mid-March" language. Furthermore, despite numerous amendments to the complaint prior to the hearing and during the course of the hearing, the General Counsel failed to amend this allegation. Thus, it is impossible to find that the matter was fully litigated.

Similarly, the General Counsel argues that the ALJ's reliance on *Dilling Mechanical Contractors, Inc.*, 348 NLRB No. 6 (2006), is misplaced. In *Dilling*, the Board held that the issue of whether the employer violated §8(a)(3) of the Act with respect to its hiring practices in June 1997. In so holding, the Board noted that neither of the complaints specifically alleged a violation of the Act, and the General Counsel did not amend either complaint to include such an allegation "before, during, or after the hearing." [*Id.* at 7] Further, the Board found that the evidence that was presented was relevant to another allegation, and the litigation of the other allegation did not require the introduction of evidence germane to that allegation. [*Id.* at 9] Thus, the respondent employer could reasonably believe that the evidence presented related only to the single allegation, and the employer would have altered the conduct of its case at hearing if it had

known. [*Id.* 8-9] Thus, the Board held that the employer was not on clear notice that an unalleged claim was being litigated.

In this case, the testimony on which the General Counsel relied related to what statements were in fact made at the work stoppage on 4 March 2006. It is well known that during a hearing the rules of evidence regarding relevancy are not strictly adhered to and that testimony is permitted in that does not relate to the specific allegations. At the close of the hearing it appeared that the General Counsel simply had failed to prove up its allegation regarding any occurrences in mid-March. In addition, despite the repeated amendments to the complaint, the General Counsel did not amend the complaint to include an allegation [or correct the existing allegation] that the alleged threat of futility occurred during the work stoppage on 4 March 2006 rather than in mid-March as set forth in the complaint. Thus, the issue was not fully litigated and the ALJ's dismissal should be upheld.

If we assume, *arguendo*, that the ALJ's dismissal of the futility allegation is overturned by the Board, then the cases cited by the General Counsel must be analyzed. First, the General Counsel cites *Federated Logistics and Operations*, 340 NLRB 255 (2003). *Federated Logistics* dealt with a situation where three (3) of the supervisors made statements to the employees privately at two (2) meetings to the effect that if the union was selected the employees wages and benefits would be reduced ["start from zero"], that if there was a strike the operation could be shut down and moved to another facility, and that the employees would lose their 401(k) plan. Thus, the Board held the supervisors' statements reasonably conveyed to the employees that selecting union representation would be futile. In this case, the only uncontroverted statements that can be tied to this futility allegation involve the statement made by Craig Milum that unionization was a "long process." [Tr. 416-417, 557, 572-573]

Similarly in *Daniel Construction Company, Inc.*, 145 NLRB 1397 (1964), the Board held the ALJ's findings that the speeches made by the company's executive vice president and the manager violated the Act where the principal points were the loss of employment if the company was organized, a firm intention to maintain the existing hiring practices regardless of the results of the election, and the intention to litigate the election issues for "a decade."<sup>40</sup> [*Id.* at 1409] Once again these facts are far removed from the statements attributed to Craig Milum in this case.

And finally, the General Counsel relies on *CWI of Maryland*, 321 NLRB 698 (1996). *CWI*, however, dealt with a situation that was quite different from the instant case. In *CWI* the president of the company informed the employees that they had "forced his hand" and that he was moving the operation to a new location in another state which would force the employees to commute to retain their jobs. This announcement occurred a week after the union filed its representation petition, and the company in fact closed the original operation and relocated to another state.

**4. Milum Did Not Interrogate Its Employees During the Work Stoppage on 4 March 2006**

The ALJ found that Milum did not interrogate its employees when Craig Milum asked the employees why they wanted a union during the work stoppage on 4 March 2006. The ALJ noted that this occurred during the work stoppage where the employees presented a union authorization petition to Craig Milum, and the question was "posed without animosity or intimidating comment". [ALJD slip op. at 14]

The General Counsel argues that this question is unlawful and cites the case of *Parts Depot, Inc.*, 332 NLRB 670 (2000). In *Parts Depot*, however, the vice-president of the company

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<sup>40</sup> These statements were made in addition to other unfair labor practices committed by the company during the course of the election campaign.

conducted an unprecedented one-on-one meeting in his office with one of the employees who was not an open and active union supporter. During this meeting, the vice-president asked the employee questions about the union and promised to terminate the manager if it would stop the union effort. The Board ruled that considering the background, the nature of the information sought, the identity of the questioner, and the place and method of this interrogation<sup>41</sup> the interrogation was coercive.

The General Counsel also relies on the case of *Christie Elec. Corp.*, 284 NLRB 740 (1987). In *Christie*, however, the foreman asked an employee who supported the union what he wanted from the union. When the employee responded that the employees might want higher wages, the foreman responded that the company would not go for that, that the president would do anything to keep the union out, and that the president would not sign a contract, among other things. Thus, the facts in *Christie* are markedly different from the instant case and are not applicable to the facts in the instant case.

Further, questioning an employee about union sympathies is not per se unlawful. *Monfort, Inc. v. NLRB*, 29 F.3d 525 (10<sup>th</sup> Cir. 1994). Consequently, in the absence of other circumstances suggesting that the inquiry was coercive, the interrogation would be lawful. *Architectural Glass & Metal Co., Inc. v. National Labor Relations Board*, 107 F.3d 426 (6<sup>th</sup> Cir. 1997). The determination of whether an unlawful interrogation has occurred is whether, under all the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with the employees in the exercise of their rights. *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel Employees Local 11 v. NLRB*, 760 F. 2d 1006 (9<sup>th</sup> Cir. 1985). The facts are examined to determine whether the employees reasonably perceived the employer's actions to be coercive, and therefore the statements reasonably tended to interfere with or coerce employees' exercise of

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<sup>41</sup> The Board ruled that these four (4) factors are considered to determine whether an inquiry is coercive.

their protected rights. *Monfort, Inc. v. NLRB, supra; Multi-Ad Servs. v. NLRB*, 255 F.3d 363 (7<sup>th</sup> Cir. 2001). All of the surrounding circumstances must be considered in determining whether the questioning was coercive. *Multi-Ad Servs. v. NLRB, supra; Monfort, Inc. v. NLRB, supra*. Thus, an employer's questioning of an employee's union views does not necessarily amount to interrogation where the conversation is casual and the employee has openly declared support for the union. *Monfort, Inc. v. NLRB*, 29 F.3d 525 (10<sup>th</sup> Cir. 1994)

In *NLRB v. Champion Labs., Inc.*, 99 F. 3d 223, 227 (7<sup>th</sup> Cir. 1996), a supervisor sought to satisfy his curiosity about the Union's campaign by asking a subordinate how many people from their production line attended a union meeting. The conversation occurred in the supervisor's office no threat of reprisal, explicit or implicit, accompanied the query. The Court held that although this question bordered on the inappropriate, no threat of reprisal, explicit or implicit, accompanied the question so it did not constitute a "coercive interrogation."

The General Counsel misstates the testimony of Craig Milum in footnote 6 on page 26 of his exceptions brief. The General Counsel states:

"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)."

The record, however, indicates that this was not a rhetorical question posed by Craig Milum, but a statement to Craig Milum by an employee. The following exchange occurred between the General Counsel and Craig Milum:

"Q [by General Counsel] How did the subject of employees signing anything come up during that work stoppage?  
A [by Craig Milum] Somebody at the meeting -- or at the work stoppage said, what is this union stuff or something very close to that and that's then when I said, the union is interested in representing our employees in discussions or negotiations about wages and working conditions, in exchange for dues. [Tr. 139-140]

Similar statements were made by Craig Milum and appear at Tr. 139 and 2064. Furthermore, Craig Milum testified about other statements that he made at the 4 March work stoppage:

“A[by Craig Milum] It was after somebody had asked me, what is a union, what is this all about with the union, and so there was a discussion on it kind of among the employees after that subject came up and Luz brought that up. Another employee brought up that an organizer had insisted that this person sign a card and that she didn’t want to and so there was a conversation back and forth and finally the union organizer said, fine, if you won’t sign I will sign it for you. That also came up in that work stoppage. That also came up in that work stoppage.

Q Again, just on its own, you didn’t ask any questions that prompted this?

A No, I didn’t.

Q And what was your reply to that, if any?

A I said, that shouldn’t happen. Absolutely, that shouldn’t happen. [Tr. 76]

Furthermore, the General Counsel then does a turn around on page 21 of his brief and contradicts his own statement (“Other than asking employees ‘what is this union stuff all about..., Milum denied saying anything to employees about the Union”) by again citing the 4 March 2006 work stoppage testimony and arguing: “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)”

There is not a shred of evidence that is negative about Craig Milum in the entire record in this case, and there is nothing in the record that would even suggest that Craig Milum has anything other than an amicable relationship with the employees.<sup>42</sup> Although Craig Milum was

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<sup>42</sup> Even when Craig Milum disciplined the employees or told them things that they did not want to hear, he conducted himself as a professional. There is no record of snide or rude remarks made to any employee that so often permeate unfair labor practice cases. Craig Milum’s professional attitude in his dealings with the employees lends credence to all of his testimony. In one instance the General Counsel challenged Craig Milum’s veracity when his testimony was not a verbatim account of what was in the affidavit that he provided to the NLRB during the investigation on 9 August 2006. It is important to point out that the affidavit was not taken by a court reporter, but was based on notes typed up on a computer by a NLRB attorney. As Craig Milum stated when he was challenged as to why the wording he used to describe something when he was testifying was different from the wording that he was using in his testimony: “I think clarify was my word, it is in that affidavit, but my recollection of the process of the affidavit was it was not word for word and I corrected many, many things that were stated and I got to the point where I did not correct things that seemed to be kind of splitting hairs. Basically the idea, but it wasn’t the word I

the CEO, he worked in the production area directly with the production employees on Saturdays so the employees interacted with him on a regular basis. [Tr. 409] Thus, the ALJ's conclusion that any inquiry made by Milum regarding why the employees wanted a union was not coercive should be upheld.

**B. The ALJ Did Not Err in Refusing to find that Milum's Continued Prosecution of the Federal Lawsuit was a Violation of the Act.**

The General Counsel and the Union erroneously maintain that the ALJ erred in refusing to find that the Lawsuit was objectively baseless. [GC Ex 27] At the outset it must be noted that the General Counsel seems to have forgotten that he had the burden of proving that the lawsuit was objectively baseless. See *BE & K Construction Co.*, 351 NLRB No. 29 slip op. at 1 (2007). As the ALJ decided, the General Counsel failed to meet its burden. [ALJD slip op. at 16]

**1. The ALJ Did Not Err by Failing to Find that Milum Did Not Show Actual Malice.**

The General Counsel argues that the ALJ erred by not requiring that Milum show the existence of actual malice during the NLRB hearing.

The General Counsel cavalierly argues that "the record is clear that Respondent was well aware that the Union's statements were accurate and truthful."<sup>43</sup> The General Counsel does not, however, provide any citation to the record to support this claim. Further, the General Counsel's entire argument misses the point set forth in *BE & K Construction Co.*, 351 NLRB No. 29 slip op. at 1 (2007). In *BE & K* the Board held that "the filing and maintenance of a reasonably based

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would have used." [Tr. 67 – 68] Craig Milum later testified that he made "many, many, corrections..." [Tr. 2072] In another instance the General Counsel challenged Craig Milum's testimony based upon a statement made by Milum's attorneys in a position statement. First, this was rather far-fetched as the position statement involved charges that were dismissed or withdrawn by the union and therefore is not part of this case. Second, the specific verbiage that the General Counsel took exception to involved the statement, "Milum cannot and will not allow the employees to **dictate** the work condition..." [GC 35] As Craig Milum pointed out, the employees cannot be permitted to **dictate** the start and stop time for work, the days they want to work, the hours they work, and whether they show up late or not. [Tr. 1985–1986] Third, the statement was prepared by counsel and was neither Craig Milum's testimony nor a statement made under oath.

<sup>43</sup> General Counsel's Exceptions Brief at 29.

lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit” -- even if the lawsuit had a retaliatory motive. The Board went on to hold that a reasonably based lawsuit does not lose the protection of the First Amendment even if the plaintiff failed to ultimately prevail in the lawsuit. As the Board stated in *BE & K*, the test is as follows: “a lawsuit lacks a reasonable basis, or is ‘objectively baseless,’ if ‘no reasonable litigant could realistically expect success on the merits.’” *BE & K* does not require that a respondent in an NLRB proceeding actually litigate its underlying lawsuit during the course of the NLRB hearing. Thus, the only issue at the NLRB hearing is whether a reasonable litigant could realistically expect success on the merits of the lawsuit that was filed by Milum.

The Union basically argues that to the extent that *BE & K, supra*, holds that a reasonably based but retaliatory lawsuit does not constitute a violation of the law, the case should be overturned.<sup>44</sup> The Union also argues that the litigation is a sham, is baseless, and an abuse of process. On this basis the Union argues that the lawsuit is retaliatory and violates the Act.<sup>45</sup> The bottom line, however, is that the issue is not whether the lawsuit was retaliatory, but whether it was reasonably based.

2. **The ALJ Did Not Err by Failing to Find that Milum Did Not Prove Actual Damages.**

The General Counsel and the Union argue that the ALJ erred by not requiring that Milum show the existence of actual damages during the NLRB hearing. The General Counsel’s entire argument misses the point: there is not a requirement that a Respondent prove actual damages during the course of an NLRB proceeding in order to show that its lawsuit was reasonably based, and a plaintiff in a federal lawsuit is not required to prove actual damages at the pleading stage of

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<sup>44</sup> Union’s Exceptions Brief at 32-33.

<sup>45</sup> Union’s Exceptions Brief at 34-39.

the lawsuit. The General Counsel and the Union proceed to argue that Milum's lawsuit was not reasonably based because of statements reported by the press concerning the impact of the Union's activities on its business. Even if we assume, *arguendo*, that Milum was required to prove actual damages at the NLRB hearing, the General Counsel's own evidence shows the existence of actual damages. As reported in GC 97, a newspaper article that appeared in the Arizona Republic on 21 February 2007:

“Some of Milum's customers, who have been targeted by Unite Here to try to make them stop using Milum's services, say they are shopping for other textile cleaners...Robert Mancuso, who owns two Valley restaurants serviced by Milum Textile, said the pressure is getting to him. “I'm not a union fan, and I filed a grievance against them. And, they are strong-arming,” Mancuso said. “But I'm shopping around and there's a good possibility I may quit Milum. There's only so much negative publicity that I can take.”

But, that is not the case. As set forth in *Gertz v. Robert Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d (1974), a case that was relied upon by the General Counsel, actual injury is not limited to out-of-pocket loss: “Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” *Gertz* at 350.

The General Counsel also cites *Beverly Health and Rehabilitation Services, Inc.*, 336 NLRB 332 (2001), to support its position. *Beverly Health* dealt with a situation where the Board was attempting to enjoin the maintenance of a lawsuit in state court involving a defamation claim. The Board held that it may not order the Respondent to cease and desist from pursuing its defamation lawsuit in state court unless and until it is determined by the Board to be baseless under a Bill Johnson's<sup>46</sup> analysis. The reference to the proof of damages in the case involves the

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<sup>46</sup> *Bill Johnson's Restaurants v. National Labor Relations Board*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983).

proof of damages during the trial in order to prevail in the action – not to the initial pleadings in the case.

The Union’s argument similarly misses the point. The Union argues that for Milum’s lawsuit to be reasonably based, “it had to ‘realistically expect’ to win its TRO”.<sup>47</sup> In examining the lawsuit, *BE & K, supra*, does not break a lawsuit down into parts, i.e., motions and pleadings. The BE & K test is whether “a **lawsuit** lacks a reasonable basis, or is ‘objectively baseless,’ if ‘no reasonable litigant could realistically expect success on the merits.’” *BE & K* does not require that a respondent in an NLRB proceeding actually litigate its underlying lawsuit during the course of the NLRB hearing or in federal court to its conclusion. Furthermore, the fact that temporary injunctive relief is not granted does not negate the validity of the lawsuit itself. The Union admits in its brief that although the plaintiff in *San Antonio Community Hospital*, 125 F.3d 1230 (9<sup>th</sup> Cir. 1997), was granted a preliminary injunction, it lost on its motion for temporary injunctive relief. The fact that the hospital lost its motion for temporary injunctive relief, however, did not prevent it from obtaining a preliminary injunction after a hearing, nor did it cause the lawsuit to be deemed baseless or dismissed. *Id.* Thus, the only issue at the NLRB hearing is whether a reasonable litigant could realistically expect success on the merits of the lawsuit that was filed by Milum. The Union admits that the “facts necessary to demonstration actual malice are often inaccessible without discovery,” and that “discovery process enables a plaintiff to explore the defendant’s support for its allegedly defamatory statements.”<sup>48</sup> That is the point: a plaintiff in an action is not required to prove actual damages or malice at the initial pleading stage of the case in order to have a meritorious claim. Once the lawsuit is filed the

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<sup>47</sup> Union’s Exceptions Brief at 19.

<sup>48</sup> Union’s Exceptions Brief at 20.

plaintiff can engage in discovery, and it must only prove its case when the matter goes to trial.<sup>49</sup>

**3. The ALJ Did Not Err by Failing to Conclude that the Federal Lawsuit Was Baseless.**

The General Counsel and the Union further contend that the ALJ erred when she found that Milum did not violate the Act by continuing to prosecute the federal lawsuit, and “abdicated her responsibility to ‘examine the plaintiff’s evidence to determine whether it raises any material questions of fact.’”

**a. Milum Attempted to Produce Evidence Regarding Its Lawsuit.**

The General Counsel and the Union erroneously maintain that Milum failed to offer or present evidence to support its lawsuit during the hearing.<sup>50</sup> The General Counsel and the Union cite *Geske & Sons v. NLRB*, 103 F.3d 1366 (7<sup>th</sup> Cir. 1997). The *Geske* case, however, was not only decided prior to *BE & K*, but dealt with a situation where the NLRB was attempting to enforce its ruling that the lawsuit was baseless and retaliatory, and to enjoin the company from continuing to prosecute its lawsuit. In the *Geske* case the company asserted that it had “lots of other evidence” to support its lawsuit, but refused to produce that evidence. During the course of the NLRB hearing in this case, however, Milum in fact offered evidence and testimony to show that there was a reasonable basis for the lawsuit – and it was the General Counsel who vehemently objected to the introduction of such evidence and testimony. The General Counsel objected to the introduction of all evidence and testimony regarding any information that was not set forth in the exhibits attached to the complaint, i.e., GC 8, on the ground that Milum was limited exclusively to the information set forth in the Complaint. [Tr. 2030-2038] Further, despite Milum’s argument regarding notice pleading, Judge Gontram ruled during the course of

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<sup>49</sup> The plaintiff would be required to provide some evidence substantiating its claim if the defendant filed a Motion to Dismiss or a Motion for Summary Judgment depending on the nature of the motion.

<sup>50</sup> Milum maintains that it was not under a legal obligation to produce evidence at trial to substantiate its lawsuit other than to substantiate its position that the lawsuit was not baseless.

the hearing that the evidence that Milum could present at the hearing regarding the false statements alleged in the Respondent's lawsuit was limited to the four corners of the complaint, i.e., the material attached to the Complaint or referenced in those materials: "It seems to me that you are stuck -- not stuck but you are limited to the material contained in the letters." [Tr. 2030-2039] With respect to exhibits that Milum wanted to introduce substantiating the claims in its lawsuit, Judge Gontram stated, "I am more than happy to receive them -- and reject them and place them in the same rejected exhibit folder. [Tr. 2038] Ultimately, Judge Gontram invited counsel to "address the matter in your post hearing brief." [Tr. 2037] Thus, Milum was prevented by the General Counsel and Judge Gontram from introducing any documentary and testimonial evidence that would support the reasonable nature of the Complaint. Milum went so far as to make an offer of proof with respect to additional documents that were produced by the Union in 2006 that contained additional false statements and documents that would have shown the clearly false nature of the statements and would have supported Milum's position that the lawsuit was reasonably based. [Tr. 2257-2258] These documents were rejected by Judge Gontram, and Milum was thus prevented from including this evidence in the record. The documents that Milum sought to introduce included the following: Mission Linen contract with the union<sup>51</sup> [R 11], the Sodexo Linen contract with the union<sup>52</sup> [R 12], the Five Diamond Linen contract with the union<sup>53</sup> [R 13], web page from the U.S. Department of Labor regarding Angelica Textile Services [R 17], web site of OSHA or the U.S. Department of Labor web site involving Cintas, Angelica and Milum [R 18], letter from the Arizona Department of Environmental Quality dated

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<sup>51</sup> In the document produced and distributed by the union entitled, "Arizona Laundry Workers Organizing For Justice," that is attached to GC 5, the union alleges that Milum pays "poverty wages". This statement is contradicted by the fact that the wages that Milum pays are higher than the wages paid pursuant to the Union's contracts Mission, Sodexo and Five Diamond, other commercial laundries operating in Phoenix, Arizona. [R 14; GC 38; Tr. 104-107] These contracts were rejected at Tr. 2037-2039

<sup>52</sup> See footnote 33.

<sup>53</sup> See footnote 33.

February 20, 2007 [R 20], Arizona Republic article dated 26 April 2006 [R 25], Customer Advisory to Bloom [R 26], Unite: Arizona Laundry Workers Organizing for Justice<sup>54</sup> [R 30], Maricopa County Inspections for Bloom [R 31], Oaxaca Customer Advisory [R 32], Bloom Dirty Conditions<sup>55</sup> [R 33], Milum Exposed Letter to Laundry Customers [R 50], Dirty Conditions at North<sup>56</sup> [R 51], Dirty Conditions at Bobby's and Mancuso's [R 52], and Dirty Conditions at Sauce Pizza<sup>57</sup> [R 53].<sup>58</sup> And, although Milum was permitted to introduce a document that was referred to in the Complaint and the Exhibits thereto, "Compromising on Quality" [R 29], the General Counsel objected to questioning regarding this document and Judge Gontram sustained the objection. [R 2144-2148] In addition, Milum made an offer of proof with respect to the Complaint and the Judgment that was filed in the Sutter Health case in California where the Defendant was similarly the union. [R 35-36] These documents were also rejected. [Tr. 2161-2164] The General Counsel should be prohibited from objecting to the introduction of evidence at the hearing offered by Milum and then turn around and argue in its exceptions that Milum failed to offer or prove anything. The General Counsel cannot have it both ways.

Milum maintains the ruling by Judge Gontram was not proper. First, in federal court the plaintiff is not required to present a perfectly drafted complaint. *Franks v. Ross*, 313 F.3d 184 (4<sup>th</sup> Cir. 2002). And, federal practice utilizes the concept of "notice pleading" which requires a complaint to be read liberally in favor of the plaintiff. *Franks v. Ross*, 313 F.3d 184 (4<sup>th</sup> Cir. 2002). Second, limiting a plaintiff to the four corners of the Complaint would only be appropriate if a motion to dismiss was filed. In that case, the court must assume that all factual

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<sup>54</sup> Although this document was admitted into evidence as part of GC 5, Judge Gontram rejected it when Milum attempted to introduce it and elicit testimony regarding it. [Tr. 2148-2149] Craig Milum had testified that he saw this document prior to filing the lawsuit. [Tr. 2148] It also appears in the record as an attachment to GC 77.

<sup>55</sup> This flier was rejected, but a copy appears in the record attached to GC 77.

<sup>56</sup> This flier, R 51, was rejected, but appears in the record attached to GC 77.

<sup>57</sup> This flier, R 53, was rejected, but appears in the record attached to GC 77.

<sup>58</sup> All of these documents were rejected at Tr. 2149-2164.

allegations made in the complaint are true and draw all reasonable inferences in the plaintiff's favor. *Shah v. Meeker*, 435 F. 3d 244, 248 (2d. Cir. 2006); *Rombach v. Chang*, 355 F. 3d 164, 169 (2d. Cir. 2004). That analysis is limited to information contained within the four corners of the complaint, with "complaint" defined to include any exhibits, any other written statements or documents attached to the complaint or incorporated by reference, and any document that is relied upon to such an extent as to make it "integral" to the complaint. See *Chambers v. Time Warner, Inc.*, 282 F. 3d 147, 152 (2d. Cir. 2002). When "material outside the pleadings is presented in response to a motion to dismiss, the court 'must either exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and afford all parties the opportunity to present supporting material. *Vollinger v. Merrill Lynch & Co.*, 198 F. Supp. 2d 433, 437 (S.D.N.Y. 2002). Third, it cannot be overemphasized that Milum specifically pled in the Complaint that "Commencing on or about 10 March 2006 and continuing to the present Unite commenced a course of conduct specifically designed to cause Milum's customers to cease doing business with Milum." [GC 8 at 2]. Thus, the continuing nature of the course of conduct was plead. Fourth, even if Milum was required to file a Motion to Amend the Complaint to include ongoing behavior on the part of the Union, it is probable that such a motion would have been granted. Under Rule 15(a) of the Federal Rules of Civil Procedure which governs such requests, leave to amend a complaint shall be freely given when justice so requires. *Franks v. Ross*, 313 F.3d 184 (4<sup>th</sup> Cir. 2002). The Complaint clearly states in paragraph 4 that on or about 10 March 2006 and continuing to the present the Defendant UNITE HERE! "commenced a course of conduct designed to cause Milum's customers to cease doing business with Milum" and damaging Milum's reputation.

**b. The General Counsel Ignores the Main Issue of Whether a Realistic Litigant Could Expect Success on the Merits of the Lawsuit.**

The General Counsel and the Union got so bogged down in trying to argue federal practice and procedure that they literally ignores the fact that the only issue that must be determined in this NLRB proceeding is whether a reasonable litigant could realistically expect success on the merits of the lawsuit that was filed by Milum. There could not be any clearer evidence of this than the fact that in November 2006, a lawsuit was decided in California involving a similar UNITE HERE! corporate campaign. [Attachment to GC 69] The jury in that case awarded the plaintiff company \$17,000,000.00 in damages:

Not long ago, Unite Here conducted a corporate smear campaign against a linen company in California and extended it to the customers of the company and to their customers, one of which operated a group of hospitals. Unite Here sent out postcards to thousands of woman who might be choosing a hospital in which to give birth to their babies, and therefore were potential “customers” of the hospital. The postcard stated that the linens supplied by the particular linen company they used were not safe: **“the laundry service utilized by [the hospital], does not ensure that “clean” linens are free of blood, feces, and harmful pathogens”**. [Copy of postcard attached hereto] Thus, as set forth on the postcard, if you have your baby at this hospital, “You may be bringing home more than your baby....” The hospital had no alternative but to sue Unite Here for libel, trade libel, wrongful interference with prospective economic relations, and unfair competition. The jury in this California case recently awarded the hospital \$17,000,000.00 against Unite Here. [Emphasis added; A copy of the actual postcard that UNITE HERE! used which includes the pivotal language is attached to GC 69]

This is the same type of language that the same Union used in the letter that it sent to Milum’s customers on 10 March 2006 – and which was attached to the Complaint filed by Milum in federal court. [GC 8] Thus, it is clear that there was not only a reasonable litigant could realistically expect success on the merits, but that a litigant had in fact obtained success on the merits in a similar case in California based upon the Union’s virtually identical behavior.

Furthermore, Daisy Pitkin, the Union person in charge of the campaign at Milum

admitted<sup>59</sup> in her testimony at the NLRB hearing stated that she did not have any evidence to support the allegations in the letters attached to the Complaint filed by Milum other than the “hearsay” generated in the midst of a union campaign, and a four-year-old report from the Arizona OSHA. [Tr. 2252-2257] Although Daisy Pitkin, the person who produced all of the documents distributed by the Union involved in this case, did not testify that she based the statements on it, there was an ADEQ report discussed during the hearing that dealt with the waste facility – not the commercial laundry – and was issued by an agency that has nothing to do with determining the safety of linens for restaurant patrons.<sup>60</sup> [Tr. 1692-1693, 2253–2257] Making statements regarding a company based solely on this type of hearsay smacks of “recklessness” and independently substantiates the reasonableness of Milum’s lawsuit.

The Union argues that union campaigners can legitimately base their statements made about an employer on the statements made by employees even if the campaigner lacks personal knowledge of the facts. The Union cites *Community Medical Services of Clearfield, Inc. v. Local 2665 AFCME*, 437 A.2d 23 (Pa. Super.Ct. 1981), to support this proposition. *Community Medical Services* dealt with a situation where the union had made statements against the hospital/employer and those statements were based upon the statements of employees and the relatives of the patients. Discovery was conducted and the union moved for summary judgment. The employer failed to provide controverting evidence in response to the motion for summary judgment, and summary judgment was granted in favor of the union. There is no explanation in the case for the hospital’s/employer’s failure to adequately respond to the motion for summary judgment or its failure to prove up its case. While this case is a clear example of what an attorney should not do during the course of litigation, it does not stand for the principle that reliance on

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<sup>59</sup> Daisy Pitkin’s testimony appears at Tr. 1693, 2253–2255. It is not disputed that Daisy Pitkin was in charge of the union’s organizing campaign at Milum. See GC Exceptions to ALJ Decision at 5-6.

<sup>60</sup> This fact was confirmed by the Union in its exceptions brief at 25.

third party statements is sufficient to oppose a libel action.

The Union also argues that the fact that there was an ADEQ is a legitimate basis for the statements that it made regarding Milum. This is a clear example of the validity of Milum's libel claims:

There was a 2002 "Medical Waste Transporters Inspection Report" by ADEQ<sup>61</sup> that is relied upon by the Union. [GC 139] The Union argues in its brief that this report stated that Milum used "the same bins to transport clean and dirty laundry."<sup>62</sup> If one looks at the ADEQ report, it has absolutely nothing to do with the transport of laundry. In fact, the report on page 11 states that the alleged violation is the "Use of a vehicle to transport biohazardous waste that does not meet the applicable leak-proof construction requirements." Thus, the truth has been distorted. Furthermore, as set forth in the subject on page 11 of the report, the report relates exclusively to the "Medical Waste Transporter Facility." As set forth at the hearing, Milum operates a commercial laundry, and the employees that the Union is organizing work exclusively in the commercial laundry operation. [Tr. 37] Milum also operates a medical waste treatment plant at a separate location,<sup>63</sup> and there are two employees who work at that operation. [Tr. 37] It is not controverted that these two (2) employees are not involved in the operation of the commercial laundry, and are not considered to be part of the Union's organizational efforts. As Milum testified during the hearing, the medical waste treatment facility engages in the following:

We pick up regulated medical waste materials in our trucks which are licensed by the county, and those materials are taken to our medical waste treatment plant. They are accumulated and then sterilized and then put in a compacter and then on a regular schedule those items are picked up and deposited at a specific cell at a properly authorized, properly engineered license landfill. [Tr. 37]

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<sup>61</sup> Arizona Department of Environmental Quality

<sup>62</sup> Union's Exceptions Brief at 26.

<sup>63</sup> On page one of the Union's document, "Compromising on Quality" [R 29], the Union sets forth the fact that there is a separate biohazard waster removal service that operates under the name of MTS Medical Waster Management.

With these facts, how can the Union legitimately claim that based upon the ADEQ report that its claim that “Medical linens are often contaminated with blood, feces and other bacteria” as set forth in a letter that the Union sent to one of Milum’s customers or the claim that “TABLE LINENS AND NAPKINS EXPOSED TO BLOOD AND BACTERIA AT LOCAL LAUNDRY” as set forth in the Union’s press release<sup>64</sup>? [Emphasis is text] And, how does what occurs at the separate medical waste treatment facility have anything to do whatsoever with the quality of the linens at Milum’s commercial laundry facility? The answer is that there is no relationship, and reliance on this report does not substantiate the Union’s claims. Further, the use of this report as such substantiation is false and misleading.<sup>65</sup>

Similarly, the Union argues that the 2002 Arizona OSHA report substantiates its claims that there are “dirty and dangerous conditions” at Milum.<sup>66</sup> This report cited Milum for violating the OSHA regulation requiring blood borne pathogen training for its employees.<sup>67</sup> The question is how does this report in 2002 provide information regarding Milum’s operation in 2006 – four (4) years later? Neither the General Counsel nor the Union presented any evidence at the hearing that there were subsequent violations with respect to blood borne pathogen training. Thus, the record shows that the situation was not totally rectified in 2002. Furthermore, how does the lack of training create “dirty and dangerous conditions” at Milum? The bottom line is that the Union’s reliance on the 2002 Arizona ADOSH report to substantiate its claims in 2006 is false and misleading.<sup>68</sup>

The Union proceeds to argue that “Milum Textile’s failure to provide training

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<sup>64</sup> GC 8 (Exhibit C to the Complaint)

<sup>65</sup> It is important to note that this argument was set forth in the Affidavit of Craig Milum that listed the false statements made by the Union that was filed in the federal court lawsuit. [GC 11]

<sup>66</sup> Union’s Exceptions Brief at 27

<sup>67</sup> Union’s Exceptions Brief at 27-28 referring to GC 61 at 13.

<sup>68</sup> It is important to note that this argument was set forth in the Affidavit of Craig Milum that was filed in the federal court lawsuit. [GC 11]

“**implicates** dirty and dangerous conditions – that may produce linens that could be a risk to your business.”<sup>69</sup> It is impossible to fathom how the failure to properly train employees in 2002 could by any stretch of the imagination cause the linens produced by Milum in 2006 to be a risk to anyone’s business.

But, the most disturbing part of the Union’s argument is its reliance upon a 2006 OSHA report as the basis for the claims that it made against the quality of linens produced at Milum.<sup>70</sup> As set forth in the report, all but two (2) of these violations deal with the hospital soil sort area – the only area where blood borne pathogens are even a consideration and protective garments are required to be worn. [GC 138] Thus, these violations have absolutely nothing to do with the production area or with restaurant linens.<sup>71</sup> The only two violations involving the production area where restaurant linens are processed involve training in the “Lockout/Tagout Program” and the level of compressed air used for cleaning dust and lint from the machines. [GC 138] Once again, how do these violations possibly relate to the quality of the restaurant linens, and how do they support the statements that the linens are contaminated with blood and feces?

Despite all of the foregoing, the Union still maintains that Milum mixes hospital and restaurant linens. The record shows that the restaurant linens are sorted in a separate location from where the hospital linens are sorted. [Tr. 1733] The actual time that the restaurant linens are sorted differs from the time that the hospital linens are sorted. [Tr. 1734-1735] And, the hospital linens are not mixed with the restaurant linens in the washing machines. [Tr. 2142] It is common knowledge that hospitals use both patient care linens and dietary linens. Thus, the fact that a hospital dietary linen might appear in the hospital soil sort area is an admission of the obvious.

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<sup>69</sup> Union’s Exceptions Brief at 28

<sup>70</sup> GC 138

<sup>71</sup> The restaurant linens are sorted in a separate location from where the hospital linens are sorted. [Tr. 1733] The actual time that the restaurant linens are sorted differs from the time that the hospital linens are sorted. [Tr. 1734-1735] The hospital linens are not mixed with the restaurant linens in the washing machines. [Tr. 2142]

This is not the same thing as saying that restaurant linens are in the hospital soil sort area. It makes no sense to have the various “sorting” areas if the company is going to mix the various types of linens in the washers or any where else. “Sorting” denotes separating the various linens prior to washing. Thus, it is absurd to believe that Milum would mix the hospital linens with the restaurant linens. If they are not mixed, then there could not be the alleged contact with blood and feces. But the bottom line is that even if we assume, *arguendo*, that the restaurant linens were mixed with the hospital linens, there is no evidence that they are “contaminated” or unsafe. Craig Milum addressed this issue at the hearing when he was analyzing the Union’s statements:

Q[by Laws] The next statement in this document that you think is untrue or a lie.

A [by Craig Milum] This study reveals that restaurant customers cannot be assured of the quality of the linen used in these establishments, et cetera, et cetera.

Q Would you explain why that's untrue?

A Even if you believed employees' reports that the linens were mixed, obviously, it wouldn't generate an unsafe condition. Hospitals reuse linens every day.” [Tr. 2166]

This position is supported by the statement by Don Herrington, Chief of the Office of Environmental Quality for Arizona Department of Health Services as per the Arizona Republic article dated, 28 April 2006 to the effect that “even if they were mixed, the hot water, detergent and bleach used in commercial laundries would rid them of any bacterial contaminates -- make the linens safe. [GC 42; GC 5 attachment] And, as Craig Milum confirmed when he spoke with Lynn Seahaulster, a Ph.D. in Microbiology at the Centers for Disease Control, there has never been a single case documented where a person picked up a disease through transmission by use of linens washed in a commercial laundry. [Tr. 2169] Neither the General Counsel nor the Union has presented any evidence to date contradicting this fact.

It is important to note that hospital linens are not disposed of after use. To the contrary,

they are washed and reused. There is no evidence that the linens are unsafe to be reused in the hospitals where sterile linens are essential. Thus, even if the statements by unknown workers were true regarding the mixing of linens, there is no basis for the Union's claims that the linens are contaminated, among other things.

The Union also argues that the carts are not washed between usages. Craig Milum testified regarding this issue while the video was presented at the hearing:

Q [by Laws] What are these conveyors in 3512?

A [by Craig Milum] They are turnaround carts. They contain clean linens. When they go to the customer, the customer empties them and then the customer deposits back soiled linens into those same containers.

We then pick up those containers on the next scheduled delivery date, transport them back to the plant. They are here being lined up to be sorted and then once those carts are emptied, they go to a cart washing station where they are washed and then that process with the cart repeats itself where they again are used for transporting clean linen to subsequent customers and subsequent soiled linens.

Q We are at 35 --

JUDGE GONTRAM: Is there any method by which these carts that go to -- you say they bring linens from the hospital and the linens are taken off to be cleaned and the carts then go to be cleaned. Is there any system by which there is assurance that only hospital carts go to hospital -- use for hospital linens or after they are cleaned, it doesn't matter? Is a cart that transported hospital linens coming in could be used to transport clean restaurant linens going out?

THE WITNESS: That is correct.

JUDGE GONTRAM: All right. Continue. [Tr. 1910]

The fact that UNITE HERE! distributed the materials containing the statements about "blood", "feces" and "bacteria" to restaurants and their customers who are very concerned with at least a modicum of cleanliness serves to elevate the inflammatory nature of the statements. It is only logical to believe that a reasonable person who is looking for a restaurant would surely be put off when he read the press release: "Scottsdale and Phoenix Restaurant Customers Be Aware: Table Linens and Napkins Exposed to **Blood and Bacteria** at Local Laundry...Milum...mixing restaurant linens with medical linens **contaminated with blood and feces**...restaurant customers

cannot be assured of the quality of linen used in these establishments.” [GC 8]

As set forth herein there is clearly substantial evidence on the record to support a finding that the Complaint raised “factual issues that were genuine and material”, that there is a “reasonable basis” in fact and in law, and that Complaint is clearly not “based on intentional falsehoods or on knowingly frivolous claims.” *Bill Johnson’s Restaurants v. National Labor Relations Board*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)

Third, the Respondent is not required to show actual malice at the pleading stage of a federal lawsuit. The General Counsel and the Union mistakenly argue that Milum was required to show actual malice at the outset of the case, i.e., on the face of the complaint. The cases relied upon by the General Counsel all involve situations where there had been a full trial on the issues, and the plaintiffs had in fact presented their evidence regarding their claims during the trial. In this case, there was not a trial on the lawsuit and Milum had not presented its evidence to the Court. In *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966), an official of the employer initially filed unfair labor practice charges with the NLRB based upon a violation of §8(b)(1)(A) – like Milum did in this case. [GC 3] And in the *Linn* case, as in this case, the Regional Director refused to issue a complaint. The employer in *Linn* and in this case then filed a lawsuit with the U.S. District Court alleging libel based upon false and defamatory statements circulated during a union organizing campaign. The prayer in the *Linn* complaint was for the recovery of \$1 Million – not actual or special damages. The union filed a Motion to Dismiss, and the District Court dismissed the lawsuit on the ground that the NLRB had exclusive jurisdiction over the subject matter. On appeal the U.S. Supreme Court reversed the decision holding that the NLRB does not bar the maintenance of a civil action for libel under state law if the plaintiff pleads and proves that the statements were made with malice and

resulted in injury to him. The Court held that the defamed party would have to establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages. The Court not only reinstated the case, but held that since the complaint did not make the specific allegations that the Court finds necessary, but directed the lower court to grant the plaintiff leave to amend his complaint. The Court went on to state that it that the plaintiff filed charges with the NLRB and then filed a lawsuit was neither unusual nor of any real import to the Court's decision in the case: "it may be expected that the injured party will request both administrative and judicial relief." *Linn* at 66. Thus, the Court in *Linn* delineated what the plaintiff therein must prove in order to obtain relief for libel **during the course of the litigation** – not what it must set forth in its initial pleadings. The Court did not find that the plaintiff had to prove damages at the time it filed the complaint, and the Court directed the lower court to permit the plaintiff to amend his complaint if he so desired.

The General Counsel also cites *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1973). In the *Gertz* case there had been a full trial in the libel suit at which the plaintiff presented its evidence. The jury decided in favor of the plaintiff, but the Judge entered judgment N.O.V. for the defendant. The issue on appeal was whether the plaintiff was a public figure, i.e., what standard should be applied in determining liability in a defamation case. The U.S. Supreme Court held that the trial court erred in entering judgment for the defendant, that the *New York Times* standard is inapplicable in cases involving private individuals, and remanded the case for a new trial. The U.S. Supreme Court held that in order to recover damages in a defamation lawsuit, there must be a showing of knowledge of falsity or reckless disregard for the truth. The Court did not hold that such a showing must be made on the face of the pleadings. Although not dispositive of the issues in the case, the Court did indicate that the existence of

injury cannot be presumed from the act of publication without evidence of actual loss.

And, the General Counsel cites *Intercity Maintenance Co. v. Local 254, SEIU*, 241 F. 3d 82 (1<sup>st</sup> Cir. 2001) cert denied 534 U.S. 818 (2001). In *Intercity*, there was a full trial before a jury during which the plaintiff presented its evidence. The Judge ruled against the plaintiff on certain issues pursuant to a Rule 50 motion – taking the decision out of the hands of the jury for determination. The Court held that in proving its case at trial the plaintiff was required to show evidence of actual loss. Citing *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966), the *Intercity* Court stated that proof of harm may include “general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law. It is interesting to note that in the *Intercity* case the Court remanded the cause of action against the union for unlawful secondary boycott activity in violation of the LMRA for retrial by the jury.

The Union also claims that the lawsuit was baseless because “Milum filed its lawsuit to block UNITE HERE’s April 27 rally.”<sup>72</sup> The Union, however, neither provides any evidence to support its claim nor any reference to the record to support this claim. The Union also argues that the timing of the filing of the lawsuit demonstrates that it was filed to stop the rally.<sup>73</sup> Once again the Union does not provide any evidence to substantiate its claim. Further, this argument ignores the fact that Milum had made attempts to obtain relief through the NLRB regarding the Union’s conduct prior to filing the lawsuit. [GC 3-4] Therefore, the Union’s argument that the lawsuit is baseless is not founded in fact and should be disregarded.

Based upon the foregoing, the ALJ did not err by concluding that the federal lawsuit filed by Milum was not baseless.

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<sup>72</sup> Union’s Exceptions Brief at 15, 22

<sup>73</sup> Union’s Exceptions Brief at 22.

**C. The ALJ Did Not Err in Refusing to Find that Kayonnie Engaged in Illegal Surveillance.**

The General Counsel takes exception to the ALJ's finding that Angela Kayonnie had an established practice of eating her lunch with her husband outside the 6<sup>th</sup> Avenue entrance to the plant that pre-dated the Union organizing campaign. Therefore, the ALJ found that her continuance of that practice did not constitute surveillance.

In order to constitute an established practice or the "status quo", the question is whether the practice is long standing. *NLRB v. Talsol Corp.*, 155 F.3d 785 (6<sup>th</sup> Cir. 1998). This is clearly a case where Angela Kayonnie had an established practice of eating lunch on 6<sup>th</sup> Avenue with her husband since she started work at Milum. The fact that the Union came into the picture and started meeting with employees at the 6<sup>th</sup> Avenue, does not render Angela Kayonnie's long established practice surveillance.

The facts set forth in the record are clear: Angela Kayonnie has an established practice of eating lunch with her husband each and every work day. Angela has been doing this for the past twenty-one (21) years – well in advance of the commencement of union activities at Milum. [Tr. 1799–1801] Each day Angela's husband drives to 6<sup>th</sup> Avenue bringing lunch for Angela and himself. [Tr. 1799–1801] Angela exits by the 6<sup>th</sup> Avenue door, and she and her husband eat their lunch in their truck on 6<sup>th</sup> Avenue. [Tr. 1799–1801] The truck is parked down the street from the 6<sup>th</sup> Avenue entrance – not in front of it. [Tr. 1799–1801; See "AK" marked on R 5] Teresa Velasquez confirmed these facts in her testimony. [Tr. 1100–1101; See "L" marked on R 5] Pat Goebel confirmed that she saw this occur every day since she has been working at Milum since December 2005. [Tr. 1458] Craig Milum also confirmed this established practice. [Tr. 71–72] Despite the numerous witnesses called by the General Counsel, not a single witness testified that Angela Kayonnie had not in fact eaten her lunch in the truck with her husband on 6<sup>th</sup> Avenue

prior to the commencement of union activities.

The General Counsel misstated the testimony when he argues that Angela Kayonnie made an about face in her testimony regarding her practice of eating lunch with her husband in their truck on 6<sup>th</sup> Avenue. The actual testimony is as follows:

Q [by General Counsel] Which other employees have you seen out there meeting with the union?

A All different. Different employees. Whoever goes outside that way to have their lunch or they -- sometimes all different employees they go out there to go to McDonald's. whoever goes out there through that door.

Q **And about how many times can you estimate that you were eating lunch and you saw employees come out and meet with the union outside the door on 6th Avenue?**

A On that month or --

Q Well, since February, 2006.

A Every day or a week.

Q When did you start eating lunch with your husband out there?

A Every day. I eat with my husband every day.

Q Right. And **when did you start?**

A The time that this UNITE HERE **they started.**

Q Okay.

JUDGE GONTRAM: That's when you started eating lunch with your husband outside?

THE WITNESS: No. Been eating out there for a long time.

JUDGE GONTRAM: Oh. You've been doing that since long before --

THE WITNESS: Yeah. Eating for several

JUDGE GONTRAM: -- since long before the union did it?

THE WITNESS: Yeah.

JUDGE GONTRAM: All right. I misunderstood.

Q BY MR. GIANNOPOULOS: When? When did you start eating lunch with your husband on 6th Avenue?

A Long time.

Q A year ago?

A Yeah.

Q Two years ago?

A Been before two years ago or three years ago before. When I started working there I always eat out -- my lunch out there with my husband every single day, years and years. [Emphasis added; Tr. 693-694]

It is clear from this testimony that Angela Kayonnie did not understand the question regarding the date that she started eating her lunch on 6<sup>th</sup> Avenue as her response was “**they**

started” which logically refers to the prior question regarding the times that Angela Kayonnie “saw employees come out and meet with the union outside the door on 6th Avenue.” Judge Gontram cleared up the questioning when he asked the question using a complete sentence, i.e., “That’s when you started eating lunch with your husband outside?” In response to this clear question, Angela Kayonnie responded, “No. Been eating out there for a long time.” [*Id.*]

The ALJ specifically noted that Angela Kayonnie’s primary language is Navajo and that “the transcript shows that she did not always understand questions put to her.” [ALJD slip op. at 7, footnote 21] Counsel for Milum requested that the NLRB provide an interpreter for Angela Kayonnie for her testimony at the NLRB hearing. That request was denied:

MR. GIANNOPOULOS: And one of the witnesses we subpoenaed who is a supervisor of the Respondent, I believe last Friday Ms. Laws had asked if the Region would provide a Navajo language translator for this witness and I discussed it with the Regional attorney and told him that the position of the Region is that we would not – this witness gave extensive evidence during the investigation including affidavits in English, we have documents signed by her in English and it is my understanding that she communicates at least with Mr. Milum in English. So we plan to question her about the facts that she set forth in the affidavit and other documents that we have from her in English.

Ms. Laws had asked me to bring this up to you.

JUDGE GONTRAM: And what are you bringing up?

MR. GIANNOPOULOS: Well, I think she wants to bring a translator in and I am telling you the government’s position is that we are not going to bring a Navajo translator in.

MS. LAWS: The supervisor, Your Honor, is a first generation Navajo speaker. Her first language was Navajo. You might notice in the wording notices that will be part of this hearing that the English is very clipped and she does not understand all words English. She feels her words – she is okay in working with people, but when she was coming to court she was terrified that she didn’t know all the words and know what she needed to do and that she would not be able to do it competently. So she does not speak and write English fluently, which is apparent from the wording that is in this documentation that she produces.

So we had requested and the General Counsel had denied the request.

JUDGE GONTRAM: Well, whether a witness should have a translator is something that I can’t – I really cannot address at least in the absence of that witness being present in the courtroom. I don’t – if there comes a time when a witness is called and there is a need at that point to address the issue of the

translator being, first of all, needed, and second of all, being available. I will address it at that point. [Tr. 29-30]

Thus, Angela Kayonnie was the only witness who was required to testify without an interpreter when the witness' primary language was not English. Despite this fact, the General Counsel takes numerous exceptions to Kayonnie's responses and requests that the Board discredit her testimony.

The General Counsel proceeds to attack Kayonnie's credibility:

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)<sup>74</sup>

The record does not support these conclusions. Jaime Chavez did not say that Kayonnie had showed him a copy of an exhibit admitted into evidence and Kayonnie was never directly and coherently questioned about this incident. The following is the questioning of Jaime Chavez by the General Counsel:

Q [by General Counsel] Did you discuss this incident further with Angela in between the time you testified the last time you were here and today?

A[by Jaime Chavez] The only thing I wanted to make sure is that I had not seen the paper with the car.

Q The emissions paper, General Counsel's 107?

A Yes. [Tr. 1758]

The testimony of Kayonnie to which the General Counsel refers regarding "the document" [GC 107] relates to what occurred in January 2007 when Evangelina Guzman was disciplined – and what Kayonnie saw at that time – not during the course of the hearing.

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<sup>74</sup> General Counsel's Exceptions Brief at 34.

“Q BY MR. GIANNAPOULOS: Is it your testimony that **Evangelina Guzman** came and showed you that document, General Counsel's 107?

A She -- she just go like this with some other papers, but I really didn't pay attention looking at it. I told her give it to Jaime because Jaime was working on that day, so you can explain it to Jaime is what I told her.

Q Let me ask you, between the last time you testified and today, did you discuss with Jaime Chavez --

MS. LAWS: I'm going to object.

Q BY MR. GIANNAPOULOS: -- General Counsel's 107 that's in front of you.

MS. LAWS: Pointing at the witness, Your Honor.

JUDGE GONTRAM: Overruled.

A No.

Q **Did you show him that document?**

A No. [Emphasis added; Tr. 1863]

Contrary to General Counsel's argument, there is no testimony from Chavez that Kayonnie had showed Chavez GC 107 during sequestration. Chavez indicated that he had “asked” Kayonnie about the paper with the car (apparently referring to GC 107). The General Counsel's questioning then changes from asking Kayonnie about whether there was a discussion showing a document with Chavez during sequestration to instead asking Kayonnie about her discussions with Chavez that took place in January:

MR. GIANNOPOULOS: One second, Your Honor.

JUDGE GONTRAM: All right.

MR. GIANNOPOULOS: I just need to review some notes.

Q BY MR. GIANNAPOULOS: You testified under direct that you don't recall having a conversation with Jaime Chavez with respect to the discipline that Evangelina Guzman received in January, 2007, is that correct, just earlier with Ms. Laws asked you?

A Repeat again.

Q Didn't Ms. Laws just ask you earlier if you had a conversation with Jamie Chavez about the discipline that Evangelina Guzman received in January, 2007?

A About this paper?

Q About the discipline she received. Do you remember that?

A (No response)

Q Let me show you General Counsel's 100 if I may. Do you remember Ms. Laws just asking you about Ms. Guzman's Discipline that's marked General Counsel's 100?

A Yes.

Q And she asked you if you had a conversation with Jaime Chavez about that discipline, isn't that right?

A Yes.

Q And you testified you don't recall, correct?

A Yes.

Q I'm going to have you note that you came in earlier a few weeks ago and you testified when I asked you questions, right? Remember that?

A Yes.

Q And on Page 769 of the transcripts, I asked you: "And Jaime came to you and told you that Evangelina Guzman had told him that she could not come to work because she had to purchase a car, correct?" And you answered: "That's what Jaime discussed with me." Do you remember giving that testimony?

A Repeat again. [Tr. 1863-1864]

It seems clear from a careful reading of the transcript that there is no substance whatsoever to General Counsel's statement that Kayonnie blatantly violated the sequestration rule and that therefore the additional statement, "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," is likewise baseless and completely without merit.

Based upon the foregoing, it is clear that Angela Kayonnie's credibility should not be questioned on the basis of the testimony set forth above.

**D. The ALJ Did Not Error in Refusing to Find that Milum Interrogated Zulema Ruiz.**

The ALJ found that Craig Milum did not interrogate Zulema Ruiz when he asked her if she was distributing union pins during "work time". [ALJD slip op. at 15]

The General Counsel argues semantics by stating that the question involved "working hours" as opposed to "work time" – and states that an employee is free to solicit and distribute information on behalf of the Union during "working hours." This is interesting in light of the fact that both the General Counsel and ALJ Gontram used both terms during the course of the hearing to mean the time when an employee is supposed to be working or the equivalent of "work time."

Judge Gontram's used the term, "work hours" twice:

A BY THE WITNESS: On one occasion and only one occasion, I saw him asleep on top of the table in the dining room.

Q What time of day was this?

A It was 5:30 a.m.

Q Was anyone with him?

A Yes. I don't know her name, but there was an Indian that worked outside also with him.

Q Do you know who Denise Knox is?

A Yes. It was her, yes.

Q At 5:30 a.m., was Soe Min to have been at work?

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JUDGE GONTRAM: Well, I agree. I don't think we need this witness to tell us what his **work hours** were. Sustained. [Tr. 1142]

JUDGE GONTRAM: Now if a person works -- a person's **work hours** are 4:00 o'clock to whatever, 3:00 o'clock in the afternoon, the person has to report early in order to be at their place by 4:00 o'clock? In other words, it is not sufficient to report on time. They have to actually be in the facility and with the appropriate garb on to be on time? [Tr. 1974]

The General Counsel's used the terms on four occasions:

Q Okay. Give me an example of when an employee has left work without permission and you've given them a verbal warning?

A Like what?

Q Well, isn't it true that sometimes employees leave their work area to go heat their lunch in the lunchroom?

A During the working hour?

Q During the **working hour**.

A They only go to restroom and water fountain.

Q You've never seen an employee leave during work, during **working hours**, to go heat their lunch in the lunchroom early? [Tr. 707]

Q You're not allowed to talk or use your cellular phone, correct?

A Yes.

Q And do you remember the circumstances surrounding this warning?

A She was talking on her cellular phone while she was working. We needed to get all the work done right away.

Q She was on her phone during **work hours** talking to someone?

A Yes.

Q How often would this person do that?

A This was the first time I saw her doing that. So I warn her.

Q You gave her the warning.

A Yes.

Q How about afterwards?  
A Afterwards, I didn't see her.  
Q And are employees allowed to talk on their cellular phones during work?  
A During their working time, no. Only during their break time." [Tr. 788-789]

Q So this guy or this person, I'm sure if Valentino is a man or woman, was smoking their cigarettes while they should be working, right?  
A Yes.  
Q How many times had you seen him do that?  
A One time.  
Q One time before?  
A One time in the sorting area and then one time in the lunch room.  
Q In the lunch room. During **work hours**?  
A Yes.  
Q And you gave him this written warning?  
A Yes. [Tr. 790]

Q And it says, "Warning been given to you for the following: Leaving without finish your work, not following your supervisor instruction, Jaime, talking on cellular phone during **work hours**, absent on Saturday, no call in." Right?  
A Yes.  
Q So she did all these things?  
A Yes.  
Q And you gave her this written warning?  
A Yes.  
Q And then on the bottom it says, "Your next absence and failing your warning, your job will be terminated."  
A Yes. [Tr. 800-801]

The General Counsel's argument also misstates the testimony. The only testimony on the record involving the distribution of any type of union button is that of Zulema Ruiz regarding a conversation that she had with Craig Milum on 27 June 2006, and it contradicts the General Counsel's argument:

Q: And what -- tell me what, if anything, did Mr. Milum tell you?  
Ruiz: A: He told me if I was handing buttons over to employees during **work hours**.  
Q: And what did you tell him?  
Ruiz: A: That I had only given one to Luz, but not during **work hours**. [Emphasis added; Tr. 414-415]

It appears from this statement that Ruiz was aware of the fact that she should not be distributing anything during **working hours**. No disciplinary action of any kind was taken against Zulema Ruiz or anyone else that related in any way to the distribution of any type of union buttons. Thus, there is absolutely no basis for a finding that Milum interrogated Zulema Ruiz, and the ALJ's decision should be upheld.

**E. The ALJ Did Not Err in Refusing to find that Milum Acted Illegally By Attempting to Cause the Arrest of Union Handbillers.**

The General Counsel alleged that Milum violated the act by soliciting third parties to contact law enforcement agencies. The ALJ found that the General Counsel had failed to present any evidence that protected rights were impacted by Milum's actions, and that the cases cited by the General Counsel related to actual police action or threat of such action directed toward individuals engaged in protected activity, i.e., interference with or coercion of employees. Thus, the ALJ dismissed the allegation.

First, the General Counsel misstates the testimony when: (1) he alleges that Milum "repeatedly approached law enforcement authorities to have them force handbillers to stop and encouraged his customers to do the same."<sup>75</sup> Craig Milum's actual testimony, however, was that he had a discussion with someone at the Scottsdale Police Department, and "What I was trying to do was put a stop to trespassing and doing things that are against the law. [Tr. 329-330]; (2) he alleges that "In another instance, the police responded to union leafleting across the street from a shopping center housing another of Respondent's customers. The testimony on pages 1072-1073 does not even relate to this claim; and (3) he alleges that "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 hand billing had ceased. The testimony on page 396 does not

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<sup>75</sup> The citations to the transcript do not support this conclusion: the testimony on pages 63, 88, 90, 91, and 102 does not even relate to this statement.

relate to this claim.

Second, the General Counsel seems to overlook the fact that this case does **not** deal with the traditional situation where there non-employee union representatives are picketing and trying to communicate with the employees that they are attempting to organize – at the employer’s place of business where the employees are actually physically located. This case deals with a situation where the non-employee union representatives are picketing the customers of the employer [Milum] – innocent third parties<sup>76</sup> -- at the customers’ places of business and at a location where the employees that they are trying to organize have absolutely **no** physical relationship.

Third, the General Counsel’s reliance on *Wild Oats Community Markets*, 336 NLRB 179 (2001), in support of its contentions is misplaced. *Wild Oats* dealt with a situation where the union was trying to organize the grocery store’s employees – not the customers of the grocery store at a remote location. The grocery store was located in a shopping center that was owned by a third party. The union representatives picketed in the no parking area in front of the grocery store – a common area to which the grocery store had an appurtenant easement. Furthermore, prior to this incident the grocery store had permitted various charitable, as well as for-profit, organizations to set up displays and distribute literature both inside the grocery store and outside the store. The Board held that it is “well established that an employer may properly prohibit solicitation/distribution by non-employee union representative on its property if reasonable efforts by the union through other available channels of communication will enable it to convey its message, and if the employer’s prohibition does not discriminate against the union by permitting other to solicit/distribute.” *Wild Oats* at 180. The employer must have a property interest in the property that entitles it to exclude other individuals from the property. In *Wild*

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<sup>76</sup> It is undisputed that the Union did not have any relationship with any of Milum’s customers.

*Oats* the Board ruled that the grocery store did not have such an interest in the common area in front of its store, and therefore the grocery store had violated the act by causing the attempted removal of the union representatives. Since the grocery store did not have the exclusionary interest in the property, the Board did not proceed to the next step of determining whether the union representative had other reasonable alternative means of communication and whether the grocery store discriminately applied a no-solicitation policy. Thus, this case applies to situations where the union is picketing at the employer's place of business – not the customers of the employers place of business – and at a location where the employees that the union is attempting to organize are actually located.

Similarly, the General Counsel's reliance on *Corporate Interiors, Inc.*, 340 NLRB 732 (2003), is misplaced. *Corporate Interiors* also dealt with a situation where the union was picketing at the employer's operation – not at the location of the customers' of the employer. The analysis set forth above with respect to *Wild Oats, supra*, is the same in analysis set forth in *Corporate Interiors*.

Fourth, it is undisputed that as part of the “corporate campaign”, the union organizers went onto private property to distribute the disparaging materials to the **customers** of Milum's restaurant **customers** at the customers' business locations.<sup>77</sup> In one instance the transcript documents the fact that the Union representatives actually went inside one of the restaurants to distribute leaflets. [Tr. 334] In Arizona, trespass is a crime.<sup>78</sup> Thus, “trespassing” is not protected activity. It is common knowledge that where there is a violation of state law or a threatened violation of state law the city police are the agency that one calls to report the incidents and to request assistance. As set forth in Section 13-1502, a reasonable request to leave issued by either

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<sup>77</sup> [Tr. 315–316, 319, 332; GC 64] The General Counsel did not introduce any evidence that the Union organizers were not distributing materials on private property at the business operations of Milum's customers.

<sup>78</sup> A.R.S. §§ 13-1502 and 13-503

the owner of the real property or any other person having “lawful control over such property” are given equal standing under the law regarding initiating a trespass complaint. Although the General Counsel apparently believes that commercial tenants should not enjoy this basic private property right, the State of Arizona has indeed provided commercial tenants with exactly this right.

As set forth in the case of *CSX Hotels, Inc. v. NLRB*, 377 F.3d 394 (4<sup>th</sup> Cir. 2004), contacting the police does not violate the Act where the individuals involved are reporting their concerns and are asking the city to enforce the law. *CSX Hotels, Inc.* involved a situation where the employer contacted the police and the city attorney and reported that concerns about the picketers who were offering handbills to people in cars at the entrances to the employer’s business.<sup>79</sup> The manager of the supermarket demanded that the picketers leave the premises and summoned the police. The police directed the picketers to leave or face arrest, and the picketers left peacefully.

In this case the Union was interfering with the business operations of Milum’s customers and violating the law. There is no question that the Union was not trying to communicate with Milum’s employees because Milum’s employees were not located at Milum’s customers’ operations. Given these circumstances, Milum’s customers were looking to Milum to suggest solutions to the problems since they were innocent third parties that had no relationship to or with the Union. Craig Milum responded to the situation by telling them to call the police if there was a violation of the law. Milum’s statements to the effect that its customers call the police do not violate the Act. As Phoenix Police Officer Davis testified, Milum never asked the police to

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<sup>79</sup> In *CSX Hotels, Inc.* the picketers were not protesting any unfair labor practice by the supermarket but were instead protesting the building contractor's hiring nonunion employees to renovate the supermarket.

curb or prevent lawful union activity.<sup>80</sup> [Tr. 1076-1077] Furthermore, there is no evidence in the record that the **employees'** rights were affected whatsoever, and the ALJ's decision should be upheld.

**F. The ALJ Did Not Err in Refusing to Find that Milum's Statement to Guzman Concerning Video Cameras Created an Impression of Surveillance.**

The General Counsel excepts to the ALJ's finding that the statement made by Rafael Parra did not create an impression of surveillance. The General Counsel relies on the case of *Meiser Elec., Inc.*, 316 NLRB 597 (1995), to support its argument. Such reliance is misplaced. *Meiser* dealt with a situation where there was uncontroverted testimony employer told two (2) employees that it was going to have a video camera in the parking lot where the union was scheduled to meet, that any employee who showed up would be terminated, and that the employer had to "keep a close eye on you guys now that all this shit's out."

The facts in the instant case are totally different. Rafael Parra has been the Chief Engineer at Milum for nine (9) years, and he works throughout the plant. [Tr. 1591–1592] During the day he speaks to and jokes with the employees. [Tr. 1593] Rafael Parra testified that he had a friendly relationship with Evangelina Guzman and would joke with her about work and soccer. [Tr. 1593–1594; 1603] On one occasion Rafael Parra was installing the bases for the replacement video camera system and Evangelina Guzman asked him what he was doing. [Tr. 1595. Rafael Parra explained what he was doing to her. [Tr. 1595] Then Evangelina Guzman asked what she was going to look like in the cameras, and Rafael Parra jokingly replied, "I told her you're going to be seen in black and white because of her dark color she has." [Tr. 1595–1596] As Rafael Parra testified, "She just broke out laughing and then after that she continued talking, chatting, joking." [Tr. 1604]

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<sup>80</sup> Officer Davis, a twenty year veteran, is part of the Community Response Team that deals with union activity.

Evangelina Guzman's take on this conversation is slightly different. [Tr. 588] Guzman admits that she asked Raphael Parra what he was doing and he explained what he was doing to her. Guzman states that she asked why they were installing the cameras. Guzman remembers, however, that Rafael Parra "started to laugh and he told me because they wanted to keep me in check and he, also, told me that they were all going to be -- they were all going to be in color but I was going to be in black and white and he started to laugh and he left." [Tr. 588]

The fact that the statements are related so closely by Guzman and Parra and the fact that Guzman admitted that Rafael Parra was laughing, shows that this was a casual and friendly conversation. This simple conversation cannot reasonably be viewed as creating an impression among the employees that their union and concerted activities were under surveillance. Furthermore, this conversation occurred inside the plant – not a hot bed of union activity – and not where the Union conducted its meetings.

**G. The ALJ Did Not Err in Failing to Find that Milum's October Suspension of Minjares Violated Section 8(a)(3).**

The General Counsel argues that ALJ Parke neglected to recognize that it is the Board's duty to evaluate whether the reasons proffered by an employer for disciplining Minjares are the actual reasons or mere pretext. There is nothing in the facts or the record to indicate that ALJ Parke neglected her duty. To the contrary, ALJ Parke analyzed the situation, and as set forth at pages 23-24 of her decision, she analyzed the very factors with which the General Counsel is concerned. Based upon her thorough analysis of the facts, ALJ Parke found that the Respondent has successfully borne its burden of showing that it would have disciplined Ms. Minjares in the circumstances regardless of her union activities." [ALJD Slip op. at 24] The case of *Desert Toyota I*, 346 NLRB No. 3, slip op. at 3-4 (2006) that was cited by the General Counsel does not create a new standard, but merely restates the standard set forth in *Wright Line, a Div. of Wright*

*Line, Inc.*, 251 N.L.R.B. 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); *NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393, 399, 76 L. Ed. 2d 667, 103 S. Ct. 2469 (1983); and *Missouri Portland Cement Co. v. NLRB*, 965 F.2d 217, 219 (7th Cir. 1992).

The facts presented by the General Counsel are incomplete and misleading. The General Counsel states that “ALJ Parke's decision also overlooks Respondent's wildly conflicting testimony concerning the circumstances leading up to Minjares' suspension,”<sup>81</sup> and that “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 situation. Indeed, Respondent claimed to consider materials that did not even exist, i.e., prior disciplinary warnings in her personnel file.” To the contrary, the testimony of Craig Milum and his two supervisors, Angela Kayonnie and Jaime Chavez, is reasonably consistent rather than wildly conflicting. Craig Milum described who made the decision to suspend Minjares:

Q So those were the only two things you considered when you suspended her in October, right?

A I audited the decision that Angela and Jaime made and so I wasn't involved in all the details of her circumstances in the context like I was researching and thinking about it and discussing it. I simply, after they made the decision, I told them you need to make this decision and I emphasized to them absolutely make sure you do not let the factor that she seems to be a firm union supporter, do not let that enter your mind in making the decision. Neither should you be more like -- you know, issue some more rigorous action than you otherwise would, nor should you do something lesser than you otherwise would. Simply ignore the fact that you believe she has any preferences one way or the other on union and make a decision completely without that and tell me what you decide. That was approximately my part in it. I didn't make the decision. [Tr. 296-297]

Angela Kayonnie's testimony regarding who made the decision to suspend Minjares is as follows: Page 758 of the hearing transcript records Ms. Kayonnie's statement on who made the

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<sup>81</sup> General Counsel's Exceptions Brief at 44

decision to suspend Ms. Minjares:

Q And what did you discuss with Mr. Milum?

A We just told Craig about just what happened with Maria. And he just told me that it was between me and Jaime. So I told Jaime that you worked the evenings, she works for you, so I don't know what you're going to do. So he came up with this suspension thing.

Q And the decision to come with the suspension was Jaime?

A Yes. [Tr. 759]

Jaime Chavez' testimony regarding who made the decision to suspend Minjares is as follows:

Q And when she came back to work two days later, you discussed this with Angela, correct?

A Correct.

Q What did you discuss with Angela?

A We saw that she had had prior problems before and also that she had left. And then we decided to talk and that we were going to suspend her. But it was my decision.

Q But you discussed that with Angela?

A Yes.

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Q And did you go back and look at her employment file to see what kind of problems she had in the past?

A We saw that she had a warning before, or two. I really -- I don't recall really, but we did have to look at her file. [Tr. 833]

On a prior occasion the General Counsel interpreted Chavez' statement that he did not recall talking with Craig Milum to be a denial that he spoke with him. In this case the General Counsel interpreted Chavez' statement, 'I don't recall really', as an affirmative statement that he did review documents.

The facts of the situation involving Minjares are pretty clear cut. It is undisputed that Minjares was dissatisfied with her job at Milum because she did not like the fact that in a commercial laundry operation, like Milum, there was not a set stop time each day. [Tr. 472] Minjares wanted to spend more time with her children. [Tr. 472] Unfortunately, that is a reality that many of us as employees face in our employment situations: if we want the job and the

paycheck we work when we are told to work.<sup>82</sup>

In order to understand the action taken by Milum, Minjares' work record must be examined. Minjares was originally employed at Milum in January 2006, and continued to work until 9 May 2006. On 9 May 2006, Minjares left work without notice and did not return for two (2) months. [Tr. 481; GC 56] Minjares was scheduled to work on 10 May 2006, and she neither reported to work that day nor did not call or notify anyone that she was going to be absent for work. [Tr. 479] Minjares admitted that she quit work without notice when she left on 9 May 2006 and did not return. [Tr. 481] In fact, Minjares just did not just fail to return to work, she quit without notice and then reapplied after a lapse of two (2) months. [Tr. 480–481]

It is important to note that while Minjares was employed during this first period of time from January through May 2006, she testified that she engaged in union activities: she attended and spoke out at the work stoppage on 4 March 2006, and she was individual who requested that the company supply name tags for the employees. [Tr. 495 – 498] Even though the company was aware of this union activity, when Minjares returned to Milum in July 2006 and requested a job, she was hired. [Tr. 481] If Milum had wanted to discriminate against Minjares or to curb her union activities, then Milum would have refused to rehire her in July 2006 as the company had a solid basis for refusing to hire her. The fact remains that Milum did hire Minjares in July 2006.

Minjares admitted that when she was rehired in July 2006, that there were “conditions they gave me, in order to return to work”, one of which was “not again leaving the company’s employment without notice.” [Tr. 477; GC 56]

It is not disputed that Minjares engaged in union activity and that Milum was aware of that fact. The General Counsel, however, failed to establish a motivational link between Minjares’ union activities and the disciplinary action. Further, the disciplinary action resulted

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<sup>82</sup> It is undisputed that the employees were compensated for the time that they worked in accordance with the law.

from conduct that was not protected activity.

The timing of Minjares' disciplinary action was totally unrelated to any union activity engaged in by Minjares. As set forth above, Minjares took part in the work stoppage on 4 March 2006. Thus, Milum was aware of the fact that she supported the Union. Furthermore, Minjares was rehired in July despite the fact that she was apparently a union supporter and had violated the company's rules. Minjares may well have been distributing fliers to employees before work in October, but she was only disciplined when she left work without permission.

Despite entering into the agreement with Milum as a condition of employment upon her return to work in July 2006, just three (3) months later Minjares left work without permission. Minjares admitted that she felt sick and left work on 16 October 2006 without permission and without giving notice to her supervisor. [Tr. 474-475] Minjares testified that she could not locate her supervisor. [Tr. 474] Evangelina Guzman, however, contradicted Minjares' testimony when Guzman testified that Minjares told her that day that she was leaving work and that Minjares did not intend to notify Jaime Chavez. [Tr. 627-628] Evangelina Guzman also testified that Minjares told Guzman that she was not going to notify her supervisor because she did not think that Jaime Chavez would let her leave work. [Tr. 628] Guzman confirmed in her testimony that the company policy is that you have to have permission to leave work [Tr. 628], and that whenever Guzman was sick, she told her supervisor, Angela or Jaime, and she was "always" permitted to leave. [Tr. 628] If Guzman had been able to obtain permission to leave when she was ill, there is no reason to believe that Minjares could not have done the same. This further undermines Minjares' testimony that she could not locate her supervisor and that she did not think that she would have been given permission to leave when she was sick. [Tr. 474]

Minjares also admitted in her testimony that she knew that she was to notify her

supervisor if she was going to be absent and that she had agreed to do this as a condition of her re-employment in July 2006.<sup>83</sup> [Tr. 482] Thus, it is undisputed that Minjares knew that it was a violation of the company policy to leave work without permission or to be absent from work without notice – and that she had agreed not to do this as a condition of her re-employment in July 2006 -- yet she left her job on 16 October 2006 without authorization and without notice. Disciplinary action was clearly warranted on that basis alone.<sup>84</sup>

But the situation involving Minjares got worse after her abrupt and unauthorized departure from work because Minjares then failed to return to work for the next two (2) scheduled work days. [Tr. 486] Minjares admitted that she did not call the company to tell them that she would not be returning to work on 17 October 2006 or on the 18<sup>th</sup> of October. [Tr. 486] Minjares stated that she told her mother to tell the company that she would not be returning to work the **next** day. [Tr. 474-475] Her mother, Luz Acosta, testified that she spoke with Jaime Chavez the next day, 17 October 2006, and told him that Minjares was ill and would not be coming into work. [Tr. 555-556] Acosta testified that Jaime responded, “that was fine, for her to return the next day.” [Tr. 556] Thus, even if we accept this as being true, it is clear that Jaime Chavez believed that permission to be absent was being granted for that single day, 17 October 2006. It is undisputed that Minjares did not return the next day either [18 October 2006], and that Minjares neither called the company nor did her mother notify the company of that fact. With Minjares’ track record, it was only logical to believe that Minjares had voluntarily quit once again.

The fact remains, however, that Minjares’ mother’s notification to the company

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<sup>83</sup> Guzman admitted in her testimony that the company policy is that an individual who is ill and unable to work is to ask his or her supervisor for permission to leave their job. [Tr. 628] And, Guzman admitted that when she was ill in the past, she asked her supervisor for permission to leave, and they “always allow me to leave”. [Tr. 628-629]

<sup>84</sup> The written warning notice was based upon the fact that Minjares left work without permission. [GC 56]

regarding Minjares' absence on the 17<sup>th</sup> of October, does not justify Minjares' departure from work on 16 October 2006 without permission and without notice.

It is undisputed that Minjares left work without permission, failed to report for scheduled work, and was late to work. [Tr. 493–494; GC 56]

Milum issued warning notices to employees who left work without permission prior to the advent of the Union on 4 March 2006 and after that date. Warning notices were given to other employees who left their jobs without notice or authorization and who failed to report to work and did not notify the company. Examples of this include and are evidenced in R 48:

Prior to 4 March 2006: pages 28, 29, 30, 32, 33, 41, 42, 43 [bottom], 43[top], 44, 45, 46, 55, 62, 64, 72, 73, 76, 77, and 78.

After 4 March 2006: pages 82, 84, 85, 89, 90, 91, 92, 98, 99, 103, 109, 110, and 111.

Similarly, written warning notices were given to employees for coming to work late. Examples of this include and are evidenced in R 48:

Prior to 4 March 2006: pages 2, 3, 5, 25, 26, 38, 50, 63, 65, 66, and 71.

After 4 March 2006: pages 80, 81, 100, 101, 102, 106, 107, 108, 114, 115, 116, 117, 118, 121, 122, and 123.

Thus, Minjares was not treated differently than the other employees who had engaged in the same conduct. The situation was compounded, however, by the fact that Minjares not only violated the company rules and left without permission, but breached her agreement with Milum that was a condition of her employment. After disappearing in May 2006 and not returning to work for two (2) months, Minjares' track record at work was not good. The subsequent two (2) day suspension and probation that was given to Minjares was more than justified.

Leaving work without permission, failing to report an absence on a scheduled work day, being late to work and breaching a condition of employment do not constitute protected activity.<sup>85</sup> The bottom line is that Minjares was suspended from work for two (2) days because she had walked off the job and disappeared on two (2) occasions within a six (6) month period of time in addition to being late and failing to call or report for scheduled work. [GC 56] When Minjares returned to the company on 19 October 2006, she was given a written warning notice and suspended for two (2) days and on probation for ninety (90) days. [GC 56] Minjares' suspension had everything to do with her unprotected conduct and nothing to do with her union activities.<sup>86</sup> It is clear from the record that no further disciplinary action was taken from the 19<sup>th</sup> of October 2006 through the date of the commencement of the hearing in March 2007.

Minjares' own testimony supports a finding that the disciplinary action was not pretextual. In response to questions regarding whether she had been late to work prior to the issuance of the warning notice and suspension she stated:

“In November -- in November, I couldn't -- I didn't -- I didn't arrive late because I'd been in suspension and could not arrive late. Before that, after that, I don't know.” [Tr. 484]

On the basis of the foregoing, the discipline of Minjares was justified and lawful, and the ALJ's finding should be upheld.

**H. The ALJ Did Not Err in Failing to Find that Milum's December 2006 Suspension of Guzman Violated Section 8(a)(3).**

Once again the General Counsel argues that ALJ Parke neglected her duty to examine the evidence in making her finding with respect to Evangelina Guzman. And, once again the facts set forth by the General Counsel are incomplete and misleading.

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<sup>85</sup> The reasons for the suspension and probation period were set forth on the disciplinary warning, GC 56.

<sup>86</sup> If the General Counsel argues that Minjares was disciplined for signing GC 104, it must be noted that Minjares' name is not the first on the document, and that Maria Rojas, Maria Teresa [Teresa Vasquez] and Luz Acosta also signed this document and did not receive any disciplinary warnings or suspensions as set forth herein.

The General Counsel makes it appear that Milum did something wrong when it hired Guzman after her work permit expired:

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. 210, 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. 273)<sup>87</sup>

As General Counsel is surely aware, Guzman is not a U.S. citizen. When Guzman's authorization to work in the United States expired, Guzman did not have new authorization, and Milum had no legal option but to cease employing her. [8 U.S.C. §§1324(a)(1) and 1324(a)(2)]. On or about 2 October 2006, Milum Textile Services received a copy of a letter with attachments that was apparently sent from Representative Raul M. Grijalva to Guzman dated 2 October 2006. In this letter it indicates that Guzman's application for employment authorization had been approved on 30 September 2006 – two (2) days after Guzman's prior authorization expired. Unfortunately, correspondence from a U.S. Congressman indicating that an alien's application for authorization to work in the United States has been granted and/or a website that so indicates the same does not constitute an exception to or exemption from the I-9 requirements. Every individual who is employed must present the actual card that is issued by the U.S. Department of Homeland Security. When Guzman appeared on 10 October 2006, requested employment, and provided documentation that she was legally entitled to work in the United States, she was hired. A new I-9 form was prepared at that time, as required by federal law, which indicated that Guzman was authorized to work in the United States through 28 September 2007. In addition to requiring that an employee be discharged when their legal status lapses, federal immigration law requires that

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<sup>87</sup> General Counsel's Exceptions Brief at 46

such not receive any benefit due to the employment eligibility lapse (such as striking of past negative work record). If the individual desires to work again for the employer, the employer is prohibited from giving the individual any extra consideration stemming from the past employment in the hiring decision. To do otherwise would constitute a felony, i.e., assisting or encouraging an unauthorized alien to obtain employment in the United States. [*U.S. v. Oloyede*, 982 F.2d 133 (4<sup>th</sup> Cir. 1992); 8 U.S.C. §1324(a)(1)(D)]

The General Counsel states that “[b]ecause Christmas fell on a Monday, Guzman was assigned to work restaurant orders that day, along with coworker Maria Torres. (581, 762, 624)”<sup>88</sup> The references to the transcript cited by the General Counsel do not support this statement, and actually there is not any testimony on the record to the effect that Guzman was assigned to work restaurant orders along with Maria Torres. In fact, Guzman testified that on the 25<sup>th</sup> of December 2006, Maria Torres was working in “the other” area:

Q Did you work with Maria Torrez, T-o-r-r-e-z, on the 25th of December?

A She was in one area and I was in the other. [Tr. 624]

Guzman went on to testify regarding the names of the other individuals who in fact worked on restaurant orders when she worked on them:

Q BY MR. GIANNOPOULOS: (continuing) Ms. Guzman, when you worked restaurant orders, who else would work on restaurant orders?

A Maria Teresa Valesquez and Maria Martinez. [Tr. 645]

Thus, the testimony clearly shows that there is no basis for General Counsel to state that both Guzman and Torres were working concurrently in restaurant orders on December 25, 2006 or any other day.

The General Counsel argues that “[u]nlike Smithfield Foods, Respondent presented no evidence that any employee, except Guzman, received a three day suspension and 90 day

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<sup>88</sup> General Counsel’s Exceptions Brief at 46

probation as a result of their first offense for leaving work early or disregarding a supervisor's instructions.”<sup>89</sup> This is simply not true. The record shows that the 25 December warning notice was **not** the first offense of disregarding a supervisor's instructions and refers to a prior warning notice that was dated just three months earlier on 26 September:<sup>90</sup>

Q Did you give Evangelina Guzman a warning notice in September of 2006? I'll ask you to look at Respondent's 8, please.

A Yes.

MS. LAWS: I'd like this marked Respondent's 42, please, Your Honor.  
(Respondent Exhibit 42 marked for identification)

MR. GIANNOPOULOS: And I'd only object, Your Honor, to the form of the question. The warning notice is dated September 26th of 2006 and I believe the question stated October.

MR. GIANNOPOULOS: Oh. All right.

MS. LAWS: I'm sorry.

JUDGE GONTRAM: Hopefully, the record will clear that up. Thank you.

Q BY MS. LAWS: Did you give Evangelina Guzman that warning notice -

A Yes.

Q -- which is Respondent's 8?

A Yes.

Q Okay. I'd ask you to look at what's been marked as Respondent's Exhibit No. 42. do you have that? Can you identify this document?

A Evangelina came up to me and she told me she can -- she can take Monday off because she has to baby-sit for another -- another lady, and I asked her that she can't, she has to work on that day, she can do on her days off, and I told her to that she needs to talk to her baby-sitter that you're -- that she's working on that day.

Q Is this --

MR. GIANNOPOULOS: Objection. Move to strike as not responsive, Judge.

JUDGE GONTRAM: Well, overruled. She explained what she did and why she did it.

Q BY MS. LAWS: Is Respondent's Exhibit 42, this document, is that in your handwriting?

A Yes.

Q All right. And do you recall when you wrote it? It's dated September 26th, '06.

A Yes.

Q Is that the date you wrote it?

A Yes.

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<sup>89</sup> General Counsel's Exceptions Brief at 49

<sup>90</sup> R 42

Q All right. Did you give this note to the front office of Milum?  
A Yes.  
Q When Evangelina Guzman came to you and asked for Monday, September 25th, '06 off for baby-sitting, what did you tell her?  
A I told her to tell her friends that she has to work on Monday, that's her working day, and she said she was going to go ahead tell her friends that she has to come into work.  
MR. GIANNOPOULOS: Objection, Your Honor. If I could ask that the document itself be taken away from the witness --  
JUDGE GONTRAM: All right.  
MR. GIANNOPOULOS: -- so that she can testify from her memory as opposed to looking at the document.  
JUDGE GONTRAM: I noticed that she was simply reading from the document. Let's proceed.  
Q BY MS. LAWS: Is baby-sitting for a friend a valid excuse for not coming to work?  
A No.  
Q I can't hear you.  
A No.  
Q In September, 2006, what was Evangelina Guzman's regular days off? What were they?  
A Thursday.  
Q Did she also have Sunday off?  
A Yes. Laundry's closed.  
Q Do you recall if Guzman showed up for work Saturday, the 23rd of September?  
A No.  
Q Do you recall if she did or did not?  
A She didn't work Saturday and Monday.  
Q Did she show up for work on that Saturday, the 23rd?  
A No.  
Q Did she show up that Sun -- o, excuse me, Monday, the 25th of September?  
A No. [Tr. 1847-1850]

Based upon the foregoing it is clear that the warning notice given to Guzman on 25 December 2006 was not Guzman's first offense.

The facts presented by Milum at the hearing that provided the basis for ALJ Parke's decision that the suspension of Guzman was not unlawful are as follows:

**1. Background Leading Up To Suspension.**

Evangelina Guzman was a disgruntled employee who did not like the work that she was

assigned to do nor the reality of the industry in which she was employed. Guzman admitted that she did not like doing restaurant orders: “restaurant orders is a difficult job because you have to pay very close attention to the orders and you always have to be checking them in the computer.” [Tr. 623–624] Guzman was, however, assigned to do restaurant orders one (1) day each week as a substitute for Teresa Velazquez.<sup>91</sup> [Tr. 630–631] Guzman admitted that Velasquez’ hours in her specific job are different from Guzman’s. [Tr. 631] One of the written warning notices that Guzman received stated that Guzman had informed Angela that Guzman only wanted to work in certain positions. [GC 98] Guzman was employed in the production department, did not have an assigned position, and was assigned to do various jobs by the supervisors each day. [Tr. 618, 627] In addition, Evangelina Guzman did not like the fact that there were not set hours of work each day. [GC 104] Unfortunately, that is a reality in a commercial laundry operation like Milum, as well as a problem that most of us as employees face in whatever type of employment we seek: we must do the work that is required and continue to work until the job is finished.

Furthermore, Guzman did not like the fact that there was not a firm start and stop time each day. [Tr. 624] Milum, however, does not have control over the volume of work that it must process every day, and the volume of work in production fluctuates from day to day. [Tr. 1962-1964] Thus, as Guzman admitted, in the production area where she worked in the second shift there was not a set stop time each day. [Tr. 618; See also testimony of Maria Martinez who has a “station” at Tr. 1563] Unfortunately, that is a reality in the commercial laundry business, and if an individual wants to be employed in such a business then he or she will have to work within the realities of that business.

## 2. Analysis.

The General Counsel alleges that Milum violated the Act when it suspended Evangelina

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<sup>91</sup> Teresa Velasquez’ full legal name is “Maria Teresa Velasquez Garcia”. [Tr. 1083]

Guzman on 26 December 2006. It is important to note that this incident occurred ten (10) months after the start of the Union's organizational drive. It is also important to note that Evangelina Guzman received a disciplinary notice on 23 September 2007, but that is not included in the complaint. Evidence regarding this incident, however, was presented at the hearing and is important to the totality of the circumstances involving the conduct of Guzman and Milum's response thereto.

**a. Prior Misconduct.**

On the 23<sup>rd</sup> and the 25<sup>th</sup> of September, 2006 – seven (7) months after the Union organizing campaign began -- Guzman failed to show up for two (2) days of scheduled work, and received a written warning notice specifically stating that fact. [R 8] Guzman admitted in her testimony that even though she knew that the company policy was that employees were required to call in to report their absences in advance, and she was scheduled to work those two (2) days, she did not report for work those two (2) days, and that she did not call to report her absence. [Tr. 607 – 608] It is undisputed that each employee worked five (5) days each week since the company does not work on Sundays and each employee has one additional day off. [Tr. 1964] Thus, each employee had two (2) days each week to take care of their personal business. This was confirmed by Guzman who admitted that she had Thursday off. [Tr. 608] Thus, if an employee had to take care of personal business, they are required to take care of it on their days off – not on scheduled work days. When Guzman was asked about the incident she testified that she had asked for the day off for a “job interview”,<sup>92</sup> and her request was denied. [Tr. 608] This testimony does not fit with the fact that she allegedly asked for a single day off for a “job interview”, but took off two days without explanation. [Tr. 608] The reality is that Guzman acted in total disregard for her job or the company's policies or production considerations, and did

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<sup>92</sup> An employer is not required to give a person a day off to go to a job interview.

exactly what she wanted to do – took the two (2) scheduled work days off without permission and without notice and in specific and direct defiance of her supervisor’s denial of her request for one of these days off.

**b. Milum’s Conduct on 26 December 2006 Was Not Unlawful.**

Now we turn to 25 December 2006. It is important to note at the outset, that once again, that this was three (3) full months after Guzman had received a written warning notice for failure to report for scheduled work in September 2006.

**(1) Facts**

On 25 December 2006 there was a major breakdown of the equipment<sup>93</sup> which set production behind for several hours. [Tr. 1851] Guzman testified that around 3 p.m. that day she was told to move to another area to complete work that had to be done, [Tr. 625] and that she did not think that was “fair”. [Tr. 625] Guzman informed her supervisor, Angela Kayonnie, that she only wanted to work in certain positions. [GC 98] Guzman testified that on all other days that she had substituted for Teresa Velasquez and Maria Martinez,<sup>94</sup> she had been permitted to leave when the work at that station was finished. [Tr. 645-646] But this day was not the normal day with the equipment failure. Furthermore, the fact that Guzman substituted for an individual with a set station did not change her classification from that of a general production employee, and regardless of her classification, overtime may be required. [Tr. 1966–1970]

Around 5 p.m. Guzman testified that she “told” her supervisor, Angela Kayonnie, that she was going to leave. [Tr. 619] Guzman further testified that at that time she had finished her eight (8) hours and was ready to leave. [Tr. 625] The reality is that according to the time clock

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<sup>93</sup> There was a major problem with the compressed air system and it took two (2) hours to repair. Thus, there was a two (2) hour delay in the operation that day. [Tr. 1851, 1855; GC 98]

<sup>94</sup> Maria Martinez testified that even having a station, on occasion she has been asked to stay after the work at her station is complete to help. [Tr. 1577]

records for that day Guzman had only worked 7.75 hours as of 5 p.m. when she clocked out and left work. [GC 126] The time clock records for that day show that other employees in the afternoon shift employees had worked later to complete the job when Guzman had taken off: Maria Torres worked until 7:33 p.m., and Minjares worked until 8:53 p.m.

Even the supervisor, Angelina Kayonnie, did not go home when her shift ended at 3 p.m. because of the extraordinary nature of the problems that day – even though she had started at 5 a.m. that day. Instead, Angela Kayonnie continued to work until 6:00 p.m. [Tr. 1854-1855]

The General Counsel alleges that Evangelina Guzman was “suspended” for wearing a metal union button which was prohibited under an overly broad rule. It is not disputed that Guzman engaged in union activity and that Milum was aware of that fact. The issues are (1) whether there was a motivational link between the adverse action and Guzman’s union activity, and (2) whether there was a legitimate basis for any action taken.

(2) **Evangelina Guzman Was Not Treated Disparately.**<sup>95</sup>

There is nothing in the record that shows that Guzman was treated any differently from any other employee for leaving without permission. The situation involving Evangelina Guzman was even more aggravated because there had been an equipment breakdown. As Angela Kayonnie testified, production employees were asked to work late if there was an equipment breakdown. [Tr. 1844]

Warning notices were given to other individuals who left their jobs without notice or authorization and who failed to report to work and did not notify the company. Examples of this include and are evidenced in R 48:

Prior to 4 March 2006: pages 28, 29, 30, 32, 33, 41, 42, 43 [bottom], 43 [top], 44,

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<sup>95</sup> This section is applicable to both incidents involving Guzman, i.e., the December and the January incidents. For sake of brevity, the section will not be set forth below, but is incorporated by reference therein.

45, 46, 55, 62, 64, 72, 73, 76, 77, and 78.

After 4 March 2006: pages 82, 84, 85, 89, 90, 91, 92, 98, 99, 103, 109, 110, and 111.

Prior to 4 March 2006, written warnings were given to employees for leaving before work is finished/without permission. Examples of this include and are evidenced in R 48 at pages 56, 60 [late], 61, 74, and 75 [absence, no call]. And, a written warning notice was given where an employee had lied about their absence. [R 48 at page 96] Furthermore, prior to 4 March 2006, written warning notices were given to employees for refusing to do the job that the employee had been told to do. Examples of this include and are evidenced in R 48 at pages 4, 31, and 54. Lydia Roberts, an eleven (11) year employee at Milum, testified that Craig Milum told Maria Salas in August 2005 – prior to the union organization effort starting at Milum – that she would have to do what her supervisor, Angela Kayonnie, told her to do. [Tr. 1189 – 1190]

As set forth in above, other employees had received written warning notices for leaving work without permission. In this case, however, the situation was more severe because Guzman not only left work without permission, but left work after she was specifically told not to leave work, i.e., insubordination. [Tr. 635] Furthermore, this was the second time in three (3) months that Guzman had willfully violated the company's rules. Thus, a three (3) day suspension was appropriate. [GC 98]

(3) **Disciplinary Action Taken Was Based Upon Unprotected Conduct.**

An employer is free to discharge any employee for unacceptable work attitude or performance. As set forth in *Marathon Le Tourneau Co., Longview Div. v. NLRB*, 699 F.2d 248 (5<sup>th</sup> Cir. 1983), Sections 8(a)(1) and 8(a)(3) are not intended to provide a “shield for the incompetent or job security for the unworthy.” Similarly, leaving work without permission is not

protected conduct. In this case, Guzman admitted that she not only left work without permission, but that she left work after she had specifically been told that she could not leave by her supervisor, Angela Kayonnie. [Tr. 635] Such behavior falls outside the protection of the Act. The severity of Guzman's misconduct was compounded by the fact that there had been a severe problem with the equipment that day. The written warning notice and a three (3) day suspension for this conduct was clearly a reasonable response by Milum. [GC 98]

**I. Milum's Conduct on 20 January 2006 Was Not Unlawful**

**1. Facts**

Prior to 20 January 2007 Evangelina Guzman had asked her supervisor, Jaime Chavez, if she could take that day off from work. [GC 100] Jaime Chavez declined her request and told her that she must work on Saturday, 20 January 2007.<sup>96</sup> Once again, when she could not get what she wanted, Guzman took off without concern for her job. Guzman admitted that she did not show up for work on 20 January 2007 although she was scheduled to report to work that day. [Tr. 638] This was the third time in six (6) months that Guzman had either failed to report for scheduled work or had left her job without permission and before the work was completed. Guzman was given a written warning notice for her failure to report for scheduled work – she was not suspended. [GC 100]

In the written warning notice that Guzman received and signed it stated that when Guzman returned to work on 23 January 2007 she informed Jaime that she had been absent because she was looking for a new car. [GC 100] Guzman testified, however, that her absence should have been excused because she was at the emissions station from 10:30 a.m. until 12:30 p.m., that her car didn't pass emissions that day, and broke down after she left the emissions

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<sup>96</sup> There is more work to do on Saturdays. As Jaime Chavez testified everyone works on Saturday and all of the employees are told that they have to work on Saturdays. [Tr. 1738]

station. [Tr. 638–639, 648] Guzman was scheduled to start work at 1 p.m. that day. [Tr. 638] Guzman’s testimony is contradicted by her emissions document that was entered into evidence as GC 108. This emissions test results sheet indicates that Guzman’s car was tested at 10:26 a.m. – not 12: 30 p.m. When confronted with this fact based upon the witness’ own document, Guzman admitted that she had left the emission station at 10:30 a.m., denied that she had testified differently,<sup>97</sup> and that she “didn’t call anybody”: “I needed to repair the car because I needed it to go to work.” [Tr. 652]

Guzman further testified that she called the office and left a message to report her absence at 3 p.m. -- two hours after she was supposed to start work.<sup>98</sup> [Tr. 639] There is no evidence that the message was left or received, and that information was not set forth on the written warning notice that Guzman signed upon her return to work on 23 January 2007. [GC 100]

Guzman testified that she showed the estimate from the mechanic [GC 107] to Angela Kayonnie when she returned to work the following Monday. [Tr. 585] Guzman admits that Angela Kayonnie told her that she did not want to see the document and sent Guzman to talk to Jaime Chavez. [Tr. 585] Despite this fact, Guzman admitted that she did not show the document to Jaime Chavez even though he was the afternoon supervisor. [Tr. 585]

The General Counsel also argues that ALJ Parke “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.”<sup>99</sup> This is not true. The ALJ found as follows:

Because she believed Mr. Garcia (ALJ error confirmed by General Counsel, this was actually Mr. Chavez) had gotten the message she left on January 20,

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<sup>97</sup> Guzman previously testified twice that she left the emissions station at 12:30 p.m. [Tr. 638, 648]

<sup>98</sup> The record reflects that this was a pre-paid cellular phone and the company was not able to verify that the call had in fact been placed within the time parameters of this hearing. [Tr. 741-742]

<sup>99</sup> General Counsel’s Exceptions Brief at 50, Footnote 12

Ms. Guzman did not show him the invoice, which read in pertinent part: **“Car Needs Mass Air Flow Sensor, Oz sensor & Fuel Pressure Regulator Fix to Continue \$537.00.** [Emphasis added; ALDJ slip op. at 12]

ALJ Parke thoroughly analyzed Guzman’s testimony:

I do not find Ms. Guzman’s account credible. The proffered mechanic’s invoice does not support her testimony of car trouble. The invoice evidences no malfunction; rather it shows only that the vehicle needed emission control procedures performed. Under cross-examination, Ms. Guzman testified that her car broke down after she left “emissions” at 12:30 p.m. and while she was on her way to work. Under cross examination, Ms. Guzman said she left the emissions facility at 10:30. Although she was scheduled to report for work at 1:00 p.m., by her account Ms. Guzman did not telephone the company and leave a message until 3:00 p.m. The inconsistencies prevent my crediting her account, and I find that she deliberately failed to report for work on January 20 after being denied leave. [ALJD slip op at 13]

Based upon Guzman’s testimony and the evidence it was reasonable for ALJ Parke to determine that the estimate (not invoice as erroneously characterized in the hearing testimony, the decision, and General Counsel's Exceptions) for emissions system repairs does not support Ms. Guzman's testimony of car trouble of the nature that would prevent it from transporting Ms. Guzman to work even without additional specific testimony on the subject at the hearing.

The General Counsel proceeds to argue that the Respondent’s witnesses told wildly conflicting stories:

The record established 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. (Tr. 1755)<sup>100</sup>

The testimony in this area is confusing and takes some careful reading. Careful reading shows, however, that the Respondent's witnesses’ testimony was not “wildly conflicting”. It is apparent

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<sup>100</sup> General Counsel’s Exceptions Brief at 51

that Kayonnie may have misunderstood Guzman's explanation as to why she was not at work on Saturday, January 20, and thought that Guzman was saying because she needed to purchase a car rather than having car trouble. Guzman may have added to her report to Kayonnie that she needed a new car after she reported that she had missed work Saturday, January 20, due to car trouble, or she may have told Chavez one thing and Kayonnie another. There may have been a misunderstanding regarding what was said since Kayonnie's and Guzman's primary languages are not the same, and it is easy for persons with limited common language speaking ability to misunderstand each other. The possibility of confusion was confirmed by Jaime Chavez' testimony:

A She told me that perhaps, like I said, maybe perhaps they didn't understand each other because what she told me was that she had taken the car, there was a problem with the car because the car stopped out on the freeway or something.

Q That is what Angela told you?

A Yes. [Tr. 1756]

Chavez and Kayonnie discussed the possibility that Guzman was making different statements to each of them:

Q What do you recall that you discussed with Angela?

A We discussed the fact that she had had prior warnings also and the fact that she was telling her one thing and she was telling me another thing. [Tr. 837]

In the following exchange on page 1752 of the transcript, Mr. Chavez words are probably most logically interpreted to mean that Kayonnie told Chavez the reason she understood why Guzman did not come to work on January 20<sup>th</sup> was because she went to purchase a car -- rather than actually reporting to Chavez that Guzman did not come to work on Saturday, January 20, and that the reason given by Mr. Guzman was due to going to purchase a car:

Q And on page 836 of the transcript, I asked you, "If Angela told you that Evangelina did not come into work on January 20<sup>th</sup> because she went to

purchase a car, correct?” And you answered, “That is what Evangelina told her so that is what Angela told me.” Do you remember that testimony?

A Yes.” [Tr. 1757-1758]

This interpretation is particularly plausible given Kayonnie's testimony:

Q You weren't working that day, were you?

A Saturday?

Q Right. The day she didn't come in.

A My day off.

Q But Jaime spoke to you about that, correct?

A Yes. [Tr. 769]

The General Counsel also argues that “[t]he 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)”<sup>101</sup> There is no evidence on the record, however, that any of these employees had specifically requested the day(s) off in advance -- as did Guzman -- did not receive approval, and then proceeded to take the day(s) off anyway.

The General Counsel also argues that ALJ Parke neglected to evaluate the reason for Guzman’s discipline:

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 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.<sup>102</sup>

Once again, there is no evidence in the record that any of these individuals acted in the same manner as did Guzman, i.e., there is no evidence that they requested a day off, were specifically told that they could not take the day off, and then proceeded to take the day off in spite of the denial of approval. The fact that an individual misses work due to an emergency is not the same as being denied approval and taking the day off anyway.

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<sup>101</sup> General Counsel’s Exceptions Brief at 52

<sup>102</sup> General Counsel’s Exceptions Brief at 52

## **2. The Disciplinary Action Was Based Upon Unprotected Conduct.**

The failure to report for scheduled work is not protected activity, and an employer is free to discharge any employee for unacceptable work attitude or performance. As set forth in *Marathon Le Tourneau Co., Longview Div. v. NLRB*, 699 F.2d 248 (5<sup>th</sup> Cir. 1983), Sections 8(a)(1) and 8(a)(3) are not intended to provide a “shield for the incompetent or job security for the unworthy.” Similarly, leaving work without permission is not protected conduct.

Based upon Guzman’s past behavior, it is reasonable to believe that when Guzman was told that she could not take a scheduled work day off – when she already had two (2) other days off each week – Guzman once again did exactly what she wanted to do as she had done on two (2) prior occasions in the prior four (4) months: she took the day off. In this case, Guzman admitted that she not only left work without permission, but that she left work after she had specifically been told that she could not leave by her supervisor, Angela Kayonnie. [Tr. 635] Such behavior falls outside the protection of the Act. The written warning notice and probationary status for this conduct was clearly a reasonable response by Milum. [GC 100]

Milum’s response to Evangelina Guzman’s misconduct was consistent with the action taken involving other employees and had nothing to do with Evangelina Guzman’s union activities. The General Counsel did not produce any evidence that would support a finding that indicates that an individual with Guzman’s work record was treated differently.

There is nothing in the record to support a finding that the discipline that Evangelina Guzman received as a direct result of her own actions was not lawful and a direct result of unprotected conduct. Based upon the foregoing it is clear that the evidence presented during the hearing provided more than a sufficient basis for ALJ Parke’s decision.

One final statement must be made at the conclusion of this section. Milum takes special

exception to the General Counsel's and the Union's last ditch effort to taint the record in this case. The General Counsel includes a footnote 11 in its Exceptions Brief and references an attached Exhibit C.<sup>103</sup> The General Counsel and the Union not only reference, but attach a copy of an unfair labor practice charge that was filed by the Union on 26 July 2007 and amended on 29 August 2007 – almost five (5) months after the alleged incident occurred<sup>104</sup> and over four (4) months **after** the hearing in this case was concluded. The General Counsel's alleged justification for this action is impertinent citing two (2) Board cases where the NLRB took administrative notice of its own files, i.e., *Lord Jim's*, 264 NLRB 1098 n.1 (1982) and *Dura Art Stone, Inc.*, 340 NLRB 977 n.3 (2003). These cases involve situations where the Board took administrative notice of its own files in order to set forth the facts regarding the filing of documents that were not only relevant to the hearing, but were filed prior to the date of the hearing – not charges that were filed **after** the hearing ended as in this case and charges that were neither plead nor litigated in this case. Milum vehemently objects to this unwarranted and unprecedented attack, and requests that these references be stricken from the record.

In the Union's Exceptions Brief, it not only makes reference to the unfair labor practice charge involving the discharge of Guzman which allegedly occurred on the day that the hearing in this case began but was not filed until 29 August 2007 – but adds two (2) additional unfair labor practice charges that were filed on 14 September 2007 and 5 November 2007 – more than

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<sup>103</sup> There is also a reference to conduct involving Guzman that occurred in 2007 at the top of page 54 of the General Counsel's exceptions brief that is subject to the same analysis and should also be stricken from the record. In this reference the General Counsel cites ALJ Parke's decision at 14. This is yet another misstatement of the facts and record as the ALJ's decision does not include a reference to conduct that occurred in 2007 – after the close of the hearing.

<sup>104</sup> The incident is alleged to have occurred on 5 March 2007 – the day that the hearing commenced in this case. The hearing continued through 11 April 2007. The General Counsel did not mention this alleged incident during the course of the hearing, and even though the General Counsel added allegations to the Complaint during the hearing, he did he seek to amend the pleadings to include this allegation.

five (5) months **after** the hearing ended.<sup>105</sup> The Union essentially argues that a *Gissel* bargaining order is appropriate based on “additional violations, committed during and after the hearing, including discharging Guzman”, and opines that the “Union expects the Region to find meritorious the Guzman discharge and other violations.”<sup>106</sup> As set forth above, these are references to conduct that was not even mentioned during the course of the hearing, and it clearly was neither litigated in this hearing nor litigated in fact to date. This constitutes an unwarranted and unprecedented attack and is a denial of due process. Milum hereby moves the Board to strike the documents and all references to the documents from the briefs and the record.

**J. The ALJ Did Not Err in Failing to Order a Bargaining Order Remedy Pursuant to *NLRB v. Gissel Packing Co.***

The General Counsel has requested that a *Gissel* bargaining order be granted as a remedy in this case. The ALJ found that the conduct attributed to Milum can be adequately remedied by the Board’s traditional remedies and refused to issue a *Gissel* bargaining order. [ALJD slip op. at 26]

The General Counsel argues that 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. 14, 26)”<sup>107</sup> The record shows, however, that ALJ Parke did not make any findings on the time relationship, i.e., soon, long after or in any respect, other than to indicate that the drop in support as measured by certain listed activities was preceded by Guzman's suspension and Knox and Min's discharges. [ALJD slip op. 14] Furthermore, ALJ Parke found only that the unfair labor practices found in the decision at

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<sup>105</sup> One of the charges has since been withdrawn by the Union. The documents are attached to the Union’s Exceptions Brief at 3, and three (3) attachments thereto.

<sup>106</sup> Union’s Exceptions Brief at 3, 44

<sup>107</sup> General Counsel’s Exceptions Brief at 53

least in part caused the majority support to dissipate. [ALJD slip op. at 26] There were a number of other factors brought out in the hearing that could have caused the majority support to dissipate: the changing demographics of the Respondent's workforce which started well before the Union's campaign [R 40], the Union's reliance on Spanish speaking organizers when many if not most of the employees did not speak Spanish [Tr. 499-500, 2024], the depth of the employees' level of commitment to the Union which cannot be gauged by a signed card, and the effect on employees of the Union's negative campaign against the Respondent, among others. Evidence of the impact of the Union's negative campaign was set forth in employee Pat Goebel's testimony regarding the Union's attempt to obtain a false statement regarding Milum from her:

Q BY MS. LAWS: Did any other incident occur that caused you to change your mind about the union?

A [by Pat Goebel] Yeah. One. A friend of mine that worked there got bit by a spider.

Q When you say worked there, are you referring to Milum?

A Working at Milum, yes. She was working. And she got bit by a spider and the union wanted her to say it had happened there.

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JUDGE GONTRAM: Well, without even knowing her name, I'll sustain the objection.

You had a conversation with a coworker and, as a result of that conversation, you also decided to leave the union, is that right?

THE WITNESS: Well, without telling you everything, yes.

JUDGE GONTRAM: That's enough.

MS. LAWS: Okay.

Q BY MS. LAWS: Has anyone in the union ever asked you to lie?

MR. GIANNOPOULOS: Objection. Leading, Your Honor.

JUDGE GONTRAM: It is leading, but I'll allow it. Overruled.

THE WITNESS: I don't see how I can answer that question because you just disallowed what --

JUDGE GONTRAM: Well, why don't you try to answer the question?

THE WITNESS: Yes.

Q BY MS. LAWS: Who asked you to lie?

A She did.

JUDGE GONTRAM: Pointing to?

THE WITNESS: The lady sitting over there.

JUDGE GONTRAM: Do you agree that that was -- that she's pointing to Ms. Pitkin?

MS. LAWS: That's correct.

JUDGE GONTRAM: Counsel?

MR. GIANNOPOULOS: Yes, she was.

JUDGE GONTRAM: All right.

Q BY MS. LAWS: And will you explain what -- what did Ms. Pitkin say to you?

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JUDGE GONTRAM: We should -- we should obtain the particulars before we get to the substance.

EXAMINATION

JUDGE GONTRAM: When did the conversation occur?

THE WITNESS: May or June of last year.

JUDGE GONTRAM: Of '06, is that right?

THE WITNESS: Yes.

JUDGE GONTRAM: All right. Where?

THE WITNESS: In the back of Milum's laundry.

JUDGE GONTRAM: What? In the facility?

THE WITNESS: No. Outside.

JUDGE GONTRAM: All right. In back of it.

THE WITNESS: Yes.

JUDGE GONTRAM: On what street?

THE WITNESS: It'd be on 6th Street. Or Avenue. I'm sorry.

JUDGE GONTRAM: What time of day?

THE WITNESS: Around ten o'clock in the morning. That's when I take my break.

JUDGE GONTRAM: All right. Was anybody else present for this meeting?

THE WITNESS: Well, it really wasn't a meeting. It was just -- we were just --

JUDGE GONTRAM: All right. Was anybody else present for the conversation?

THE WITNESS: Me and my friend and her.

JUDGE GONTRAM: And your friend's name is?

THE WITNESS: I could describe it to her. So many -- that's the reason I was --

JUDGE GONTRAM: And are you saying in that conversation Ms. Pitkin told you to lie?

THE WITNESS: She asked me to lie.

JUDGE GONTRAM: She asked you.

THE WITNESS: She did not tell me.

JUDGE GONTRAM: She asked you to lie. All right. I will -- I will allow the testimony. Objection overruled.

Q BY MS. LAWS: What did Ms. Pitkin say to you?

A If I would back up a story.

Q And what story? Do you know what story she was referring to?

A The conversation that we were having just before.

Q And what was that conversation about?  
A I don't know if I can answer this one because --  
JUDGE GONTRAM: Was it about a spider?  
THE WITNESS: Yes, it was.  
JUDGE GONTRAM: All right. Please proceed.  
THE WITNESS: I can answer it then?  
JUDGE GONTRAM: I think we have the sense of what went on.  
THE WITNESS: Okay.

Q BY MS. LAWS: You can go ahead and answer the question.  
A Oh, okay.  
JUDGE GONTRAM: Well, no. I'm trying to save some time here. I mean we can go over this. I mean we can describe the spider. I mean it's really not helpful.  
MS. LAWS: It's non-detail, Your Honor, but, with all due respect --  
JUDGE GONTRAM: All right.  
MS. LAWS: -- we have the right to go into --  
JUDGE GONTRAM: Listen. I'm trying to save some time, counsel. It's not necessary.  
Tell us and tell us quickly.  
THE WITNESS: Okay.  
JUDGE GONTRAM: Quickly.  
THE WITNESS: My friend had been off work. I asked her why she had been off work. She said she got bit by a spider. She was showing me the spider mark or bite, and they asked her to say it happened there. She said no, because she had already reported it where she lived. And they asked me if I would say I saw the bite there.  
JUDGE GONTRAM: All right. Fine. Next question.

Q BY MS. LAWS: And, when you --  
MS. LAWS: Your Honor, with all due respect.  
JUDGE GONTRAM: Next question. Do you have a question, counsel, or are you finished with this witness?  
MS. LAWS: No, I'm not, Your Honor, but --  
JUDGE GONTRAM: Well, then you had better ask a question or I'm going to dismiss the witness.

Q BY MS. LAWS: When you --  
MS. LAWS: I'm trying to, Your Honor.  
JUDGE GONTRAM: Well, then ask a question and ask it now.  
MS. LAWS: Yes, Your Honor.

Q BY MS. LAWS: When you referred to there, what did you mean?  
A What do you mean there?  
Q You said it happened there.  
A Oh. When it -- when she got bit, it happened where she lived.  
Q And you were asked to tell it -- say it happened --  
A That it happened --  
Q -- where?  
A In the shop at Milum's. [Tr. 1450-1456]

Further, the employees may have been disenchanted with the type of behavior the Union exhibited in a similar “set-up” incident involving one of the full time Union organizers<sup>108</sup>, Martha Chacon: Chacon stated in the charge that she spoke with some of the Milum employees. [R 16] Martha Chacon allegedly filled out an application for employment at Milum [R 16], and when Milum called Chacon to set up an interview on 28 June 2005, Chacon was out of town and could not make the interview. [R 16] In September 2005, Chacon again filled out an application for employment at Milum,<sup>109</sup> and Chacon interviewed with Angela Kayonnie on 22 September 2005. [R 16]. Chacon was hired by Angela Kayonnie and told to report the next morning for work. [R 16] Chacon alleged that she arrived at Milum on 23 September 2005, punched in, and started ironing pillowcases. [R 16] Chacon further alleged that one hour later Angela Kayonnie told her that she couldn’t work at Milum anymore because Chacon was pregnant. [R 16] On 19 February 2006, Chacon filed a Charge of Discrimination against Milum with the Equal Employment Opportunity Commission (EEOC). [R 16] Daisy Pitkin admitted in her testimony that she knew that Chacon was going to apply for a job at Milum and that she assisted Chacon in the preparation of the EEOC charge. [Tr. 1678, 1682; R 16] The charge was knowingly false at the time it was filed under penalty of perjury,<sup>110</sup> but Milum still had to respond to it. [Tr. 2138]. The filing of the EEOC charge was timed to coincide with the commencement of the Union’s employee campaign.

### **1. The Facts.**

Milum will set forth the facts that are necessary for and relevant to a determination of the appropriateness of a *Gissel* bargaining order since the General Counsel does not set forth the

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<sup>108</sup> Daisy Pitkin’s testimony at Tr. 1681.

<sup>109</sup> Milum offered Chacon’s employment application as an exhibit, Respondent’s Exhibit 15, but it was rejected.

<sup>110</sup> Milum subpoenaed Chacon to testify in order to show the false nature of the EEOC charge. Judge Gontram granted the union’s Motion to Quash.

facts that support the ALJ's decision.

First, aside from the 4 March 2006 work stoppage, only four (4) production employees out of approximately eighty (80) were allegedly subjected to unfair labor practices. Therefore, the unfair labor practices did not "pervade" the unit. *Cintas Corporation*, 4-CA-34160; JD-65-06; Ira Sandron; 9/20/06 at 37.

Secondly, in this case -- unlike the cases where a Gissel bargaining order has been issued as a remedy -- it is clear from the facts that the Union never intended to petition for an NLRB election for the employees at Milum<sup>111</sup> nor has the Union petitioned for an election to date.<sup>112</sup> The head of the Union's organizing effort at Milum, Daisy Pitkin, testified that the goal of the Union's campaign at Milum was to obtain a card check neutrality agreement. [Tr. 1672] This fact was confirmed in the Union's Exception Brief.<sup>113</sup> An election campaign was never conducted at Milum by either the Union or Milum. In fact, the only petition for an election that was filed, was filed by Milum -- not the Union.

The Act was designed to protect the right of the **employees** to select a bargaining representative or to refrain from doing so. *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980). The system that was designed to effectuate this right was the secret ballot election. The concept of a *Gissel* bargaining order was created as remedy in cases where there had either already been an election conducted or where a union had tried to obtain proof of a majority status in order to petition for an election. The essential right that is being protected is "ensuring a fair **election (or a fair rerun)**" **involving the employees** in the bargaining unit, i.e., to protect the

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<sup>111</sup> Judge Gontram sustained every objection made by the General Counsel to Respondent's questions to head union organizer, Daisy Pitkin, regarding whether the Union had a policy not to petition for an election [Tr. 1665], or whether the Union was seeking an election at Milum. [Tr. 1672]

<sup>112</sup> Milum filed an RM Petition in December 2006 but the election was blocked as a result of this unfair labor practice case. If the Union had given its consent, an election could have been conducted at that time.

<sup>113</sup> Union's Exceptions Brief at 1.

**employees'** right to a fair election.

As the United States Supreme Court stated, the Board may enter a bargaining order if “the possibility of erasing the effects of past practices and of **ensuring a fair election (or a fair rerun) by the use of traditional remedies**, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order.” [Emphasis added] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969)

In its decision in the *Gissel* case, the Court neither discussed nor anticipated the use of the bargaining order as a remedy in situations where a union had neither petitioned for an election nor had any intention of or desire to petition for an election. In addition, there is no reference in *Gissel* [or other case involving *Gissel* bargaining orders] to situations where a union seeks to use unfair labor practices as the sole basis for obtaining a bargaining order where its attempts at forcing the employer to agree to a card check neutrality agreement – its primary objective -- have been unsuccessful<sup>114</sup> i.e., where the Union is doing everything that it can to avoid ever letting the employees vote in an NLRB secret ballot election. While card check neutrality agreements are legal, *Milum* maintains that situations where a union is seeking a card check neutrality agreement rather than election are neither the same as nor are they entitled to the same protections as situations involving the employees’ right to a vote in a fair election. A union should not be permitted to obtain the protections of the Act while denying the employees their right to an NLRB secret ballot election. The issuance of a *Gissel* bargaining order in this case would only serve to validate a Union’s efforts to force an employer to enter into a card check

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<sup>114</sup> This is essentially a stop-gap measure when the union cannot force the employer to sign a card check neutrality agreement. The petition that is signed by the employees is logically only obtained in the event that there is an unfair labor practice hearing in order and the union has to prove majority status in order to obtain a *Gissel* bargaining order.

neutrality agreement. It should also be noted that at the time that *Gissel* was decided, the concept of corporate campaigns had not been realized or significantly utilized in labor relations. The issuance of a bargaining order based upon this factual situation would not protect the interests of the employees whatsoever and is outside the scope of protections set forth in and envisioned by *Gissel*.

It is Milum's contention that if it had agreed to the card check neutrality agreement at any time since the 4 March 2006 work stoppage that agreement would itself have been a violation of the Act as it would have constituted unlawful assistance.<sup>115</sup> The Act requires that an employer have a good faith reason to believe that a majority of its employees actually want a specific union to represent them before it engages in negotiations with that union. Obviously, in view of the facts presented in this hearing, many of which were either known or suspected by Craig Milum by the end of the work stoppage on 4 March 2006, or came to be known by Craig Milum since that time, Craig Milum had good reason to believe that a majority of the employees did **not** actually want the union to represent them as their exclusive bargaining agent.<sup>116</sup> The primary purpose of the Act and a matter of the utmost concern to the NLRB is the protection of the right of the employees to choose whether to have a union represent them or not – not the interests of

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<sup>115</sup> Sections 8(a)(2) and 8(f).

<sup>116</sup> Craig Milum was forthright in his testimony regarding the Union to the effect that he was watching the pulse of the Union's activities: "I'd been making a continuing -- a continuous effort to have a **feel** for the level of union support and an easy way, in my mind, to sort of gauge that is just the overt obvious activities." [Tr. 376 – 377] Craig Milum went on to testify: "Just knowing in a general way. I think the unfair labor practice charges, we, for example, why; by having kind of a feel for the dynamics of the campaign I had a better shot at knowing what kind of things would be problematic or not. Like a what person if she got a suspension or not, would that be a problem or would it not? On these discrimination cases, EEOC or even the NLRB, it is my opinion that we need to be in a position where it is kind of like we can prove what we did, why we did it and so the burden of proof is on us so any action we take, we need to be sure that we can be at a hearing like this and support what we did and show that it wasn't illegal discrimination. Also, the idea of work stoppage, that the Union might ask for another work stoppage, even like a strike, or something. I just wanted to have a sense of what was going on without crossing that line and getting involved in details, personalities. I didn't want to inhibit the Union but I did want to kind of understand the environment." [Errors in transcript] [Tr. 2060 – 2061]

the union or the employer.

Based upon the foregoing, the issuance of a *Gissel* bargaining order in order in this case is not appropriate even if there is a finding of serious and substantial unfair labor practices.

Even if the Board rules that a *Gissel* bargaining order is appropriate in cases that do not involve elections, a bargaining order is inappropriate in this case.

Pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969), the Board may enter a bargaining order if:

- (1) the union once represented a majority of the unit employees,
- (2) the employer has committed serious unfair labor practices, and
- (3) "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."

As set forth in *National Labor Relations Board v. Western Drug*, 600 F.2d 1324 (9th Cir. 1979), elections are the preferred method of ascertaining employee sentiment, and a *Gissel* bargaining order should only issue where "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."

In *Gardner Mechanical Services Inc. v. National Labor Relations Board*, 89 F.3d 586 (9th Cir. 1996), the Board found that the employer violated sections 8(a)(1), (3), and (5) of the Act by: (1) asking Adair to poll other employees as to how they planned to vote in the May 4, 1990 election; (2) discouraging employees from voting for Union representation by promising a 50-cent per hour wage increase prior to the election; (3) withdrawing recognition of the Union's representation after the election; (4) changing the working conditions after the election without notice to or bargaining with the Union; (5) barring employee Discussion of Union representation;

(6) threatening employees with reductions in benefits if they secured Union representation; and (7) discharging Adair because of his Union activities. The Administrative Law Judge vacated the election results as invalid and issued a bargaining order. The Ninth Circuit, however, held that a re-run election rather than a bargaining order was the appropriate remedy under the circumstances because there was nothing so “severe or pervasive as to make a fair election impossible.”

Similarly in *United Steelworkers of America AFL-CIO-CLC v. National Labor Relations Board*, No. 04-76132 (9th Cir. 2007), the Board found that the employer disciplined and fired two employees because of their support of the union-organizing drive, disciplined a third employee because of his union support, threatened a fourth employee with reprisal if he supported the union, and removed union literature from posting areas while permitting non-union notices to remain posted. The bargaining order issued by the ALJ was upheld by the Board. The Ninth Circuit, however, overturned the bargaining order stating that the “Board's traditional cease-and-desist and other affirmative remedies including posting of a notice will sufficiently address [Tower's] misconduct to ensure that a fair rerun election can be held, and that these remedies and the holding of a rerun election will satisfactorily protect and restore employees' Section 7 rights.”

Further, in *National Labor Relations Board v. Chatfield-Anderson Co.*, 606 F.2d 266 (9<sup>th</sup> Cir. 1979), the union obtained authorization cards and petitioned for an election. During the course of the election campaign the company interrogated employees about their union activities, threatened economic reprisals including closing the plant, imposing stricter work rules, and withholding contemplated raises and bonuses. In addition, the company promised economic benefits, threatened to prolong negotiations with the union while withholding raises and bonuses,

and announced an open-door policy to improve communications between employees and management. The union lost the election. The Board confirmed the Administrative Law Judge's decision to impose a *Gissel* bargaining order. The Ninth Circuit overturned the bargaining order stating that the company's behavior was "hardly irreparable in the sense required to justify a bargaining order."

Thus, even if the allegations set forth in the complaint were sustained, and Milum maintains that they should not, a *Gissel* bargaining order is not an appropriate remedy. Traditional remedies including the posting of notices could create an atmosphere in which a free and fair election could be held.

The next issue that must be addressed in determining the appropriateness of a *Gissel* is whether a bargaining order would best serve the interests of the "affected employees" and protect their freedom of choice. *Western Drug, supra*. In determining the best interests of the affected employees, employee **turnover** must be considered as well as whether there was **unusual delay**. *Id.* In *Western Drug*, the Court held that turnover should be considered.

2. **A Gissel Bargaining Order Is Not Appropriate Due To The High Rate Of Employee Turnover and Demographic Changes In The Workforce.**

The Board is not free to disregard employee turnover when issuing a bargaining order." *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056 (D.C. Cir. 2001); see also *Avecor, Inc. v. NLRB*, 931 F.2d 924 (D.C. Cir. 1991)

In the instant case as in *Western Drug, supra*, before this case was tried,<sup>117</sup> the employee turnover was dramatic and created a change in circumstances. Even the Union organizers recognized that there was a high turnover rate. [Tr. 985] It is undisputed that in 2006 the Respondent had a turnover rate of 400%. [Tr. 1999] By July 2006, only 20 of the original 43

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<sup>117</sup> There is not an allegation that Milum did anything that created the turnover.

individuals whose names appear on the Union's "petition" are still employed at Milum. [Tr. 2191] At the time of the hearing, only thirteen (13) of the original forty-three (43) individuals whose names appear on the Union's "petition" were still employed at Milum. [Tr. 2190] Thus, the workforce had substantially changed.

In addition to the rapid turnover in the workforce at Milum, the ethnic demographics of the workforce have changed substantially. As set forth on R 40, the demographics of the Respondent's workforce changed dramatically from 9 March 2005 through 9 March 2007. On 9 March 2005, the workforce was 8% Native American, 85% Hispanic, and 8% Middle Eastern. By 9 March 2006, the complexion of the workforce had changed to 4% Anglo, 6% Native American, 59% Hispanic, 11% Asian, and 20% Middle Eastern. The demographics continued to change at Milum, and on 9 March 2007, the workforce was comprised of 1% Anglo, 3% Native American, 34% Hispanic, 31% Asian, 29% Middle Eastern, and 1% Russian. In March 2006, the employees spoke English, Spanish, Burmese, Somali and Arab. [Tr. 2023–2024; R 40] As a result in the change in demographics, the number of languages spoken by the employees in March 2007 included English, Spanish, Burmese, Javanese (phonetic), Arab, Somali, and Russian. [Tr. 2024] In addition, it is reasonable to believe that the interests of different ethnic groups are different in fact. Thus, the interests of the workforce in March 2006 are different from the interests of the workforce in 2007.

With the tremendous turnover rate and the ever changing demographics of the work force at Milum's operation, there is no evidence that Milum's alleged acts, if proven, would "continue to repress employee sentiment long after most, or even all, original participants have departed." *Western Drug, supra.*

3. **A Gissel Bargaining Order Is Not Appropriate Due To The Time Period Between the Alleged Unfair Labor Practices And An Election, If Ordered.**

As a matter of common sense and in light of the case law, time is a factor that should be considered by the Board -- in addition to employee turnover -- in determining the appropriateness of a *Gissel* bargaining order. As the Court stated in *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980), “With the passage of time, any coercive effects of an unfair labor practice may dissipate, employee turnover may result in a work force with no interest in the Union, and a fair election might be held which accurately reflects uncoerced employee wishes as of the present time.”

In this case any delay is the direct result of the Union’s inaction: the Union obtained signatures on a petition and then did absolutely nothing. If the Union obtained the signatures of a majority of the employees on 4 March 2006 as it claims, then it was free to go to the NLRB and petition for an election. The fact that the Union did not do that led to a situation where over a year has passed since that date. The record in this case is clear that the only unfair labor practice that is alleged to have occurred even near 4 March 2006 was the one that involved the alleged statements made by Craig Milum at the work stoppage. Any impact that these alleged statements might have had on an election is *de minimus* at best. This is another reason militating against a bargaining order, and since the Union is responsible for any delay, it cannot be said that Milum is benefiting from its behavior if any of the allegations are proven. In the same token, the Union should not benefit from its behavior.

4. **There Is No Evidence That The Employees Have Been Impacted By The Alleged Conduct Of Milum.**

As set forth above, this case involves a handful of employees out of a workforce of eighty (80) employees. The General Counsel did not introduce evidence to support a finding that the

employees generally were impacted by the alleged unfair labor practices other than the opinions of the union organizers. And, in this case only four (4) employees were involved in the alleged unfair labor practices. The case of *Cintas Corporation*, 4-CA-34160; JD-65-06; Ira Sandron; 9/20/06, involved a situation where (aside from the incident involving the union fliers) only five (5) production employees out of approximately ninety (90) were “subjected to” unfair labor practices. The Administrative Law Judge held that the unfair labor practices did not, therefore, “pervade” the unit. As a result the unfair labor practices are not so “numerous, pervasive, and outrageous” as to require the imposition of extraordinary remedies, and none were granted.

Thus, the General Counsel has not presented sufficient evidence to support a finding that even if the alleged unfair practices were upheld, that a fair election could not be conducted.

Based upon the foregoing, even if all of the alleged unfair labor practices were upheld, a Gissel bargaining is unwarranted and inappropriate. The General Counsel has failed to show that in that event a fair election could not be conducted in conjunction with traditional remedies.

### **III. Conclusion**

This was a hard-fought case at the hearing and the initial brief level. The ALJ Parke reviewed the transcript of the hearing, applied the law, and rendered her decision. As set forth herein, the ALJ’s findings were consistent with the facts and the law, and should be upheld by the Board.

Respectfully submitted this 7<sup>th</sup> day of January 2008.

s/ Laurie A. Laws \_\_\_\_\_  
Gregory A. Robinson  
Laurie A. Laws  
Farley, Robinson & Larsen  
6040 North 7<sup>th</sup> Street, Suite 300

Phoenix, Arizona 85012  
602-265-6666

Attorneys for Respondent  
Milum Textile Services Company

## CERTIFICATE OF SERVICE

I hereby certify that on this 7<sup>th</sup> day of January 2008 a copy of the foregoing RESPONDENT'S BRIEF IN SUPPORT OF RESPONDENT'S RESPONSE TO THE EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION FILED BY THE GENERAL COUNSEL AND THE UNION was e-filed with the NLRB and served as follows:

Original and Eight Copies via Federal Express Overnight Delivery:

Lester A. Heltzer, Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W., Room 11602  
Washington, D.C. 20570-0001

One copy via Federal Express Overnight Delivery:

Cornele A. Overstreet  
Regional Director  
National Labor Relations Board, Region 28  
2600 North Central Avenue, Suite 1800  
Phoenix, Arizona 85004-3099

One copy to the following via e-mail pursuant to agreement:

John Giannopoulos  
National Labor Relations Board  
Region 28  
2600 North Central Avenue  
Suite 1800  
Phoenix, Arizona 85004-3099

Ira Katz, Esq.  
UNITE HERE!  
275 Seventh Avenue  
New York, New York 10001

s/ Laurie A. Laws  
Laurie A. Laws