

**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**

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**I. Analysis of the Introduction, Background and Factual Information**

The General Counsel's Exceptions Brief<sup>1</sup> is rife with misstatements.

Misstatement One: The General Counsel states, "Tired of being mistreated at work, the employees at Milum Textile Services Company (Respondent) decided to unionize." [GCEX 1] There is no evidence in the record that the employees were "mistreated" and 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 employees' selection of the Union." [GCEX 2] 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 1½ years and the alleged unfair labor practices were few and far between:

4 March 2006: Work stoppage

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

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

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<sup>1</sup> References to the Transcript are designated "Tr"; references to the General Counsel's Exhibits are designated "GC"; references to the Respondent's Exhibits are designated "R"; references to the General Counsel's Exceptions Brief will be referred to as "GCEX".

5 March 2007            Hearing began

The record reflects the fact that Craig Milum believes that the employees have an “unfettered right” to organize except while they are supposed to be working [Tr 2136], and he went to great lengths to insure that the employees’ rights were not infringed upon. When Milum 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. Commencing in 2002, Milum contacted the manager of Mission Linen which had been targeted by the same union to obtain information [Tr 2040–2041], and he 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.”<sup>2</sup> [Tr 2041–2042] In February 2006, Craig Milum continued his research regarding the Union. [Tr 2043-2044] 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. [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 (date RM Petition filed) – a period of eighteen (18) months: (1) Craig Milum did not engage the services of anyone who specialized in creating and executing anti-union campaigns [Tr 2064]; (2) the large 9 X 4 foot “Unite” banner was put on the wall in the lunch area in March 2006, and remained there through the date of the hearing [R 2]; (3) the microwave oven covered with Unite stickers was placed in the lunch area in March 2006, and remained there through the date of the hearing [R 4]; (4) from June 2005 through December

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<sup>2</sup> Katz presented a Power Point presentation for the members of Milum’s management team, and discussed what he felt would be helpful in preparing for a unionization effort at the seminar he conducted. [R 55; Tr 2041-2042]

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 [Tr 2065]; and (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: he did not initiate an “extensive campaign of unfair labor practices” as alleged by the General Counsel [GCEX 2], nor did Milum attempt to “steamroll” the employees’ selection of the Union.

Misstatement Three: The General Counsel alleges that the Union sent a letter to Milum “asking” him to “discuss” the situation, that the Respondent declined, and that Respondent’s workers ultimately delivered the Petition to Milum during a work stoppage on March 4. [GCEX 7] The reality is that the Union conducted its organizing blitz starting 24 February 2006 [Tr 887, 906-907], the employees presented the petition during the work stoppage on 4 March 2006 [Tr 906], and then the Union sent the letter dated 3 March 2006 by mail to Milum requesting a card check neutrality agreement. Thus, the employees did not “ultimately deliver” the petition to Milum.

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.” [GCEX 7] The ALJ actually found that there were the “signatures of 42 individuals” on the petition [ALJD at 3], and then stated that there “43 of the production employees had authorized the union to represent them.” [ALJD 13]

Misstatement Five: When referring to what the ALJ stated in her opinion regarding what had occurred during the work stoppage on 4 March 2006, the General Counsel states that Milum asked the congregated employees why they wanted a union, and made numerous statements

regarding the unionization process. [GCEX 7] The General Counsel conveniently left out the fact that the ALJ also stated that “Mr. Milum said that he could not tell the employees anything for or against the Union.” [ALJD 5]

Misstatement Six: The General Counsel sets forth the Union’s other community efforts as follows: “During this same time period, the Union started distributing **informational leaflets** publicizing its organizing efforts to members of the public.” [GCEX 10] 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 -- the leaflets did not even mention the fact that the Union was trying to organize the employees at Milum. [GC 77] The leaflets were directed at Milum’s customers -- the restaurants that used its linens and the customers of their customers – and were designed to exert pressure on the restaurants to cease doing business with Milum, to cause the customers of the restaurants not to dine there, and to degrade the restaurants. [GC 77; Tr 323 (Exhibit A)<sup>3</sup>, 388]

Misstatement Seven: The General Counsel states that “Milum had warned his supervisors to be alert for the Union and to contact him if such activity occurred.” [GCEX 11] 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 Eight: 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 had joined the Union after speaking with organizers outside the plant.” [GCEX 11] Craig Milum actually said was that Kayonnie had told him that while she was eating lunch she saw a union organizer step in front of some Burmese employees, attempt to converse with them, and then had these employees sign some cards. [Tr 71-72 (Exhibit B)]

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<sup>3</sup> Exhibits A - P refer to excerpts of the transcript that are attached to this brief for easy reference.

Misstatement Nine: The General Counsel states that “Milum wrote various opinion pieces” and “some of these pieces were published.” [GCEX 12] In reality the evidence shows that there was a single “opinion piece” published which was a letter to the editor regarding the corporate campaign and pressuring Milum to make a decision for the employees. [GC 37; Tr 392-393 (Exhibit C)] The General Counsel states, “In these articles, Milum compared the Union's organizing drive to an 'organized crime shakedown.’” There is no reference to “an organized crime shakedown in 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] There was but a single article, and the reference relates to the Union’s corporate campaign – not the employee campaign: “the union is trying to get Milum’s best customers to drop their cleaning contracts with him and use union-friendly commercial laundry services. [GC 97] ‘This whole thing is like an organized-crime shakedown,’ Milum said.”<sup>4</sup> [GC 97] Milum’s testimony during the hearing further clarified this point. [Tr 392-394 (Exhibit C)]

Misstatement Ten: The General Counsel states, “In another article, Milum falsely asserted that the Union would not accept a card-check agreement conducted by Respondent.” [GCEX 12] First, this statement appears in the same letter to the editor dated 2 March 2007 discussed above – not “another article”, and Craig Milum testified that he believed that the union would not want an employer conducted card check. [Tr 97-98 (Exhibit D)]

Misstatement Eleven: The General Counsel misstates the facts regarding the wearing of the metal union buttons. The General Counsel alleged that Ruiz removed the button, and never

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<sup>4</sup> Craig Milum testified that he read the book entitled, “Solidarity for Sale,” by Robert Fitch, which references union official Edgar Romney’s affiliation with organized crime [Tr 2047-2049; R 65], and Trends in Union Corporate Campaigns, that was published by the U.S. Chamber of Commerce. [R 66-rejected]

wore one again.” [GCEX 14] There is no testimony on page 214 that Ruiz removed her button or never wore one again.

Misstatement Twelve: 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 added; GCEX 15] The ALJ, however, makes no mention of Soe Min being an “active” union supporter. [ALJD slip op. at 9]

Misstatement Thirteen: 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.**” [Emphasis added; GCEX 16] The actual statements made by the ALJ are as follows: (1) “Ms. Knox replied that everyone, including Ms. Zambrano, went to the lunchroom after clocking in.” [ALJD 10]; and (2) “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 10]

Misstatement Fourteen: 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.” [GCEX 16] The ALJ did not make such a finding, and the IT Director did not testify that “Milum saw no need” to replace the security camera system in January 2006. Jason Myer testified that in January 2006 Milum stated that “it’s just not the right time”, but in November 2006 Milum told him that “volume was up, business was good, and that it might be good time to do it.” [Tr 1413 (Exhibit E)] When the camera had proven to be effective and durable, and the price of the replacement security camera system dropped dramatically and “business was good”, Milum authorized the purchase.

Misstatement Fifteen: The General Counsel misstates the ALJ's decision when he states that the ALJ found that Milum had violated the Act when it showed a video to employees 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." [GCEX 17] 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. The actual text states that "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 General Counsel's Brief**

### **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's allegation 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 is based upon that the single allegation that Milum asked the employees during the work stoppage why they wanted a union and that constituted the solicitation of employee grievances. The ALJ found the statements were made during the course of an open discussion at the time of the work stoppage, the work stoppage was initiated by and involved open and active union supporters, Milum did not make any express promises to the employees, and that when requested to do so, Milum refused to get rid of an unpopular supervisor. 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). *George L. Mee* dealt with a situation where the employer

initiated the meeting, and the CEO solicited grievances, but stated that he could not make any promises. The Board did not find a violation, nor did it find 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' grievance.

The General Counsel relies on cases that involve distinct factual situations in which the employer acted affirmatively to solicit employee grievances. *Center Service System Division*, 345 NLRB No. 45 (2005), dealt with a situation where an employee was required to pick up his paycheck from the president of the company whereupon the president conducted a 45 minute meeting, and asked if he had any questions or concerns about his job. When the employee indicated that he was not receiving health insurance, 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, which had not been the case prior to the union organizing campaign. In this case, the statements made by Milum were made during the course of an open employee-initiated meeting involving open and active union supporters, and Milum neither solicited nor promised increased benefits. *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155 (2004), 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 they should take workplace concerns to the school board. Prior to this the employees testified that their concerns could not be taken to the board, and that their employer had never solicited their concerns. *Burger King*, 258 NLRB 1293 (1981), involved a situation where the employer regularly asked the employees to submit any problems that they had, informed them that they “really didn’t need a union to speak for [them]”, and that “management would take care of all

such problems.” [Id at 1297] The ALJ found that grievances were “assiduously solicited” and that such conduct was unprecedented. [Id at 1297] In light of those facts, the ALJ held the employer thus implied that a resolution would be forthcoming, and this conduct violated the Act. *Dentech Corp.*, 294 NLRB 924 (1989), involved a situation where the company created and distributed an employee handbook, granted wage increases, and the president of the company conducted group employee meetings and informed them that he was disappointed with them because they had not come to him, that the employees could come to him instead of going to a union, and that the employees could do better without the union and probably have higher wages. [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) *Multi-Ad Servs.* dealt with a situation 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 General Counsel argues 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 above, 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 divided about even wanting a name tag [Tr 424,497], the usage was extremely short-lived [Tr 2074, 2078, 2236], and the union issued a paper nametag to the employees shortly before the company issued a name tag. [Tr 880-881] Based upon the

foregoing, the company did not solicit complaints or grievances, and neither promised or distributed 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<sup>5</sup> nor the evidence presented by the General Counsel put Milum on notice that these statements were at issue. The General Counsel argues that the evidence to support this allegation is the alleged fact 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; GCEX 21] The uncontradicted testimony shows that during the course of the open discussion at the work stoppage Milum said that if a union organizer signed a card for an employee when the employee refused to do so, that behavior was wrong and should be reported. [Tr 76, 309 (Exhibit F)] This is no different from saying that if one witnesses a crime, that one should report it to the appropriate authorities. 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 two cases in support of his argument. In *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1293 (1981), a Director of the employer wrote a letter to the employees 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.” [*Id* at 1156] This is different from the facts in the instant case. And *Winkle Bus. Co., Inc.*, 347 NLRB No. 108 slip

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<sup>5</sup> 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, but the General Counsel did not present any evidence to support this allegation.

op. at 1-2 (2006), 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. 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 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. The ALJ held that 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 15] Thus, the ALJ dismissed the allegation.<sup>6</sup> [ALJD 15] If one looks at the Third Consolidated Complaint, 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: section 5(a) deals exclusively with occurrences “on or about March 4, 2006” and does not mention “futile”; while section 5(b) deals exclusively with

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<sup>6</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 15, footnote 37]

occurrences “in or about mid-March 2006” and involves the “futile” allegation. Further, in its post-hearing brief, Milum did in fact struggle to find any evidence that correlated with the allegation in **mid-March**: (1) “[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 post hearing brief at 78] ; and (2) “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”. [Respondent’s post hearing brief at 78] It would have been imprudent for Milum to ignore the General Counsel’s anticipated argument in its brief, and Milum so addressed the allegation at pages 78-79 of its brief. That does not change the fact that the General Counsel failed to prove up its allegation.

The General Counsel argues that the ALJ’s reliance on *Sara Lee d/b/a International Baking Company*, 348 NLRB No. 76 (2006), and *Dilling Mechanical Contractors, Inc.*, 348 NLRB No. 6 (2006), is misplaced. In *Sara Lee*, the ALJ found violations of the act with respect to a specific supervisor, *sua sponte*, and the Board held that the respondent did not have notice that the conduct was at issue.<sup>7</sup> In this case, the General Counsel framed the complaint utilizing the “mid-March” language, and despite making numerous amendments to the complaint prior to and during the hearing, the General Counsel failed to amend this allegation. And, in *Dilling* the Board dismissed an allegation where 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] In the instant case, the testimony on which the General Counsel relies related to what statements were in fact made at the work stoppage on 4 March 2006. At the close of the hearing it appeared that the General Counsel simply had failed to

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<sup>7</sup> The Board noted that the General Counsel amended its complaint during the course of the hearing involving another matter, but made no such motion with respect to this allegation.

prove up its allegation regarding any occurrences in mid-March since it did not amend the complaint with respect to this claim. Thus, the ALJ's dismissal should be upheld.<sup>8</sup>

**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, and noted that this occurred during the work stoppage on 4 March 2006, and the question was “posed without animosity or intimidating comment”. [ALJD 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 conducted an unprecedented one-on-one meeting in his office with one of the employees who was not an open and active union supporter, and during this meeting, he asked the employee questions about the union and promised to terminate the manager if it would stop the union effort. The Board ruled that the background, the nature of the information sought, the identity of the questioner, and the place and method of this interrogation<sup>9</sup> rendered the interrogation coercive. The General Counsel also relies on the case of *Christie Elec. Corp.*, 284 NLRB 740 (1987), where 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

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<sup>8</sup> 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. *Federated Logistics and Operations*, 340 NLRB 255 (2003) dealt with a situation where the supervisors made statements to the employees privately at meetings to the effect that if the union was selected the wages and benefits would be reduced, if there was a strike the operation could be shut down and moved, and that the employees would lose their 401(k) plan. The Board held the supervisors' statements conveyed to the employees that selecting a union would be futile. [Tr 416-417, 557, 572-573] In *Daniel Construction Company, Inc.*, 145 NLRB 1397 (1964), the speeches made by the company's executive vice president and manager violated the Act as the principal points were the loss of employment if the company was organized, a firm intention to maintain the existing hiring practices, and the intention to litigate the election issues for “a decade.” [Id at 1409] *CWI of Maryland*, 321 NLRB 698 (1996), dealt with a situation where the president of the company informed employees that they had “forced his hand”, and that he was moving the operation. The company in fact closed the original operation and relocated to another state. Each of these cases involves a distinctly different set of facts from the instant case.

<sup>9</sup> The Board ruled that these four (4) factors are considered to determine whether an inquiry is coercive.

the union out, and that the president would not sign a contract, among other things. The facts in *Christie* are markedly different from 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)], and, 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); *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*, *supra*. 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: Milum did not deny saying anything other than "what is this union stuff all about' and then explaining to them that Union sought to represent them in exchange for employees paying dues." The record shows that this was not a rhetorical question posed by Craig Milum, but a statement to Craig Milum by an employee, and that Craig Milum made other

statements at the work stoppage. [Tr. 76, 139-140, 2064 (Exhibit G)] Furthermore, the General Counsel then does a turn around at page 21 of his brief and contradicts his own statement 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.”

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. Although Craig Milum was 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 erroneously maintains that the ALJ erred in refusing to find that the Lawsuit was objectively baseless. [GCEX 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). The ALJ found that the General Counsel failed to meet its burden. [ALJD 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” but the General Counsel does not, however, provide any citations to the record to

support this claim. [GCEX 29] First, 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):“the filing and maintenance of a reasonably based 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 held 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. The test is whether “a lawsuit lacks a reasonable basis, or is ‘objectively baseless,’ if ‘no reasonable litigant could realistically expect success on the merits, and *BE & K* does not require that a respondent in an NLRB proceeding actually litigate its underlying lawsuit during the course of the NLRB hearing. [*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. Second, Milum is not required to show actual malice at the pleading stage of a federal lawsuit – 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)<sup>10</sup> – as did Milum. [GC 3] When the Regional Director refused to issue a complaint, the employer filed a lawsuit with the U.S. District Court alleging libel based upon false and defamatory statements circulated during a union organizing campaign. 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

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<sup>10</sup> The Court stated that filing charges with the NLRB and then filing a lawsuit was neither unusual nor of any real import to the Court’s decision in the case. *Linn* at 66.

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, the lower court was directed to grant the plaintiff leave to amend his complaint. Thus, *Linn* delineated what the plaintiff therein must prove in order to obtain relief for libel **during the course of the federal litigation.**<sup>11</sup>

The General Counsel also cites *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1973), which dealt with a situation where 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 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. The General Counsel also 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), which dealt with a situation where there was a full trial before a jury during which the plaintiff presented its evidence. The Court held that in proving its case **at trial** the plaintiff was required to show evidence of actual loss – not proving its case on the face of the pleadings. The *Intercity* Court stated that proof of harm may include “general injury to reputation,

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<sup>11</sup> The Court in *Linn* 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.

consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law.<sup>12</sup>

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

The General Counsel argues 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 that 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 the lawsuit. The General Counsel proceeds 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. But, as set forth in *Gertz v. Robert Welch*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed. 2d (1974), 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...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] Even if we assume, *arguendo*, that Milum was required to prove actual damages before the NLRB, the General Counsel's own evidence shows the existence of actual damages: one of Milum's customers specifically states that he is being "strong-armed" by the union, and there is a good possibility that he may "quit" Milum. [GC 97]

The General Counsel also cites *Beverly Health and Rehabilitation Services, Inc.*, 336 NLRB 332 (2001), which 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

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<sup>12</sup> In *Intercity* 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.

unless and **until it is determined by the Board to be baseless** under a *Bill Johnson's*<sup>13</sup> analysis. The reference to the proof of damages in the case involves the proof of damages during the trial in order to prevail in the action – not to the initial pleadings in the case.

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

The General Counsel contends that the ALJ erred in finding 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 maintains that Milum failed to offer or present evidence to support its lawsuit during the hearing.<sup>14</sup> The General Counsel cites *Geske & Sons v. NLRB*, 103 F.3d 1366 (7<sup>th</sup> Cir. 1997),<sup>15</sup> in which 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, 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 all evidence and testimony regarding any information that was not set forth in the exhibits attached to the federal Complaint [GC 8; Tr 2030-2038] Further, Judge Gontram ruled during the course of 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.<sup>16</sup> Thus, Milum was **prevented** by the General Counsel and Judge Gontram<sup>17</sup>

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<sup>13</sup> *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983).

<sup>14</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.

<sup>15</sup> *Geske* was decided prior to *BE & K* and dealt with a situation where the NLRB was attempting to enforce its ruling that the lawsuit was baseless and retaliatory in order to enjoin the company from prosecuting its lawsuit.

<sup>16</sup> Gontram stated: “It seems to me that you are stuck -- not stuck but you are limited to the material contained in the letters.” [Tr 2030-2039] Gontram invited counsel to “address the matter in your post hearing brief.” [Tr 2037-2038]

<sup>17</sup> Milum maintains the ruling by Gontram was not proper. First, federal practice utilizes the concept of “notice pleading which requires a complaint to be read liberally in favor of the plaintiff, and does not require a plaintiff to

from introducing any documentary and testimonial evidence to support the reasonable basis of the Complaint.<sup>18</sup> [Tr 2144-2148, 2257-2258] The General Counsel cannot have it both ways.

**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 got so bogged down in trying to argue federal practice and procedure that he 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 against UNITE HERE! where as part of a “corporate smear campaign” the union sent postcards to the customers of a hospital with whom it

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present a perfectly drafted complaint. *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 and the court must assume that all factual 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). If "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 the continuing nature of the union's actions, and 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 as leave to amend a complaint is freely given. *Franks v. Ross, supra*.

<sup>18</sup> The documents that Milum sought to introduce included the following: Mission Linen contract with the union<sup>18</sup> [R 11], the Sodexo Linen contract with the union<sup>18</sup> [R 12], the Five Diamond Linen contract with the union<sup>18</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 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>18</sup> [R 30], Maricopa County Inspections for Bloom [R 31], Oaxaca Customer Advisory [R 32], Bloom Dirty Conditions<sup>18</sup> [R 33], Milum Exposed Letter to Laundry Customers [R 50], Dirty Conditions at North<sup>18</sup> [R 51], Dirty Conditions at Bobby's and Mancuso's [R 52], and Dirty Conditions at Sauce Pizza<sup>18</sup> [R 53]. All of these documents were rejected at Tr 2149-2164. Milum was permitted to introduce a document that was referred to in the Complaint and the Exhibits thereto, “Compromising on Quality” [R 29], but the General Counsel objected to questioning regarding this document and Judge Gontram sustained the objection. [R 2144-2148] 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, and these documents were rejected. [R 35-36; Tr 2161-2164]

had a labor dispute using the language, “**the laundry service utilized by [the hospital], does not ensure that “clean” linens are free of blood, feces, and harmful pathogens.**” [Emphasis added; GC 69] The hospital sued Unite Here! for libel, trade libel, wrongful interference with prospective economic relations, and unfair competition. 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, head union organizer Daisy Pitkin<sup>19</sup> admitted in her testimony 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.<sup>20</sup> [Tr 2252-2257] Making statements regarding a company based solely on this type of hearsay smacks of “recklessness” and independently substantiates the reasonableness of Milum’s lawsuit. Based upon the foregoing, the ALJ did not err by concluding that the federal lawsuit filed by Milum was not baseless.

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. In order to constitute an established practice or the “status quo”, the question is whether the practice is long standing. *NLRB v. Talsol Corp.*,

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<sup>19</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. [GCEX 5-6]

<sup>20</sup> Although Daisy Pitkin 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. This fact was confirmed by the Union in its exceptions brief at 25. [Tr 1692-1693, 2253–2257]

155 F.3d 785 (6<sup>th</sup> Cir. 1998). 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 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] Teresa Velasquez, Pat Goebel, and Craig Milum confirmed this practice. [Tr 71-72, 1100–1101; 1458] Despite the numerous witnesses called by the General Counsel, not a single witness testified that Angela Kayonnie did not have this established practice 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. It is clear from Angela Kayonnie’s testimony that she 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.” [Tr 693-694 (Exhibit H)] Further, 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 7, footnote 21] Counsel for Milum requested that the NLRB provide an interpreter for Angela Kayonnie for her testimony at the NLRB hearing, but that request was denied. [Tr 29-30 (Exhibit I)] Despite the fact that Angela Kayonnie was the only witness who was required to testify in a language other than her primary language, the General Counsel takes numerous exceptions to Kayonnie’s responses and requests that the Board

discredit her testimony. The General Counsel argues that Kayonnie provided evasive answers, was impeached by her affidavit, and violated the sequestration rule and lied about discussing testimony with Jaime Chavez. [GCEX 34] The record does not support these conclusions. Jaime Chavez did not testify that Kayonnie had showed him a copy of an exhibit admitted into evidence, he testified that he had “asked” Kayonnie about the paper with the car. [Tr. 1758 (Exhibit J)] Kayonnie was never directly and coherently questioned about this incident, and her testimony 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. [Tr 1863-1864 (Exhibit K)] The General Counsel's questioning changes in mid-stream from asking Kayonnie about whether there was a discussion regarding a document with Chavez during sequestration, to asking Kayonnie about her discussions with Chavez that took place in January 2007. [Tr. 1863-1864 (Exhibit K)] 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, was evasive, and lied. Based upon the foregoing, it is clear that the ALJ's decision to credit the testimony of Angela Kayonnie should be upheld.

**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 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.”<sup>21</sup>

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 who testified that Milum “told me if I was handing buttons over to employees during **work hours**” to which she responded that she “had only given one to Luz, but not during **work hours**. [Emphasis added; Tr 414–415] Thus, 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, and there is absolutely no basis for a finding that Milum interrogated Zulema Ruiz.

**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 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>22</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

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<sup>21</sup>Judge Gontram used the term, “work hours” twice: (1) “I don't think we need this witness to tell us what his **work hours** were”[Tr 1142]; and (2) “a person’s **work hours** are 4:00 o’clock to whatever, 3:00 o’clock in the afternoon.... [Tr 1974] The General Counsel used the terms on four occasions: (1) “You've never seen an employee leave during work, during **working hours**, to go heat their lunch in the lunchroom early?” [Tr 707]; (2) “She was on her phone during **work hours** talking to someone?” [Tr 788-789]; (3) “During **work hours**?” [Tr 790]; and (4) “talking on cellular phone during **work hours**. [Tr 800-801]

<sup>22</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.

do was put a stop to trespassing and doing things that are against the law.” [Tr 329-330] The General Counsel also states 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, the General Counsel 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 at Tr 396 does not 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>23</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), 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, and the union representatives picketed in 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

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<sup>23</sup> It is undisputed that the Union did not have any relationship with any of Milum’s customers.

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, and in *Wild Oats* the grocery store did not have such an interest in the common area in front of its store. 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 employer's 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 as it 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>24</sup> In one instance the transcript documents the fact that the Union representatives actually went inside one of the restaurants to

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<sup>24</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.

distribute leaflets. [Tr 334] In Arizona, trespass is a crime,<sup>25</sup> and 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 A.R.S. Section 13-1502, a reasonable request to leave issued by either 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>26</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

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<sup>25</sup> A.R.S. §§ 13-1502 and 13-503

<sup>26</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.

police do not violate the Act. As Phoenix Police Officer Davis testified, Milum never asked the police to curb or prevent lawful union activity.<sup>27</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, and erroneously relies on *Meiser Elec., Inc.*, 316 NLRB 597 (1995), which dealt with a situation where there was uncontroverted testimony employer told two 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. 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] 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 Parra was installing the bases for the replacement video camera system and Evangelina Guzman asked him what he was doing. [Tr 1595]. 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 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 Parra testified, "She just broke out laughing and then after that she continued talking, chatting, joking." [Tr 1604] Evangelina Guzman's take on this conversation is slightly different. [Tr 588] Guzman admits that she asked Parra what he was doing and he explained what he was doing to her. Guzman states that she asked why they were installing the

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<sup>27</sup> Officer Davis, a twenty year veteran, is part of the Community Response Team that deals with union activity.

cameras. Guzman remembers, however, that 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 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. To the contrary, ALJ Parke analyzed the very factors with which the General Counsel is concerned and 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 23-24] 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 NLRB 1083 (1980), enf’d, 662 F.2d 889 (1<sup>st</sup> Cir. 1981), cert. denied, 455 U.S. 989 (1982).

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.” [GCEX 44] To the contrary, the testimony of Craig Milum and his two supervisors is reasonably consistent rather than wildly conflicting. Craig Milum testified that Angela Kayonnie and Jaime Chavez made the

decision – not him. [Tr 296-297 (Exhibit L)] Angela Kayonnie testified that they told Craig Milum what had happened and that Craig Milum told her that it was between her and Jaime Chavez. [Tr 759 (Exhibit M)] Kayonnie then told Jaime that it was his decision. [Id] Jaime Chavez testified that Angela Kayonnie told him that it was his decision to make. [Tr 833 (Exhibit N)] Jaime Chavez continued his testimony stating that he did not “recall” if he looked at Minjares’ file [Id], but the General Counsel interpreted this statement to constitute an affirmative statement that he did review documents.

The facts 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, and she wanted to spend more time with her children. [Tr 472] 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 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 did not just fail to return to work, she quit without notice and then reapplied after a lapse of two months. [Tr 480–481] It is also 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. [Tr 495 – 498] Even though the company was aware of this union activity, when Minjares requested a job at Milum in July 2006, she was hired.<sup>28</sup> [Tr 481] 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

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<sup>28</sup> If Milum had wanted to impact Minjares’ 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.

leaving the company's employment without notice." [Tr 477; GC 56] Despite this fact, just three 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, but stated that she could not locate her supervisor. [Tr 474-475] Evangelina Guzman, however, contradicted Minjares' testimony: Guzman testified that Minjares told her that day that she was leaving work and that Minjares did not intend to notify Jaime Chavez because she did not think that Jaime Chavez would let her leave work. [Tr 627-628] 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. Guzman's testimony 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 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>29</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>30</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 scheduled work days. [Tr 486] Minjares admitted that she did not call the company to

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<sup>29</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>30</sup> The written warning notice was based upon the fact that Minjares left work without permission. [GC 56]

tell them that she would not be returning to work on 17 October 2006 or on the 18<sup>th</sup> of October.<sup>31</sup>

[Tr 486] 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]

Minjares was not treated any differently from other employees who left work without permission and who came to work late: warning notices had been issued to such employees who left work without permission prior to the advent of the Union on 4 March 2006 and after that date,<sup>32</sup> and to employees who came to work late.<sup>33</sup> Minjares' situation was compounded, however, by the fact that she not only violated the company rules and left without permission, but had done so in the past, and now had breached her agreement with Milum that was a condition of her employment.

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>34</sup> The bottom line is that Minjares was suspended from work for two days because she had walked off the job and disappeared on two occasions within a six month period of time in addition to being late and failing to call or report for scheduled work. [GC 56] Minjares' suspension had everything to do with her unprotected conduct and nothing to do with her union activities.

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

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<sup>31</sup>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.

<sup>32</sup>Prior to 4 March 2006 at pages 28, 29, 30, 32, 33, 41, 42, 43 [bottom], 43[top], 44, 45, 46, 55, 62, 64, 72, 73, 76, 77, and 78; and after 4 March 2006 at pages 82, 84, 85, 89, 90, 91, 92, 98, 99, 103, 109, 110, and 111. [R 48]

<sup>33</sup> Prior to 4 March 2006 at pages 2, 3, 5, 25-26, 38, 50, 63, 65-66, 71; and after 4 March 2006 at pages 80-81, 100-102, 106-108, 114-118, 121-123. [R 48]

<sup>34</sup> The reasons for the suspension and probation period were set forth on the disciplinary warning, GC 56.

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] Minjares knew what she had done wrong.

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).**

The General Counsel argues that ALJ Parke neglected her duty to examine the evidence in making her finding with respect to Evangelina Guzman. At the outset the General Counsel makes it appear that Milum did something wrong when it refused to hire Guzman after her work permit expired, and refused to rely on a letter from U.S. Congressman Raul Grijalva’s stating that Guzman was legally entitled to work in the United States. [GCEX 46] As General Counsel is surely aware, Guzman is not a U.S. citizen, and when Guzman’s authorization to work in the United States expired,<sup>35</sup> Milum had no legal option but to cease employing her.<sup>36</sup> Milum Textile Services received the copy of a letter that was sent from Representative Raul M. Grijalva to Guzman dated 2 October 2006, which indicated that Guzman’s application for employment authorization had been approved on 30 September 2006 – two 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.<sup>37</sup>

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<sup>35</sup> It is undisputed that Guzman did not have new authorization.

<sup>36</sup> 8 U.S.C. §§1324(a)(1) and 1324(a)(2)

<sup>37</sup> Every individual 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. In addition to requiring that an employee be discharged when their legal status lapses, federal law requires that the employee not receive any benefit due to the employment eligibility lapse (such as striking of past negative work record). If the

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 probation as a result of their first offense for leaving work early or disregarding a supervisor's instructions.” [GCEX 49] This is simply not true. The record shows that the 25 December 2006 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 2006. [R 42; [Tr 1847-1850 (Exhibit O)] 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 set forth below.

**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.<sup>38</sup> [Tr 623–624] In addition, Guzman did not like the fact that there were not set hours of work each day, and a firm start and stop time each day. [GC 104; Tr 624] Milum 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] Further, 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] Guzman was assigned to do restaurant orders one day each week as a substitute for Teresa Velazquez.<sup>39</sup>

**2. Analysis.**

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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)]

<sup>38</sup> Guzman testified “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] One of Guzman’s written warning notices stated that she had informed Angela that she only wanted to work in certain positions. [GC 98]

<sup>39</sup> Teresa Velasquez’ full legal name is “Maria Teresa Velasquez Garcia.” [Tr 1083] Guzman admitted that Velasquez’ hours in her specific job are different from Guzman’s. [Tr 630-631]

The General Counsel alleges that Milum violated the Act when it suspended Evangelina Guzman on 26 December 2006. It is important to note that this incident occurred ten 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 months after the Union organizing campaign began -- Guzman failed to show up for two 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 days, she did not report for work those two days, and that she did not call to report her absence. [Tr 607–608] It is undisputed that each employee worked five days each week since the company does not work on Sundays and each employee has one additional day off.<sup>40</sup> [Tr 1964] When Guzman was asked about the incident she testified that she had asked for the day off for a “job interview”,<sup>41</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 exactly what she wanted to do – took the two scheduled work days off without permission and without notice and in specific and direct defiance of her supervisor's

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<sup>40</sup>Each employee had two days each week to take care of their personal business. Guzman admitted that she had Thursday off in addition to Sunday. [Tr 608] Employees are required to take care of their business on their days off.

<sup>41</sup> An employer is not required to give a person a day off to go to a job interview.

denial of her request for one of these days off.

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

**(1) Facts**

On 25 December 2006 – three months after Guzman received a written warning notice for failure to report for scheduled work in September 2006 -- there was a major breakdown of the equipment<sup>42</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, 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>43</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, and 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 – even though she admitted that in the production area where she worked there was not a set stop time each day. [Tr 618-619] Guzman testified that she had finished her eight hours and was ready to leave. [Tr 625] According to the time clock 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 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.,<sup>44</sup> and Minjares

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<sup>42</sup> There was a major problem with the compressed air system and it took two hours to repair. Thus, there was a two (2) hour delay in the operation that day. [Tr 1851, 1855; GC 98]

<sup>43</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]

<sup>44</sup> 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.” [GCEX 46] Guzman denied this. [Tr 624]

worked until 8:53 p.m.<sup>45</sup>

(2) **Evangelina Guzman Was Not Treated Disparately.**<sup>46</sup>

There is nothing in the record that shows that Guzman was treated any differently from any other employee for leaving without permission. As Angela Kayonnie testified, production employees were asked to work late if there was an equipment breakdown. [Tr 1844] Prior to and after 4 March 2006 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,<sup>47</sup> to employees who left before work was finished or without permission,<sup>48</sup> to an employee who lied about his absence,<sup>49</sup> to employees who refused to do the job that they had been told to do.<sup>50</sup> In this case, however, the situation was more severe because Guzman not only left work without permission, but left work when she was specifically told not to leave work, i.e., insubordination. [Tr 635] Furthermore, this was the second time in three months that Guzman had willfully violated the company's rules, and a three 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.” Leaving work without permission is not protected conduct.

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<sup>45</sup> Even supervisor Kayonnie did not go home when her shift ended at 3 p.m. because of the extraordinary nature of the problems that day – she had started at 5 a.m. and continued to work until 6:00 p.m. [Tr 1854-1855]

<sup>46</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.

<sup>47</sup> Prior to 4 March 2006 at pages 28-30, 32-33, 41-46, 55, 62, 64, 72-73, 76-78; and after 4 March 2006 at pages 82, 84-85, 89-92, 98-99, 103, 109-111. [R 48]

<sup>48</sup> R 48 at pages 56, 60 [late], 61, 74, and 75 [absence, no call]

<sup>49</sup> R 48 at page 96

<sup>50</sup> R 48 at pages 4, 31, 54.

**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>51</sup> Once again, when she could not get what she wanted, Guzman took off without concern for her job: she admitted that she did not show up for work on 20 January 2007, a scheduled work day. [Tr 638] This was the third time in six 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 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>52</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

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<sup>51</sup> There is more work to do on Saturdays, and all of the employees are told that they have to work. [Tr 1738]

<sup>52</sup> Guzman previously testified twice that she left the emissions station at 12:30 p.m. [Tr 638, 648]

hours after she was supposed to start work.<sup>53</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.” [GCEX 50, Footnote 12] This is not true. The ALJ found that the invoice merely stated that Guzman’s “Car Needs Mass Air Flow Sensor, Oz sensor & Fuel Pressure Regulator Fix to Continue \$537.00.” [ALDJ 12] ALJ Parke thoroughly analyzed Guzman’s testimony and did not find Guzman’s account credible based on the following: (1) the language on the invoice that a part was needed, but not that the car was not drivable, and (2) Guzman’s inconsistent testimony: Guzman testified that her car broke down after she left “emissions” at 12:30 p.m. while she was on her way to work. Under cross examination, however, Guzman said she left the emissions facility at 10:30. Although she was scheduled to report for work at 1:00 p.m., Guzman admitted that she 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 13]

The General Counsel proceeds to argue that the Respondent’s witnesses told wildly conflicting stories. The testimony in this area is confusing and takes some careful reading, but

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<sup>53</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]

shows that the testimony was not “wildly conflicting”. It is apparent 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 that Kayonnie told me that “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.” [Tr 1756] Further, Chavez and Kayonnie discussed the possibility that Guzman was making different statements to each of them, and that Guzman had received prior written warnings. [Tr 837] Jaime Chavez testified that Kayonnie told him that Guzman had told Kayonnie that the reason she understood why Guzman did not come to work on 20 January 2007 was because Guzman went to purchase a car. [Tr 1752, 1757-1758] Since Kayonnie did not work on 20 January 2007 she could not have “reported” to Jaime Chavez that Guzman did not show up for work. [Tr 769]

The General Counsel also argues that the “record includes evidence of four other similarly-situated employees who did not report to work, none of whom were placed on probation.” [GCEX 52] There is no evidence on the record that any of these employees had the same disciplinary record as did Guzman. The General Counsel also argues that ALJ Parke neglected to evaluate the reason for Guzman’s discipline. [GCEX 52] As set forth above, that is simply not the case.

## 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. 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. 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. Thus, 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 last ditch effort to taint the record in this case. The General Counsel not only referenced, but attached 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>54</sup> and over four (4) months **after** the hearing in this case was concluded.<sup>55</sup> 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

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<sup>54</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 did not seek to amend the pleadings to include this allegation.

<sup>55</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.

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. 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.*<sup>56</sup>**

The General Counsel has requested that a *Gissel* bargaining order be granted as a remedy in this case, but 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 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...,and because of Respondent's unfair labor practices, support for the Union amongst Respondent's employees soon dissipated.” [GCEX 53] The record shows, however, that ALJ Parke did not make any findings on the timing of the 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 14] There were a number of other factors 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],

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<sup>56</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969)

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 Union's negative campaign was set forth in employee Pat Goebel's testimony that head union organizer Daisy Pitkin attempted to obtain a false statement regarding Milum from her. [Tr 1450-1456 (Exhibit P)] Further, the employees may have been disenchanted when they learned<sup>57</sup> about the type of behavior the Union exhibited in a similar "set-up" incident involving one of the full time Union organizers, Martha Chacon.<sup>58</sup>

### 1. The Facts.

First, it is important to note that only a small number of employees 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. Second, 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>59</sup> the Union petitioned for an election to date,<sup>60</sup> and an election was never conducted.

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)], and the secret ballot election was designed to effectuate this right. The concept of a *Gissel* bargaining order was created as remedy in cases where there had either already been an

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<sup>57</sup> Chacon stated in the charge that she spoke with some of the Milum employees. [R 16]

<sup>58</sup> On 19 February 2006 Chacon filed an EEOC charge that was knowingly false at the time it was filed under penalty of perjury, and the filing was timed to coincide with the commencement of the Union's employee campaign. Martha Chacon allegedly applied for a job at Milum [R 16], but did not make the interview on 28 June 2005. [R 16] In September 2005, Chacon applied for a job at Milum [R 15 – rejected], and interviewed with Angela Kayonnie. [R 16] Chacon was hired by Angela Kayonnie and told to report the next morning for work. [R 16] Chacon alleged that she started working on 23 September 2005, but an hour later Kayonnie told her that she couldn't work at Milum anymore because Chacon was pregnant. [R 16] Daisy Pitkin admitted 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]

<sup>59</sup> Judge Gontram sustained all objections made to Respondent's questions to Daisy Pitkin regarding whether the Union had a policy not to petition for elections [Tr 1665], or whether the Union was seeking an election. [Tr 1672]

<sup>60</sup> Milum filed an RM Petition in December 2006 but the election was blocked as a result of this unfair labor practice case. 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 at 1.

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 **employees’** right to a fair election. As the U.S. 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., supra*. 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.<sup>61</sup> 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>62</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

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<sup>61</sup> When *Gissel* was decided, the concept of corporate campaigns had not been realized or significantly utilized in labor relations.

<sup>62</sup> This is essentially a stop-gap measure when the union cannot force the employer to sign a card check neutrality agreement. The petition 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.

Union's efforts to force an employer to enter into a card check neutrality agreement, and would not protect the interests of the employees. This result is clearly outside the scope of protections set forth in and envisioned by *Gissel*. Milum also contends 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>63</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. 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>64</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 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 *Gissel*, 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

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<sup>63</sup> Sections 8(a)(2) and 8(f).

<sup>64</sup> Craig Milum testified 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...to have a sense of what was going on without crossing that line and getting involved in details, personalities." [Tr 376 – 377; 2060 – 2061]

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 asking an employee to poll other employees as to how they planned to vote in the election, discouraging employees from voting for union representation by promising a wage increase prior to the election, withdrawing recognition of the union's representation after the election, changing the working conditions after the election without notice to or bargaining with the union, barring employee discussion of union representation, threatening employees with reductions in benefits if they secured union representation, and discharging an employee because of his union activities. The ALJ vacated the election results and issued a bargaining order, but the Ninth Circuit 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, but the Ninth Circuit 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, imposed stricter work rules, withheld contemplated raises and bonuses, 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 imposition of a *Gissel* bargaining order, but 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 deemed true, a *Gissel* bargaining order is not an appropriate remedy because traditional remedies could create an atmosphere in which a free and fair election could be held.

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

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*] 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). In the instant case as in *Western Drug, supra*, before this case was tried,<sup>65</sup> the employee turnover was dramatic and created a change in circumstances.<sup>66</sup> 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 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 between 9 March 2005 and 9 March 2007.<sup>67</sup> 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] 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*. A bargaining order is not appropriate in this case.

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

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

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<sup>65</sup> There is not an allegation that Milum did anything that created the turnover.

<sup>66</sup> Even the Union organizers recognized that there was a high turnover rate. [Tr 985]

<sup>67</sup> 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. [R 40]

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, and 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.

**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, and 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. 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 production employees out of approximately ninety were “subjected to” unfair labor practices. The ALJ 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 16<sup>th</sup> day of January 2008.

s/ Laurie A. Laws  
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## CERTIFICATE OF SERVICE

I hereby certify that on this 16<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 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  
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One copy via Federal Express Overnight Delivery:

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

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s/ Laurie A. Laws  
Laurie A. Laws

# **EXHIBIT A**

1 A If the NLRB rules in favor of Milum Textile Services  
2 and against the union, for instance, in the first unfair  
3 labor practice we charged, then, if the union appealed  
4 that, it would end up in federal court, possibly.

5 Q Okay. Now that last paragraph, that second sentence,  
6 says that Brandy Ybarra was handbilling, right? She's the  
7 only employees that you recognized on that list, correct?

8 A That is correct.

9 Q And it says I doubt if we can do anything effective  
10 against Brandy due to the labor dispute and rights of  
11 employees to express support for a union, but, on the  
12 other hand, we would fire a person in a moment for what  
13 Brandy has done otherwise. It objectively and clearly is  
14 bad business practice for us to employ persons who  
15 harass our customers. What had Brandy done? Are you  
16 talking about her handbilling?

17 A Yeah. My understanding was that she had distributed  
18 leaflets that said that we were mixing linens, health  
19 care and food and beverage, and that our linens were not  
20 safe to use and that she was confronting the diners of  
21 the customers, of our customers, and attempting to  
22 persuade those customers that we were not a good company  
23 to be providing linens and that they're -- they might be  
24 in physical danger simply by having lunch or dinner at  
25 the restaurant. And it only the union aspect of that

# **EXHIBIT B**

1 correct?

2 A Correct.

3 Q Did you sign any on-line petitions with respect to the  
4 Employee Free Choice Act?

5 A I did.

6 **(GC Exhibit 36 marked for identification)**

7 Q BY MR. GIANNOLOUPOS: Let me show you a document marked  
8 General Counsel's 36. The second page, Mr. Milum, and under  
9 Nos. 2 and 3 it looks like it is a duplicate, but is that the  
10 on-line petition that you signed, did you type that in on line  
11 and submit it to Employees Free Choice Act?

12 A I think, yes. I think this is what I did.

13 JUDGE GONTRAM: Off the record.

14 **(Off the record.)**

15 JUDGE GONTRAM: Back on the record.

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

22 A Right.

23 Q When have you seen that happen?

24 A Angela Kayonnie, our production manager, for years she has  
25 been in the habit of having lunch with her husband in their

1 personal vehicles during the 30-minute lunch break and parking  
2 on 6<sup>th</sup> Avenue and having lunch. So during one lunch Angela told  
3 me that she was sitting there having lunch with her husband and  
4 that she saw a union organizer confront - I think it was a  
5 couple Burmese people, might have been three, and as they were  
6 trying to walk into the building the union organizer stepped in  
7 front of them and then started conversing or trying to converse  
8 in English. The Burmese people appeared to have listened and  
9 then the person - the organizer put the cards in the hands of  
10 the Burmese employees and gave them a pen and then the Burmese  
11 employees apparently sign the cards.

12 Q And Angela referred this back to you?

13 A She did.

14 Q And that is what you were describing here?

15 A Yes, that is correct.

16 Q Any other incidents?

17 A No, sir.

18 Q And when did that occur, do you recall with respect to the  
19 presentation of the Petition?

20 A I do not. I think it was after, but I am not sure.

21 Q I would have you look at General Counsel's 29, is this the  
22 area you are talking about?

23 A That is the general area involved, yes.

24 Q Now Angela doesn't know what language these union  
25 organizers speak, does she?

# **EXHIBIT C**

1 A That is correct.

2 Q And you were pleased that this article was published?

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

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

8 A Yes.

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

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

16 Q It says here the whole thing.

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

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

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

24 Q Sure. The whole thing?

25 A Yeah. That was part of a editorial that I had

1 written and submitted to The Arizona Republic and so that  
2 was, that whole editorial, was about the corporate  
3 campaign. It wasn't about going to employees and asking  
4 them to sign cards and then asking for an election. It  
5 wasn't about that, not at all. It was about the  
6 corporate campaign, the pressuring us to make that  
7 decision, in effect, for the employees.

8 Q Isn't it --

9 A That was the whole subject of that editorial and  
10 that's the context in which that sentence was made.

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

14 A At least, one that I know of.

15 Q Brandy Ybarra?

16 A That's correct.

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

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

25 Q Let me have you turn to the second page. The top

1 sentence says Brian Kalatchy, UNITE HERE organizer based  
2 in Phoenix, said the union would keep its efforts "as long  
3 as it takes." And it says Milum said, "The union intends  
4 to keep at it until I go out of business or give up and  
5 I'm not giving up." What did you mean by that?

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

10 Q Yes, please.

11 A That we're not going to agree that employees will not  
12 get an opportunity to make their vote. We're not going  
13 to make the decisions -- that decision for the employees.  
14 That decision is going to be made by the employees.  
15 We're not giving up on that.

16 Q Okay.

17 MR. GIANNPOULOS: Move for admission of General  
18 Counsel's 97, Your Honor.

19 JUDGE GONTRAM: Any objection?

20 MS. LAWS: No objection.

21 JUDGE GONTRAM: 97 is admitted.

22 **(General Counsel Exhibit 97 received into evidence)**

23 Q BY MR. GIANNPOULOS: I'll have you look at General  
24 Counsel's 91.

25 MR. GIANNPOULOS: And, for the record, Your Honor,

# **EXHIBIT D**

1 Q BY MR. GIANNOPOULOS: Let me show you. I will mark this  
2 my next in line. I don't have the copies here with me but I  
3 have them somewhere, which is General Counsel's 37.

4 Mr. Milum, you recently wrote a letter to the Editor, did  
5 you not, to the Arizona Republic?

6 A I did.

7 MR. GIANNOPOULOS: If I may approach, Your Honor.

8 JUDGE GONTRAM: Yes.

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

13 A A letter to the Editor.

14 Q A letter to the Editor. Correct.

15 A Right.

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

19 Is that what it says right there?

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

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

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

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

3 A No.

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

6 A Correct.

7 Q What does that mean?

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

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

11 A That's my belief.

12 Q But you never offered them that, did you?

13 A I didn't.

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

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

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

21 A I only had 200 words.

22 MR. GIANNOPOULOS: I move for admission of Employer's --  
23 or General Counsel's Exhibit 37 and I will make the sufficient  
24 copies, Your Honor.

25 JUDGE GONTRAM: All right. Ms. Laws.

# **EXHIBIT E**

1 They were still at a very low price. And I asked about, again,  
2 about setting up -- you know, installing cameras at that  
3 location.

4 Q And what did Craig respond?

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

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

9 A November, 2006.

10 Q And what did Craig say?

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

15 Q Did you -- who made the recommendation initially on where  
16 the cameras were to be placed?

17 A I did.

18 Q If you would show us on this, show us on Respondent's 5,  
19 where the old cameras were placed.

20 A Show? Mark?

21 Q You can mark. We'll put. Just one second.

22 MS. LAWS: John, can --

23 MR. GIANNPOULOS: How about a Brink's signal? I don't  
24 think anyone would get confused with that.

25 MS. LAWS: Okay.

# **EXHIBIT F**

1 forth and finally the union organizer said, fine, if you won't  
2 sign I will sign it for you. That also came up in that work  
3 stoppage. That also came up in that work stoppage.

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

6 A No, I didn't.

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

8 A I said, that shouldn't happen. Absolutely, that shouldn't  
9 happen.

10 Q Anything else about the union that maybe now you can  
11 remember occurring in that work stoppage, any discussions?

12 MS. LAWS: I am going to ask as to clarity, first. Are you  
13 asking what he discussed or are you asking what was discussed  
14 around him?

15 MR. GIANNOPOULOS: Both.

16 A I remember myself when that came up, people felt Angela  
17 didn't give me adequate respect and dignity. I said that I  
18 personally respect each of you and I hope that - I conveyed  
19 that, do you realize that. It seemed to me that pretty much  
20 everybody shook their heads affirmately and then several said,  
21 oh, yeah, there is no problem with you, we realize that you  
22 respect us and we just want Angela to do the same. I said I  
23 know from years of working with Angela that actually she does  
24 respect each of you. I have talked to her and she tells me  
25 things that obviously reflect her positive feelings about

1 remember where they came from. I can tell you this. I  
2 didn't ask anybody if they were getting calls late at  
3 night. I didn't ask anybody if they were getting union  
4 contacts.

5 Q How about any of your supervisors?

6 A I feel that they did not.

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

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

20 Q Now in this conversation with Mr. Stoll, at one point  
21 he told you that it must be pretty bad what you were  
22 going through and that he was sorry you had to go through  
23 all this, right?

24 A Yes. I think he did say that.

25 Q And you replied to him that it didn't bother you

# **EXHIBIT G**

1 forth and finally the union organizer said, fine, if you won't  
2 sign I will sign it for you. That also came up in that work  
3 stoppage. That also came up in that work stoppage.

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

6 A No, I didn't.

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

8 A I said, that shouldn't happen. Absolutely, that shouldn't  
9 happen.

10 Q Anything else about the union that maybe now you can  
11 remember occurring in that work stoppage, any discussions?

12 MS. LAWS: I am going to ask as to clarity, first. Are you  
13 asking what he discussed or are you asking what was discussed  
14 around him?

15 MR. GIANNOPOULOS: Both.

16 A I remember myself when that came up, people felt Angela  
17 didn't give me adequate respect and dignity. I said that I  
18 personally respect each of you and I hope that - I conveyed  
19 that, do you realize that. It seemed to me that pretty much  
20 everybody shook their heads affirmately and then several said,  
21 oh, yeah, there is no problem with you, we realize that you  
22 respect us and we just want Angela to do the same. I said I  
23 know from years of working with Angela that actually she does  
24 respect each of you. I have talked to her and she tells me  
25 things that obviously reflect her positive feelings about

1 A That is correct.

2 Q And who?

3 A I do not remember.

4 Q Was that in reply to a question that you had made?

5 A No.

6 Q They just spurt it out?

7 A That is correct.

8 Q How about the next sentence? One employee reported that  
9 an organizer forged a signature authorization card.

10 A Same thing.

11 Q Some unidentified employee, after work stoppage, just  
12 spurted that out.

13 A If -- if I know who it was, it was Luz. I was trying to  
14 think about that last night. She said either that her niece  
15 had refused to sign one and that an organizer had signed it for  
16 her or she said that her niece signed one and then, decided she  
17 didn't want that and asked for it back and was refused.

18 So, either I do not recall who that was or it was an  
19 employee by the first name of Luz. I'm not sure.

20 Q How did the subject of employees signing anything come up  
21 during that work stoppage?

22 A Somebody at the meeting -- or at the work stoppage said,  
23 what is this union stuff or something very close to that and  
24 that's then when I said, the union is interested in  
25 representing our employees in discussions or negotiations about

1 wages and working conditions, in exchange for dues.

2 Q Okay and how about signatures on cards?

3 A After I said that, then I noticed several people, like  
4 shaking their heads, like affirmatively and then looking at  
5 others and kind of pointing, saying see, I told you that's what  
6 this was about. I -- I, you know, don't speak very much --  
7 English -- but I could tell by the looks on their faces and  
8 kind of picked up the -- enough of the meaning of the words  
9 that -- that I felt sure that's exactly what they were saying.

10 Q In fact, there were a lot of signatures on that petition  
11 they gave. Right?

12 A I saw it for the first time yesterday. I don't know if  
13 what I saw yesterday was what I had in my hand on that  
14 particular day. It may have been.

15 Q Again, after you -- after you said the employee started  
16 shaking her head, I'm just curious about --

17 A Some employees starting shaking their heads affirmatively  
18 that, that's what I thought this was all about.

19 Q I'm curious about these signatures. But what would cause  
20 an employee to just blurt out -- burst out and say something  
21 about signature?

22 A When certain employees started shaking their heads yes  
23 and saying, see, that's what I told you about. Then, other  
24 employees started responding in Spanish and it was kind of  
25 like, a lot of people talking for like, a minute or two about

1 Union?"

2 JUDGE GONTRAM: Right.

3 MS. LAWS: Is that not a legitimate question?

4 JUDGE GONTRAM: Well, I am not sure that that is  
5 objectionable but to have Mr. Milum testify why he didn't --  
6 well, it seems to me it is only relevant if he did. If he  
7 didn't, in other words, he may not have talked -- let's assume  
8 that he didn't talk to the worst person in the world, you know,  
9 but he did talk to somebody that is sort of anti-union.

10 Is that something that you seek to establish? Is that --  
11 in other words, does that enhance the Respondent's claim that  
12 he didn't talk to anybody else?

13 MS. LAWS: I asked him if he hired --

14 JUDGE GONTRAM: Oh, okay. Overruled.

15 MS. LAWS: -- a firm or individual.

16 JUDGE GONTRAM: Overruled.

17 MS. LAWS: Okay. The question was, did you hire someone,  
18 the answer was, no, and I said, why not?

19 JUDGE GONTRAM: I am going to ask the question. Did you  
20 hire anybody who helped you to wage a campaign against the  
21 Union?

22 THE WITNESS: No, sir.

23 JUDGE GONTRAM: Why not?

24 THE WITNESS: I didn't think it would be productive.

25 JUDGE GONTRAM: Very good. Let's move on.

# **EXHIBIT H**

1 A I just told him that the UNITED they're out there. That's  
2 it.

3 Q And you told him that some of the Burmese employees had  
4 signed something, right, that the union agents gave them?

5 A I don't remember.

6 Q You don't remember that. But do you remember the Burmese  
7 employees signing something out there?

8 A I see them out there.

9 Q Which other employees have you seen out there meeting with  
10 the union?

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

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

18 A On that month or --

19 Q Well, since February, 2006.

20 A Every day or a week.

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

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

24 Q Right. And when did you start?

25 A The time that this UNITE HERE they started.

1 Q Okay.

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

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

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

7 THE WITNESS: Yeah. Eating for several

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

9 THE WITNESS: Yeah.

10 JUDGE GONTRAM: All right. I misunderstood.

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

13 A Long time.

14 Q A year ago?

15 A Yeah.

16 Q Two years ago?

17 A Been before two years ago or three years ago before. When  
18 I started working there I always eat out -- my lunch out there  
19 with my husband every single day, years and years.

20 Q And, before the union organizing drive started, did you  
21 have a habit of going back and telling Mr. Milum what you saw  
22 going on on 6th Avenue?

23 A Telling him what?

24 Q Would you go an tell Mr. Milum what you saw on 6th Avenue  
25 before the union drive?

# **EXHIBIT I**

1 like that.

2 JUDGE GONTRAM: That is no problem. I will certainly take  
3 witnesses out of order and certainly for the convenience of  
4 witnesses, that will not be a problem as far as I am concerned.

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

17

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

19 JUDGE GONTRAM: And what are you bringing up?

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

23 MS. LAWS: The supervisor, Your Honor, is a first  
24 generation Navajo speaker. Her first language was Navajo. You  
25 might notice in the wording notices that will be part of this

1 hearing that the English is very clipped and she does not  
2 understand all words English. She feels her words - she is okay  
3 in working with people, but when she was coming to court she  
4 was terrified that she didn't know all the words and know what  
5 she needed to do and that she would not be able to do it  
6 competently. So she does not speak and write English fluently,  
7 which is apparent from the wording that is in this  
8 documentation that she produces.

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

11       JUDGE GONTRAM: Well, whether a witness should have a  
12 translator is something that I can't - I really cannot address  
13 at least in the absence of that witness being present in the  
14 courtroom. I don't - if there comes a time when a witness is  
15 called and there is a need at that point to address the issue  
16 of the translator being, first of all, needed, and second of  
17 all, being available. I will address it at that point.

18       At this point it is not before me so if it comes, No. 1,  
19 and No. 2, if it then is addressed that the parties have, for  
20 whatever reason, not taken necessary steps by way of -I don't  
21 know, of being courteous to each other, that is something I  
22 will also address. But we are not there and hopefully that  
23 won't be necessary to address. It seems to me that counsel are  
24 both being courteous to each other so I do not expect that will  
25 come about.

# **EXHIBIT J**

1 answered, "That is what Evangelina told her so that is what  
2 Angela told me." Do you remember that testimony?

3 A Yes.

4 Q Did you discuss this incident further with Angela in  
5 between the time you testified the last time you were here and  
6 today?

7 A The only thing I wanted to make sure is that I had not  
8 seen the paper with the car.

9 Q The emissions paper, General Counsel's 107?

10 A Yes.

11 Q Who told you that Evangelina took her car to Emissions  
12 that day?

13 A That is what supposedly Angela understood from Eva.

14 Q And Angela told you that?

15 A Yes.

16 Q And when did she tell you that?

17 A The day that we talked, the day that Evangelina showed up  
18 to work?

19 Q The 23<sup>rd</sup> of January?

20 A Yes.

21 Q You testified there was more work on Saturdays. Do you  
22 bring in extra workers to handle the extra work?

23 A Both shifts work hard.

24 Q On Saturdays?

25 A Yes, on Saturdays.

# **EXHIBIT K**

1 front of you.

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

3 JUDGE GONTRAM: Overruled.

4 A No.

5 Q Did you show him that document?

6 A No.

7 MR. GIANNOPOULOS: One second, Your Honor.

8 JUDGE GONTRAM: All right.

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

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

15 A Repeat again.

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

19 A About this paper?

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

22 A (No response)

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

1 A Yes.

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

4 A Yes.

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

6 A Yes.

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

10 A Yes.

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

16 A Repeat again.

17 Q Do you remember testifying that Jaime came to you and told  
18 you that Evangelina Guzman had told him she could not come to  
19 work because she had to purchase a car?

20 A Yes.

21 Q And that's what happened back in January, 2007, right?

22 A Yes.

23 Q Before Evangelina was given that suspension, right?

24 A That's all he told me. That's it.

25 Q That's all he told you?

# **EXHIBIT L**

1 least, according to Lynn Roy?

2 A I think that's correct.

3 Q And you asked for everything that was in her file  
4 since her employment first began to convey the  
5 circumstances that Milum Textile Services considered when  
6 you suspended her in October, right?

7 A Say one more time.

8 Q Well, this last paragraph of your e-mail says please  
9 forward -- also forward the warning notices and  
10 termination notices, et cetera, on Maria Minjares that  
11 she has accumulated since her employment first began to  
12 convey the circumstances we considered at the time we  
13 suspended Maria Minjares about two weeks ago for three  
14 days approximately. Right?

15 A Yeah, it says that.

16 Q And the only thing that was there that you had any  
17 records were her May 19th Personnel Action Form that we  
18 just admitted as General Counsel 57, right?

19 A Well, it's a good thing we have this in writing,  
20 because, otherwise, I wouldn't remember that, but I mean  
21 I'm looking at it and that's what it says and I'm sure  
22 that's exactly right.

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

25 A I audited the decision that Angela and Jaime made and

1 so I wasn't involved in all the details of her  
2 circumstances in the context like I was researching and  
3 thinking about it and discussing it. I simply, after  
4 they made the decision, I told them you need to make this  
5 decision and I emphasized to them absolutely make sure  
6 you do not let the factor that she seems to be a firm  
7 union supporter, do not let that enter your mind in making  
8 the decision. Neither should you be more like -- you  
9 know, issue some more rigorous action than you otherwise  
10 would, nor should you do something lesser than you  
11 otherwise would. Simply ignore the fact that you believe  
12 she has any preferences one way or the other on union and  
13 make a decision completely without that and tell me what  
14 you decide. That was approximately my part in it. I  
15 didn't make the decision.

16 MR. GIANNOPOULOS: Move for admission of General  
17 Counsel's 58.

18 JUDGE GONTRAM: Any objection?

19 MS. LAWS: No objection.

20 JUDGE GONTRAM: 58 is admitted.

21 **(General Counsel Exhibit 58 received into evidence)**

22 Q BY MR. GIANNOPOULOS: Let me ask you, if there were  
23 no other warning notices, where did this come from that  
24 she has missed a number of days of work in General  
25 Counsel's 56? Do you know?

# **EXHIBIT M**

- 1 A Yes.
- 2 Q What did you discuss with Jaime?
- 3 A Jaime told me that Maria, she left I think it was on  
4 Monday or Tuesday and that she didn't let Jaime know that she  
5 was leaving. So she just left without telling Jaime. And  
6 Jaime told me that this is what happened.
- 7 Q And then you guys went and discussed the issue with Mr.  
8 Milum?
- 9 A I talked with Jaime.
- 10 Q I'm sorry?
- 11 A I talked with Jaime.
- 12 Q Uh-huh.
- 13 A Yes.
- 14 Q And then did you and Jaime go and discuss that with Mr.  
15 Milum?
- 16 A Yes.
- 17 Q And what did you discuss with Mr. Milum?
- 18 A We just told Craig about just what happened with Maria.  
19 And he just told me that it was between me and Jaime. So I  
20 told Jaime that you worked the evenings, she works for you, so  
21 I don't know what you're going to do. So he came up with this  
22 suspension thing.
- 23 Q And the decision to come with the suspension was Jaime?
- 24 A Yes.
- 25 Q Did you discuss with Mr. Milum the fact that Ms. Minjares

# **EXHIBIT N**

1 A Correct.

2 Q What did you discuss with Angela?

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

6 Q But you discussed that with Angela?

7 A Yes.

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

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

12 MR. GIANNOPOULOS: Can we go off the record for just a  
13 minute?

14 JUDGE GONTRAM: Off the record.

15 **(Off the record).**

16 We're back on the record.

17 MR. GIANNOPOULOS: Are we back on the record?

18 JUDGE GONTRAM: Yes.

19 Q BY MR. GIANNOPOULOS: After you discussed the issue with  
20 Angela, you went and discussed this with Mr. Milum. Isn't that  
21 true?

22 A I do not recall. I don't recall having spoken with Mr.  
23 Milum.

24 Q I'll have you look at what's marked as General Counsel's  
25 56.

# **EXHIBIT O**

1 A No.

2 Q Was she classified as a general production employee?

3 A She's employee.

4 Q I'm sorry. I couldn't hear you.

5 A Yes.

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

9 A Yes.

10 MS. LAWS: I'd like this marked Respondent's 42, please,  
11 Your Honor.

12 **(Respondent Exhibit 42 marked for identification)**

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

17 MR. GIANNOPOULOS: Oh. All right.

18 MS. LAWS: I'm sorry.

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

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

23 A Yes.

24 Q -- which is Respondent's 8?

25 A Yes.

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

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

10 Q Is this --

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

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

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

17 A Yes.

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

20 A Yes.

21 Q Is that the date you wrote it?

22 A Yes.

23 Q All right. Did you give this note to the front office of  
24 Milum?

25 A Yes.

1 Q When Evangelina Guzman came to you and asked for Monday,  
2 September 25th, '06 off for baby-sitting, what did you tell  
3 her?

4 A I told her to tell her friends that she has to work on  
5 Monday, that's her working day, and she said she was going to  
6 go ahead tell her friends that she has to come into work.

7 MR. GIANNOPOULOS: Objection, Your Honor. If I could ask  
8 that the document itself be taken away from the witness --

9 JUDGE GONTRAM: All right.

10 MR. GIANNOPOULOS: -- so that she can testify from her  
11 memory as opposed to looking at the document.

12 JUDGE GONTRAM: I noticed that she was simply reading from  
13 the document. Let's proceed.

14 Q BY MS. LAWS: Is baby-sitting for a friend a valid excuse  
15 for not coming to work?

16 A No.

17 Q I can't hear you.

18 A No.

19 Q In September, 2006, what was Evangelina Guzman's regular  
20 days off? What were they?

21 A Thursday.

22 Q Did she also have Sunday off?

23 A Yes. Laundry's closed.

24 Q Do you recall if Guzman showed up for work Saturday, the  
25 23rd of September?

- 1 A No.
- 2 Q Do you recall if she did or did not?
- 3 A She didn't work Saturday and Monday.
- 4 Q Did she show up for work on that Saturday, the 23rd?
- 5 A No.
- 6 Q Did she show up that Sun -- o, excuse me, Monday, the 25th
- 7 of September?
- 8 A No.
- 9 Q Did you receive a call from Guzman saying that she would
- 10 not be in to work on Saturday --
- 11 A No.
- 12 Q -- the 23rd of September?
- 13 A She didn't call.
- 14 Q Did you receive a call from Guzman regarding -- saying
- 15 that she would not be coming in to work on Monday, the 25th of
- 16 September?
- 17 A No.
- 18 Q Did you Guzman a warning notice in December, 2006?
- 19 A December?
- 20 Q I'm sorry. I didn't hear you.
- 21 A December?
- 22 Q Yes.
- 23 A Yes.
- 24 Q Do you remember why you gave her a warning notice for that
- 25 day?

# **EXHIBIT P**

1 husband's job, and they came to my house and my husband  
2 almost lost his job over it.

3 Q Did you explain why coming to your home would cause a  
4 problem with your husband's job?

5 MR. GIANNOPOULOS: Objection. Relevance, Judge.

6 JUDGE GONTRAM: Yes. There really is no difference  
7 why. She told them why she couldn't be contacted at  
8 home.

9 MS. LAWS: Okay.

10 JUDGE GONTRAM: I don't see why it matters.  
11 Sustained.

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

14 A Yeah. One. A friend of mine that worked there got  
15 bit by a spider.

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

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

21 MR. GIANNOPOULOS: Objection. Lack of foundation,  
22 Judge. Objection. Hearsay. Beyond -- certainly, she is  
23 narrating beyond the question. I mean it's --

24 JUDGE GONTRAM: All right. It seems to me she's  
25 explaining why. I will not accept it for the truth of

1 the matter if that's what it's offered for.

2 MS. LAWS: No, Your Honor.

3 JUDGE GONTRAM: All right.

4 MR. GIANNOPOULOS: Lack of foundation as to when this  
5 occurred, who was there, what --

6 MS. LAWS: It's her perception.

7 JUDGE GONTRAM: Why don't you tell us when this  
8 conversation occurred and your friend was? What her name  
9 is.

10 THE WITNESS: I don't know what her name is because  
11 so many people come in and out. We smoked together and  
12 stuff like that.

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

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

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

20 JUDGE GONTRAM: That's enough.

21 MS. LAWS: Okay.

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

24 MR. GIANNOPOULOS: Objection. Leading, Your Honor.

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

1 Overruled.

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

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

6 THE WITNESS: Yes.

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

8 A She did.

9 JUDGE GONTRAM: Pointing to?

10 THE WITNESS: The lady sitting over there.

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

13 MS. LAWS: That's correct.

14 JUDGE GONTRAM: Counsel?

15 MR. GIANNOPOULOS: Yes, she was.

16 JUDGE GONTRAM: All right.

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

19 MR. GIANNOPOULOS: Objection, Your Honor. Lack of  
20 foundation and hearsay. We can start with foundation.  
21 Where did this conversation take place? Who was present?  
22 Every single question is like that.

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

25

#### EXAMINATION

1 JUDGE GONTRAM: When did the conversation occur?

2 THE WITNESS: May or June of last year.

3 JUDGE GONTRAM: Of '06, is that right?

4 THE WITNESS: Yes.

5 JUDGE GONTRAM: All right. Where?

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

7 JUDGE GONTRAM: What? In the facility?

8 THE WITNESS: No. Outside.

9 JUDGE GONTRAM: All right. In back of it.

10 THE WITNESS: Yes.

11 JUDGE GONTRAM: On what street?

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

14 JUDGE GONTRAM: What time of day?

15 THE WITNESS: Around ten o'clock in the morning.

16 That's when I take my break.

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

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

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

23 THE WITNESS: Me and my friend and her.

24 JUDGE GONTRAM: And your friend's name is?

25 THE WITNESS: I could describe it to her. So many --

1 that's the reason I was --

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

4 THE WITNESS: She asked me to lie.

5 JUDGE GONTRAM: She asked you.

6 THE WITNESS: She did not tell me.

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

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

10 A If I would back up a story.

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

13 A The conversation that we were having just before.

14 Q And what was that conversation about?

15 A I don't know if I can answer this one because --

16 JUDGE GONTRAM: Was it about a spider?

17 THE WITNESS: Yes, it was.

18 JUDGE GONTRAM: All right. Please proceed.

19 THE WITNESS: I can answer it then?

20 JUDGE GONTRAM: I think we have the sense of what  
21 went on.

22 THE WITNESS: Okay.

23 Q BY MS. LAWS: You can go ahead and answer the  
24 question.

25 A Oh, okay.

1 JUDGE GONTRAM: Well, no. I'm trying to save some  
2 time here. I mean we can go over this. I mean we can  
3 describe the spider. I mean it's really not helpful.

4 MS. LAWS: It's non-detail, Your Honor, but, with all  
5 due respect --

6 JUDGE GONTRAM: All right.

7 MS. LAWS: -- we have the right to go into --

8 JUDGE GONTRAM: Listen. I'm trying to save some  
9 time, counsel. It's not necessary.

10 Tell us and tell us quickly.

11 THE WITNESS: Okay.

12 JUDGE GONTRAM: Quickly.

13 THE WITNESS: My friend had been off work. I asked  
14 her why she had been off work. She said she got bit by a  
15 spider. She was showing me the spider mark or bite, and  
16 they asked her to say it happened there. She said no,  
17 because she had already reported it where she lived. And  
18 they asked me if I would say I saw the bite there.

19 JUDGE GONTRAM: All right. Fine. Next question.

20 Q BY MS. LAWS: And, when you --

21 MS. LAWS: Your Honor, with all due respect.

22 JUDGE GONTRAM: Next question. Do you have a  
23 question, counsel, or are you finished with this witness?

24 MS. LAWS: No, I'm not, Your Honor, but --

25 JUDGE GONTRAM: Well, then you had better ask a

1 question or I'm going to dismiss the witness.

2 Q BY MS. LAWS: When you --

3 MS. LAWS: I'm trying to, Your Honor.

4 JUDGE GONTRAM: Well, then ask a question and ask it  
5 now.

6 MS. LAWS: Yes, Your Honor.

7 Q BY MS. LAWS: When you referred to there, what did  
8 you mean?

9 A What do you mean there?

10 Q You said it happened there.

11 A Oh. When it -- when she got bit, it happened where  
12 she lived.

13 Q And you were asked to tell it -- say it happened --

14 A That it happened --

15 Q -- where?

16 A In the shop at Milum's.

17 Q All right. Do you consider yourself to be a member  
18 of the union?

19 A No, I do not.

20 MR. GIANNOPOULOS: Asked and answered, Judge.

21 JUDGE GONTRAM: That's all right.

22 Q BY MS. LAWS: Do you know who Evangelina Guzman is?

23 A Yes, I do.

24 Q Have you heard anything about her receiving  
25 disciplinary warnings?