UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILUM TEXTILE SERVICES CO.

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

UNITE HERE!

COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF

Counsel for the General Counsel submits the following Reply Brief to Respondent's Answering Brief.[1] For the reasons described below, the matters asserted by Respondent in its Answering Brief are without merit and the Board should find the additional violations and remedies contained in Counsel for the General Counsel's Exceptions.

I. The ALJ Erred in Failing to Order a *Gissel* Remedy

A. A Gissel remedy is proper in this matter.

Respondent's claim that a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 US 575 (1969), is appropriate only in cases where there "had either already been an election" or where a union was obtaining signatures "in order to petition for an election" is simply wrong. Resp't Br., at 43-44. Indeed, in *Gissel,* instead of an election the union was seeking voluntary recognition based on a demonstration of a card majority. Id., at 579-580; *Gissel Packing Co.*, 157 NLRB 1065, 1068-70 (1966). In determining whether a duty to bargain existed, the Supreme Court identified the following relevant questions:

> whether the duty to bargain can arise without a Board election under the Act; whether union authorization cards . . . are reliable enough to provide a valid, alternate route to

[1] Citations correspond to Respondent's January 16, 2008 Answering Brief based upon Respondent's unopposed Motion requesting that this brief serve as its operative Answering brief.

> majority status; [and] whether a bargaining order is an appropriate and authorized remedy where an employer rejects a card majority while at the same time committing unfair labor practices that tend to undermine the union's majority and make a fair election impossible.

Id. at 579. This language conflicts with Respondent's suggestion that "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."[2] Resp't Br., at 44. As the Supreme Court made clear, a *Gissel* remedy is appropriate where, as here, the Union obtained authorization from a majority of employees, and this support was dissipated by Respondent's illegal conduct.[3]

B. The severity of Respondent's illegal actions warrants a *Gissel* remedy.

Respondent's claim that a *Gissel* remedy is unwarranted because only a "small number" or "handful" of employees were subjected to its unfair labor practices is unsupported by the record and the law.[4] Resp't Br., at 43, 44-46, 49. The record shows that Respondent illegally granted benefits to all of its employees in the form of nametags to discourage their union support in March 2006 (ALJD slip op. at 5, 15; Tr. 829, 832; GC. 31); that every employee was individually shown a video in which Respondent threatened to cut their wages if they unionized in December 2006 (ALJD at 8, 20; Tr. 101-02); and that every employee was subjected to the impression of surveillance through the installation of the lunchroom camera in January 2007. (ALJD slip op. at 19) Far from a "handful," every one of the 70 unit

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[2]The Union's desire to file a petition for an election is irrelevant as to the appropriateness of a bargaining order remedy. As the Board has noted, "an employer does not have a 'vested right' to an election." *Gissel,* 157 NLRB at 1084. In fact, "where an employer engages in conduct disruptive of the election process, cards may be the most effective-perhaps the only-way of assuring employee choice." *Gissel.* 395 U.S. at 602.

[3] ALJ Parke properly found that employee support for the union was dissipated, in part, by Respondent's unfair labor practices. (ALJD slip op. at 14, 26) As Respondent did not take exceptions to this finding, it is precluded from arguing, as it attempts to do in its Answering Brief at p. 42-43, that other factors could have caused the dissipation of the Union's majority support. See Board's Rules and Regulations § 102.46 (b)(2).

[4] Similarly meritless is Respondent's insinuation that Respondent employed 80 production employees. The ALJ properly found that 43 of Respondent's 70 production workers had authorized the Union to represent them as of March 4, 2006, and Respondent did not except to this finding. (ALJD slip op. at 13)

employees were subjected to Respondent's illegal conduct. Moreover, the violations found by the ALJ were as severe, if not more severe, than those found in *Gissel*, which involved two discharges, and findings of surveillance, interrogation, threats, and coercive statements.[5] See *Gissel,* 157 NLRB at 1081-82, 1088; *Gissel*, 180 NLRB 54, 55 (1969) (upon remand from the Supreme Court, Board finds a bargaining order warranted). Therefore, Respondent's claim that the unfair labor practices here are not so severe and pervasive as to warrant a *Gissel* remedy is unsupported by the underlying facts and the extant law.

Similarly unwarranted is Respondent's claim that employee turnover precludes a bargaining order. Resp't Br., at 47-48. The Board traditionally does not consider turnover in determining whether a bargaining order is appropriate, but rather assesses the appropriateness of such a remedy based upon the situation at the time of the illegal conduct. *Garvey Marine, Inc.*, 328 NLRB 991, 995-96 (1999). Nonetheless, even if employee turnover were a relevant factor, Respondent presented no credible evidence of turnover. Instead, Respondent's only evidence is Milum's speculative and self-serving testimony that employee turnover was 400%.[6] Respondent introduced no employment documents to support this claim, which was contradicted by Milum's other testimony that 30% of the original Union petitioners (13 of 43) were still employed over a year later. (Tr. 2190) In short, Respondent simply failed to present credible evidence supporting its assertion that employee turnover precludes a bargaining order.[7]

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[5] The General Counsel contends that the unfair labor practices found by the ALJ are sufficiently severe and pervasive to warrant a *Gissel* remedy. The unfair labor practices urged in the General Counsel's Exceptions only add to the necessity of a bargaining order remedy in this matter.

[6] This estimate was based on Milum's assertion that Respondent had processed "four times as many W-2's in the last year or two as we actually had full time employees." (Tr. 1998-1999) Even assuming Milum's statement is accurate, this does not necessarily equate to a turnover rate of 400%. Respondent presented no evidence as to whether the abundance of W-2's was a result of all of its 70 unit employees being rehired 4 times, or due to 10 unit positions turning over 40 times.

[7] Respondent also cites no precedent for its unsubstantiated assertion that a change in the ethnic makeup of some of its employees precludes a bargaining order. Resp't Br., at 48.

Respondent's suggestion that a bargaining order is inappropriate because of the passage of time, and because the Union did not file a petition for an election, Resp't Br., at 48-49, ignores Respondent's numerous unfair labor practices since March 2006, and long-settled Board precedent. See *Evergreen America Corp.*, 348 NLRB No. 12 slip op. at 5 (2006) (*Gissel* remedy appropriate even though four years had passed since the employer's illegal conduct); *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993) (employer's continuing violations support a *Gissel* remedy); *General Fabrications Corp.*, 328 NLRB 1114, 1115 (1999). Furthermore, there is simply no requirement that a union file a petition for an election after achieving a card majority to be eligible for a *Gissel* remedy. *Gissel*, 395 US at 580; *Gissel*, 180 NLRB at 54 n. 5, 55 (bargaining order issued where union notified employer it sought voluntary recognition, not an election).

II. The ALJ Erred in Failing to Find that the Suspension and Discipline of Evangelina Guzman Violated the Act

Respondent tries to have it both ways. When it re-hired Guzman in October 2006, it did so as a completely new employee, with a new personnel file, a new employee number, and without seniority or benefits. (GC. 2; Tr. 2239) In December 2006, however, in an attempt to bolster its decision to suspend Guzman, Respondent revived a September 2006 warning notice from Guzman's defunct personnel file.[8] Resp't Br., at 35. Even if Respondent were able to rely on this warning, the record contains ample evidence of disparate treatment. Here, Guzman was suspended even though she had only one prior warning (R. 8), while other employees repeatedly violated work rules but were not suspended.[9] For example, one employee repeatedly missed work, and received multiple written and verbal warnings, but

[8] Respondent's implication that it was forced by immigration law to consider the September discipline is simply unsupported by its legal citations. Resp't Br., at 33 n. 37.

[9] When asked for other instances where a rehired employee's prior disciplines were considered for future disciplinary purposes, Respondent could only cite Minjarez' October suspension, despite the fact Minjarez had never previously been disciplined by Respondent. (Tr. 2133-34, 2239-41)

was never suspended. (GC. 115) (Tr. 781) Another left without finishing his work three times before receiving a warning, but was never suspended. (GC. 125 p. 2; Tr. 796) A third ignored a work order, and left without permission, but was not suspended, even though it was his second warning for a similar violation. (Tr. 795-96; GC. 125 p. 1)

Similarly meritless is Respondent's attempt to claim that there was an equipment breakdown on December 25, requiring employees to perform extra work. Resp't Br., at 36. The ALJ made no such finding. Moreover, Respondent's own witness testified that, even if asked to stay late, she stays only "when she can" and the decision to do so is her own.[10] (Tr. 1577-78) Finally, Respondent's inference that Guzman agreed with its description of facts regarding her January 2007 discipline because she signed her warning notice, Resp't Br., at 38-39, is also baseless where the record shows that employees were subject discipline to for refusing to sign warning notices. (R. 48, pp. 53, 95)

III. The ALJ Erred in Failing to Find that The Suspension of Maria Minjarez Violated the Act

The record does not support the conclusion that Maria Minjarez was rehired in July 2006 subject to certain preconditions. Resp't Br., at 30-31. To the contrary, her original separation notice indicates that Respondent considered Minjarez eligible for rehire without listing any conditions (GC. 57), which is consistent with Minjarez' testimony that Respondent never advised her that her rehire was somehow conditional. (Tr. 492-93) The testimony Respondent cites claiming Minjarez admitted conditions to her employment, Resp't Br., at 30-

[10] Contrary to Respondent's claim, Guzman did not deny working in restaurant orders with Maria Torres on Christmas Day. Resp't Br., at 36 n. 44. The record shows that each restaurant order employee has her own station. (Tr. 1540-41, 1560, 1577) Guzman did not deny working with Torres, but instead referred to the fact that each were at their own individual sorting station. (Tr. 624)

31, involves her October 2006 suspension, and not preconditions for being hired as a new employee three months earlier.[11]

Respondent's suggestion that Minjarez was absent from work through October 18 is also not supported by the record. Resp't Br., at 32 n. 31. To the contrary, the ALJ found, based on ample evidence in the record, that Minjarez returned to work on October 18, but was sent home by Kayonnie. (Tr. 475-76; ALJD at 11)

Also unpersuasive is Respondent's claim that its decision to re-hire Minjarez in July, although it knew she was a Union activist, is evidence that her later suspension was not motivated by anti-union animus. Resp't Br., at 30 n.28. It is undisputed that, when Minjarez applied for re-employment, the Union had already filed its first unfair labor practice charge against Respondent. (GC. 1(a)) If Respondent had not hired Minjarez, it would have assuredly faced an additional charge alleging a refusal to hire violation.

IV. The ALJ Erred by Failing to Find that Respondent's Lawsuit against the Union Violated the Act

Contrary to Respondent's arguments, no litigant could have realistically expected Respondent's lawsuit to be successful. Resp't Br., at 20. The record evidence clearly demonstrates that the Union's claims were, in fact, true. The Union received evidence from employees that Respondent mixed restaurant and hospital linens (Tr. 1693); Respondent's own witnesses testified that they find restaurant linens mixed with hospital lines during the sorting process (Tr. 1532-33, 1754); Milum admitted using the same bins to transport clean and dirty linens (Tr. 1909); and the Arizona Department of Environmental Quality issued

[11] Minjarez was specifically testifying about the statement in her October suspension notice stating: "You need to be at work every day with very few excused exceptions, consistently on time, and work at a good, fast pace consistently." (Tr. 477; GC. 56)

Respondent a Notice of Violation involving its laundry facility.[12] (GC. 139, pp. 11-12). Likewise, Respondent's attempt to demonstrate the reasonableness of its lawsuit by citing a California State court jury verdict was appropriately rejected by the ALJ as irrelevant, where that decision involved an unrelated hospital and interpreted California law. (Tr. 2163-64)

Respondent's claim that it was prohibited from introducing evidence showing the reasonable basis of its lawsuit is also baseless. Resp't Br., at 19-20. Respondent attached two letters and one press release to its lawsuit, and only claimed that these three documents, disseminated by the union, supported its allegations. (GC. 8) The evidence Respondent attempted to introduce at hearing shed no light upon whether these three specific documents contained false or misleading information, and the ALJ properly sustained the General Counsel's objections to Respondent's irrelevant evidence. (Tr. 2147-2164) Contrary to its claim, Respondent was afforded every opportunity to develop relevant evidence concerning this allegation.

V. The ALJ Erred in Failing to Find that Respondent's Attempts to Have the Union Handbillers Arrested Violated the Act

Despite Respondent's claim, Resp't Br. at 24-25, the record supports the ALJ's finding that Milum repeatedly approached the police to stop union handbillers, encouraged his customers to do the same, and provided them with explicit directions on how to do so. (ALJD slip op. at 7, 17-18); (Tr. 315-20, 334-36, 396) (GC. 63, 88, 90, 91, 102, 329-30).[13] The record also shows that Milum personally requested the police respond to handbilling at a customers' restaurant, where he testified that "I have a vague recollection of describing the situation to detective Mulkly and she saying that she was going to go visit the restaurant."

[12] Contrary to Respondent's claim, this violation involved Respondent's laundry, not its medical waste facility. Resp't Br., at 21 n.20. This is evidenced by comparing the ADEQ notice of violation in GC. 139, addressed to Respondent's laundry facility located at 333 N. 7th Ave., to the ADEQ inspection letter in R. 20, concerning its medical waste facility "MTS Medical Waste Management," located at 3152 North 34th Drive. (Tr. 1901)

[13] The citation to "Tr. 63, 88, 90, 91, 102, 329-30" in the General Counsel's Exceptions is mistakenly cited as a Transcript citation, instead of a General Counsel's Exhibit citation. GC's Exceptions Br., at 37.

(Tr. 396; GC. 91). The record also supports the General Counsel's claim that police responded to union leafleting across the street from the Kierland Commons shopping center housing one of Respondent's customers, Fox Restaurant Group. (Tr. 316, 334-35, 1072-73) In the absence of any evidence indicating the need for a police presence, or that Respondent was motivated by lawful concerns, the ALJ erred by not finding that Respondent violated Section 8(a)(1) by calling the police and encouraging its customers to do so in its stead, even if no lawful union activity was impeded. *Sprain Brook Manor Nursing Home*, 351 NLRB No. 75 slip op. 2-3 (2007).

VI. The ALJ Erred by Dismissing, on Procedural Grounds, Complaint Allegations

Respondent admits that the Complaint was amended to include the allegation that Respondent asked employees to report on the Union activities of others. Resp't. Br., at 10 n.5. Thus, the ALJ's finding to the contrary is clearly a mistake. (ALJD at 15)

Similarly, the ALJ also erred by finding that the pleadings and evidence did not provide Respondent notice of the futility allegation, because the Complaint alleged that the threat occurred in mid-March, while the evidence showed the conduct occurred on March 4. There can be no question that this claim was fully litigated where Respondent was aware of the allegation, evidence regarding the allegation was adduced at hearing, and the parties addressed the matter in their post-hearing briefs.[14] Under these circumstances, the ALJ's dismissal of this allegation was unwarranted. See *Vermont Marble*, 301 NLRB 103, 104 fn. 8 (1991) (a discrepancy of only a few weeks between complaint allegations and the actual date the violation occurred does not, in itself, prejudice the Respondent); *Brannan Sand and Gravel Co.*, 314 NLRB 282, 283 (1994) (analysis of claim in brief to ALJ supports a finding that the matter was fully litigated).

[14] Respondent admits that it addressed this allegation in its post-hearing brief. Resp't Br., at 12.

VII. Respondent Has Waived Any Exception to the ALJ's Finding that It Unlawfully Gave Benefits to Employees in Violation of Section 8(a)(1)

The ALJ properly found that, in March 2006, Respondent unlawfully distributed benefits to employees to discourage their Union support. (ALJD at 15, 27) Respondent did not file exceptions to this finding, and is therefore precluded from now claiming in its Answering Brief that "the company . . . neither promised or distributed a benefit to employees." Resp't Br., at 10. See Board's Rules and Regulations § 102.46 (g).

VIII. Respondent's Analysis of the Facts Misstates the Record

At the outset of its brief, Respondent claims that the General Counsel's Exceptions Brief contains certain misstatements. The factual statements in the General Counsel's brief are fully supported by record citations, and the record speaks for itself. Indeed, it is Respondent who has failed to accurately state the facts by claiming there is no evidence that Milum warned his supervisors to be alert for the Union, to contact him if Union activity occurred, or that Kayonnie informed Milum that Burmese employees were joining the Union. Resp't Br., at 4. Angela Kayonnie specifically testified that Milum told her to be alert for the Union, to contact him if she observed union activity, and that she acted accordingly. (Tr. 1867-68) Similarly, Milum testified that it was Kayonnie who told him Burmese employees were signing authorization documents after speaking with the Union organizer. (Tr. 92)

Likewise, Respondent argues that the General Counsel wrongly asserted that Zulema Ruiz removed her Union button and never wore one again. Resp't Br., at 5-6. However, the record shows that Milum admitted Ruiz removed her Union button (Tr. 2094-94), and Ruiz testified that she never wore one again afterwards. (Tr. 415) Respondent also challenges the General Counsel's statement that the ALJ found that Soe Min was an open and active Union supporter. Resp't Br., at 6. Clearly, Soe Min was an active supporter as the ALJ found that

Soe Min "openly supported the Union" and wore Union t-shirts to work "almost daily." (ALJD at 9)

Most incredibly, Respondent asserts that no evidence exists to support the claim that Jaime Chavez and Angela Kayonnie violated the sequestration rule. Resp't Br., at 23. However, Chavez specifically testified that, during a break in the trial, Kayonnie showed him the trial exhibit marked as General Counsel's 107, and that he discussed this exhibit with her. (Tr. 1747-50) Despite Chavez' admission, Kayonnie simply denied showing him the exhibit.[15] (Tr. 1862-63)

IX. CONCLUSION

Based on the foregoing, the Board should reverse the ALJ's erroneous rulings and find that Respondent committed the additional violations as set forth in the General Counsel's Exceptions, and also find that Respondent's violations are so severe that the Board's traditional remedies will not erase their coercive effects, thereby warranting a bargaining order.

Dated at Phoenix, Arizona, this 7th day of February 2008.

Respectfully submitted,

John T. Giannopoulos
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2123
Facsimile: (602) 640-2178

[15] Respondent's claim that Kayonnie's discordant version of this event is a result of her speaking Navajo as a first language, rather than her dissembling, is unsupported by the record. ALJ Gontram, who actually witnessed Kayonnie's ability to testify in English, deemed a translator unnecessary (Tr. 664-66), and never found that Kayonnie had any trouble understanding or answering the questions posed to her.

CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF in MILUM TEXTILE SERVICES CO., Cases 28-CA-20898 et al., was served via postpaid regular mail, on this 7th day of February 2008, on the following:

The original and seven copies on:
Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW, Room 11602
Washington, DC 20570-0001

One Copy on the following:
Laurie Laws, Attorney at Law
Gregory A. Robinson, Attorney at Law
Farley, Robinson and Larsen
6040 North 7th Street, Suite 300
Phoenix, AZ 85014-1803

Milum Textile Services
333 North 7th Avenue
Phoenix, AZ 85007

Ira J. Katz, Associate General Counsel
UNITE HERE!
275 7th Avenue
New York, NY 10001

UNITE HERE!
2800 North 24th Street
Phoenix, AZ 85008

John T. Giannopoulos
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 N. Central Ave., Suite 1800
Phoenix, Arizona 85004
Telephone: (602) 640-2123
Facsimile: (602) 640-2178