UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28

Milum Textile Services Co.

and 28-CA-20898 et al

UNITE HERE

UNITE HERE'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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Introduction

Administrative Law Judge Lana Parke erred in two respects: (1) She found that Milum Textile's lawsuit violated §8(a)(1) in just a small part, and not in its entirety; and (2) she did not impose a *Gissel* order. Milum Textile does little to defend her decision.

A. The *Bill Johnson's* Violation.

Milum Textile filed a lawsuit, accompanied by a motion for a temporary restraining order, to enjoin UNITE HERE's rally scheduled for the next day. US District Court Judge James A. Teilborg denied the TRO, finding that Milum Textile made no attempt to show the actual malice necessary to enjoin labor speech. Milum Textile then withdrew the lawsuit. The lawsuit violated §8(a)(1).

Milum Textile does not contest retaliation,[1] a necessary element of a *Bill Johnson's* violation. Nor does it contest Judge Parke's finding that it could not prevail in its lawsuit on its secondary boycott allegations because those allegations were preempted.

But it does assert that the lawsuit was reasonably based, because, if the lawsuit had run its course, Milum Textile would ultimately have prevailed. In fact, the lawsuit ran its course. Milum Textile filed the lawsuit to enjoin the rally, and for no other purpose. In support of this conclusion, UNITE HERE marshaled extensive evidence. Milum Textile pretends that this evidence does not exist.

Because the TRO motion was the entire case, to avoid the *Bill Johnson's* §8(a)(1) violation, Milum Textile had to show that it reasonably expected to get the TRO. But on actual malice, Milum Textile at best presents to the Board the same arguments that Judge Teilborg belittled. It makes other arguments, on both actual malice and actual damages—also necessary to enjoin

[1] Brief in Support of Respondent's Response to the Exceptions to the Administrative Law Judge's Decision Filed by the Union ("Milum Textile Answering Brief"), 2.

labor speech—which it did not make to Judge Teilborg. Milum Textile tried to show actual damages to Judge Teilborg with conclusory assertions of harm unsupported by evidence. So Milum Textile could not reasonably have expected to persuade Judge Teilborg to issue the TRO.

Milum Textile repeatedly asserts its non-obligation to prove facts at the "initial pleading stage of the case."[2] These assertions are essentially admissions that Milum Textile could not reasonably expect to prove its case at the TRO hearing.

B. **The *Gissel* order.**

UNITE HERE had majority support, as demonstrated by an employee petition. Milum Textile then committed serious and pervasive unfair labor practices, including two hallmark discharges, depriving the Union of its majority. Its unfair labor practices, often committed by its highest official and still continuing, make a fair election impossible.

Milum Textile argues that its violations were not pervasive. It disregards the two discharges, the videoed wage loss threat displayed to every employee, and the camera surveilling every employee using the lunchroom. A complaint has now issued alleging a third hallmark discharge in 28-CA-21489 *et seq*.

Milum Textile claims that UNITE HERE is not entitled to a *Gissel* order because the Union did not intend to file an election petition, but rather engaged in a secondary publicity campaign for a card check agreement. Yet, *Gissel* itself involved no petition, and voluntary recognition agreements are sanctioned, as are publicity campaigns against secondary employers.

Milum Textile asserts that employee turnover renders the *Gissel* order inappropriate. It relies on Craig Milum's amorphous, self-serving assertion of 400% annual turnover, unsupported by employee lists. It also relies on the attrition of UNITE HERE's original supporters, without any evidence on the continued employment of union non-supporters who were and are still

[2] Milum Textile Answering Brief, 2, 4, 16.

exposed to Milum Textile's continual unfair labor practices, which are still being litigated in 28-CA-21489 *et seq*. It finally emphasizes its workforce's changing ethnic composition, despite all employees' continuing common interests in their wages, hours and employment conditions, regardless of their race and national origin.

Argument

I. Milum Textile violated §8(a)(1) by filing a baseless, retaliatory lawsuit.

A. Milum Textile filed the lawsuit for only one reason: To stop the rally.

UNITE HERE set forth numerous reasons, all referencing record evidence, showing that the lawsuit was, in its entirety, an attempt to enjoin the April 27 rally.[3] Milum Textile responds: "The Union, however, neither provides any evidence to support its claim nor any reference to the record to support this claim."[4] And Milum Textile offers only conclusory assertions that it ever intended to continue the litigation after the TRO disposition.

For example, Milum Textile argues, "Once the lawsuit is filed the plaintiff can engage in discovery, and it must only prove its case when the matter goes to trial."[5] But Milum testified that he withdrew the lawsuit because "it would cost a substantial amounts of money to prosecute the lawsuit and substantial amounts of my time."[6] Discovery is expensive and time consuming. Milum Textile never intended to take discovery.

Because the lawsuit is only about the TRO, Milum is stuck with the evidence it presented before Judge Teilborg on April 27, supplemented only with any explanation of why it reasonably expected to produce evidence on April 27 that it somehow was unable to produce.[7] Nothing else

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[3] UNITE HERE's Brief in Support of Exceptions to Administrative Law Judge's Decision ("UNITE HERE Exceptions Brief"), 22-24.
[4] Milum Textile Answering Brief, 18.
[5] Milum Textile Answering Brief, 4.
[6] Milum, 4/11, 2176.
[7] *Geske & Sons v. NLRB,* 103 F.3d 1366, 1376 (7th Cir. 1997), cert. den. 522 U.S. 808 (1997).

is relevant to the issue of whether the lawsuit was reasonably based. General Counsel met his burden of proving that the lawsuit was baseless by showing that Milum Textile did not attempt to establish elements of its prima facie case. Although this analysis requires examining Milum Textile's efforts to establish its case before Judge Teilborg, it does not equal shifting the burden of proof to Milum Textile (as Judge Parke suggested) or shifting the time period on which the analysis is focused to the Board hearing (as Milum Textile suggests). Instead, the analysis looks back in time to examine the litigation record for what it reveals about the merits of Milum Textile's legal action at that time. Counsel for General Counsel entered into evidence the entire litigation record,[8] and showed that the record included no evidence of actual malice or actual damages. And Milum offered no explanation of why it did not produce necessary evidence before Judge Teilborg.

B. **Milum Textile's lawsuit was baseless.**

1. **Milum Textile could not reasonably expect to show actual malice before Judge Teilborg.**

To the Board, Milum Textile makes numerous assertions that it never made to Judge Teilborg. Material not presented to Judge Teilborg generally cannot show that Milum reasonably expected to prove its case before Judge Teilborg.

Milum Textile relied on documents that Judge Gontram correctly rejected because Milum Textile had not produced them before Judge Teilborg.[9] Of the documents considered by neither Judge Gontram nor Judge Teilborg, Milum Textile complains most vociferously about an article describing UNITE HERE's loss of the *Sutter* defamation case.[10] UNITE HERE lost that case in

[8] GCX7-18.
[9] Milum Textile Answering Brief, 5-9; 4/10, 2030-2039.
[10] Milum Textile Answering Brief, 9.

November 2006,[11] well after the April 27 TRO hearing. At most, *Sutter* shows that UNITE HERE made statements with actual malice against Sutter, not against Milum Textile. Moreover, UNITE HERE is currently appealing *Sutter*,[12] and expects to prevail.

Milum Textile then points to Union Organizer Daisy Pitkin's testimony.[13] Pitkin led UNITE HERE's campaign,[14] and therefore could be expected to have some relevant testimony concerning UNITE HERE's rationales for the allegedly defamatory statements. Milum Textile offered no evidence of any attempt that it might have made to produce her testimony before Judge Teilborg.

Milum Textile argues that UNITE HERE showed actual malice because it could not reasonably base its linen mixing assertion on "hearsay" employee reports.[15] But UNITE HERE's reliance on employee reports was clear from the allegedly defamatory letters,[16] and yet Milum Textile did not make this argument to Judge Teilborg. And even if it had, the argument is not persuasive. Milum Textile's own witnesses, including Supervisor Chavez, admitted to mixing hospital and hospitality linen.[17] So it is likely that Milum also knew that Milum Textile mixed linen, and that he therefore could not reasonably expect to prove the contrary. Even giving Milum the benefit of the doubt, and assuming that nobody ever informed him about linen mixing, UNITE HERE could reasonably rely on "many" employee statements.[18]

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[11] Answering Brief, 9.
[12] *Sutter Health v. UNITE HERE*, C054400, filed 12/18/06, California 3rd District Court of Appeal, appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc_id=731665&doc_no=C054400
[13] Milum Textile Answering Brief, 9-10.
[14] Milum Textile Answering Brief, 9.
[15] Milum Textile Answering Brief, 9-10.
[16] GCX8.
[17] Groebel, 4/4, 1532-1533; Chavez, 4/5, 1754.
[18] Pitkin, 4/11, 2254; *Community Medical Services of Clearfield, Inc. v. Local 2665 AFCME*, 437 A.2d 23, 28-29 (Pa. Super. Ct. 1981).

Milum Textile then attacks UNITE HERE's reliance on the ADEQ report.[19] The ADEQ report states that Milum Textile used the same containers "for transporting clean laundry to and soiled laundry from contracted facilities."[20] Milum Textile makes no argument—it does not even cite the ADEQ quote—neither to Judge Teilborg, nor in its answering brief, that the ADEQ quote provided no reasonable basis for UNITE HERE's belief that Milum Textile's linens "could be a risk to" its customers' business.

Milum Textile questions how OSHA's 2002 report, which included hand washing and training violations, evidences dirty and dangerous conditions in 2006.[21] UNITE HERE's early 2006 employee surveys and OSHA's May 2006 report indicated that hand washing and training problems existed in 2006.[22]

Milum Textile argues, as it argued before Judge Teilborg, that the washing process would clean any restaurant linens that had been mixed with hospital linens.[23] But Milum Textile never ascertained UNITE HERE's reason for asserting that risk, and therefore did not argue before Judge Teilborg that UNITE HERE asserted the risk with reckless disregard of the truth.

2. Milum Textile could not reasonably expect to show actual damages before Judge Teilborg.

Milum Textile first proffers an article suggesting that a customer, Mancuso's, might take its business elsewhere because of UNITE HERE's campaign.[24] The article was dated February 21, 2007, well after the April 27, 2006 hearing date.

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[19] Answering Brief, 10-11.
[20] GCX139, p.9.
[21] Milum Textile, Answering Brief, 12.
[22] Training: 2002 OSHA report, GCX61, p.13, citing 29 CFR §1910.1030(g)(2)(ii)(A); "Compromising on Quality," GCX5, Exhibit D, p.4 ("75% of workers surveyed report never receiving health and safety training"); 2006 OSHA report, GCX138, p.6, citation 1, item 1(e), citing 29 CFR §1910.1030(g)(2)(vi). Handwashing: 2002 OSHA report, GCX61, p.12, citing 29 CFR §1910.1030(d)(2)(vi); "Compromising on Quality," GCX5, Exhibit D, p.4-5; 2006 OSHA report, GCX138, p.5, citation 1, item 1(a), citing 29 CFR §1910.1030(d)(2)(iii).
[23] Milum Textile Answering Brief, 14.
[24] Milum Textile Answering Brief, 3.

Citing *Gertz v. Robert Welch*,[25] Milum Textile then asserts, "actual injury is not limited to out of pocket loss."[26] The next sentence in *Gertz* includes the language, "all awards must be supported by competent evidence concerning the injury…."[27] But Milum Textile asked Judge Teilborg to presume damages, offering only conclusory assertions.[28] Damages are not presumed, but must be proven. [29]

II. UNITE HERE is entitled to a *Gissel* order.

A. Milum Textile's unfair labor practices were pervasive.

Milum Textile argues that its unfair labor practices affected only a small number of employees.[30] In fact, many employees knew about the discharges, and were presumably intimidated by them.[31] All employees viewed the videoed wage loss threat.[32] The lunchroom surveillance camera affected all employees using the lunchroom.[33] The threat and surveillance violations are fully established, as Milum Textile took no exceptions to Judge Parke's findings.

Milum Textile's pervasive unfair labor practices distinguish this case from *Steelworkers v. NLRB*.[34] Although in *Steelworkers,* in a unit of a size comparable to Milum Textiles, there were two discharges (and unlawful write-ups leading up to the discharges[35]), the additional unfair labor practices were limited. There were two discriminatory write-ups issued to another employee[36] and a one-on-one coercive statement,[37] with no suggestion in the Board's opinion

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[25] 418 U.S. 323, 350 (1974).
[26] Milum Textile Answering Brief, 3.
[27] 418 U.S. at 350.
[28] GCX11, p.3, ¶5.
[29] *New York Times v. Sullivan*, 376 U.S. 254, 283-284 (1964); *Gertz,* 418 U.S. at 350.
[30] Milum Textile Answering Brief, 19, 27.
[31] Milum, 3/7, 265, 275; Velasquez Garcia, 4/2, 1091, 1120, 1123; Reyes, 4/2, 1140; Roberts, 4/3, 1204; Zambrano, 4/3, 1279-1280; Goebel, 4/4, 1499, 1507, 1533; *NLRB v. Davis*, 642 F.2d 350, 354 (9th Cir. 1981).
[32] Milum, 3/6, 102.
[33] Decision, 19.
[34] 482 F.3d 1112 (9th Cir. 2007), denying petition for review of *Allied Mechanical*, 343 NLRB 631 (2004).
[35] 343 NLRB at 634-635 (Hays disciplinary report), and at 636 (Reddoch disciplinary reports).
[36] 343 NLRB at 639-640 (Pinheiro write-ups, January 31 and March 25).

that knowledge of these violations was disseminated; and an unlawful no posting rule.[38] Milum Textile's unfair labor practices were more numerous and pervasive. And, considering the unfair labor practice complaint currently pending in 28-CA-21489 *et seq*., including Evangelina Guzman's hallmark discharge, Milum Textile's misconduct is even more egregious.

B. UNITE HERE's comprehensive campaign does not disqualify it from the benefit of a *Gissel* order.

Milum Textile argues that UNITE HERE is not entitled to a *Gissel* order because it intended to obtain recognition, not through a Board conducted election, but by using a comprehensive campaign to persuade the Employer to enter into a card check neutrality agreement.[39] Yet, in *Gissel* itself, the union never sought an election.[40] Card check neutrality agreements are not only lawful,[41] but are favored. "It is a long established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor management relations."[42] Publicity campaigns against secondary employers are similarly lawful.[43]

In fact, there was a Board petition filed. Milum Textile filed an RM petition in December 2006. That same day, Milum Textile showed the videoed wage loss threat.[44]

Anticipating Milum Textile's unlawful response to an election petition, UNITE HERE opted instead for its comprehensive campaign. To prevail in these campaigns, a union needs both employer agreement and majority support. If the union obtains and then—because of severe and

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[37] 343 NLRB at 638
[38] *Id*.
[39] Milum Textile Answering Brief, 19-22.
[40] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580 (1969).
[41] *Verizon Information Systems*, 335 NLRB 558 (2001); *HERE Local 2 v. Marriott Corp.*, 961 F.2d 1464 (9th Cir. 1992).
[42] *MGM Grand Hotel*, 329 NLRB 464, 466 (1999). See also *NLRB v. Creative Food Design*, 852 F.2d 1295, 1299 (D.C. Cir. 1988), and cases cited in *Dana Corp.*, 351 NLRB No. 28 (2007), slip op. at 12 (Members Liebman and Walsh, dissenting in part, concurring in result).
[43] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988).
[44] Milum, 3/6, 102.

pervasive employer misconduct—loses majority support before it is able to persuade the employer to agree to a recognition procedure, the union is entitled to the same remedy as if it had filed an election petition. The same conditions, which would make unlikely the conduct of a fair election, would also make unlikely the union's ability to reestablish the majority support necessary to prevail in a campaign for card check recognition.

C. **Milum Textile introduced no significant turnover evidence.**

Milum Textile argues that a *Gissel* order is inappropriate because of employee turnover.[45] Judge Parke made no finding concerning employee turnover. Milum Textile did not except to the lack of a finding.

The Board generally places little weight on employee turnover.[46] Appellate courts disagree, believing that significant turnover makes the conduct of a new election more likely, as new employees are not exposed to the employer's unfair labor practices.[47]

Here, Milum offered vague, self-serving testimony.

> A I think we produced approximately four times as many W-2's in the last year or two as we actually had full time employees employed.
> Q So the rate would be?
> A You could say 400 percent.
> Q And what was the rate of turnover in 2006?
> A Approximately that.[48]

No documentary evidence supports this assertion.

Moreover, the 400% figure is inconsistent with Milum's assertion that, at time of the spring 2007 trial, 13 of 43 March petition signers were still employed,[49] a turnover rate among these employees of 70%. But the turnover of those who did not sign the petition is as relevant as those who did. They were exposed to Milum Textile's unfair labor practices. They were presumably

[45] Milum Textile's Answering Brief, 24-26.
[46] *Garvey Marine*, 328 NLRB 991, 995-996 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001).
[47] *Creative Food Design,* 852 F.2d at 1302-1303.
[48] Milum, 4/10, 1998-1999.
[49] Milum, 4/11, 2190.

affected by the unlawful acts, so that their resistance to unionization would increase. And they are likely to tell new employees about the unlawful acts to discourage their unionization.[50]

And, after Milum Textile committed the unfair labor practices that dissipated UNITE HERE's majority in July 2006, it continued committing unfair labor practices, exposing new employees to anti-Union coercion. In December 2006, it showed all employees the videoed wage loss threat. In January 2007, it installed the lunchroom camera. And it continued committing unfair labor practices, as will be evidenced by whatever violations are found in 28-CA-21489 *et seq*.[51]

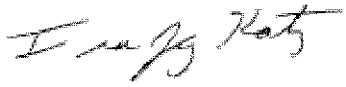
Milum finally asserts that the change its workforce's ethnic composition results in an employee compliment with different interests. All employees, no matter their race or national origin, share an interest in the employer's wages, hours and conditions of employment. That shared interest is the only interest that really matters here.

[50] *California Gas Transport v. NLRB*, 507 F.3d 847, 856 (5th Cir. 2007).
[51] *Garney Morris*, 313 NLRB 101, 103 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995) (continued violations justify *Gissel* order).

Conclusion

For the above reasons, for the reasons set forth in its exceptions brief, and for the reasons set forth by Counsel for General Counsel, the Union requests that the alleged violations be found and that appropriate remedies be imposed; and, specifically, that a *Gissel* order be imposed.

Respectfully submitted,



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Dated: February 7, 2008

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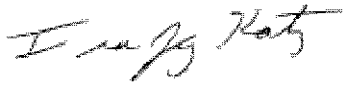

Ira Jay Katz

Dated: February 7, 2008