

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

COASTAL SUNBELT PRODUCE, INC.

and

Case 5-CA-36362

MAYRA L. SAGASTUME, AN INDIVIDUAL

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S**  
**ANSWERING BRIEF TO RESPONDENTS EXCEPTIONS TO THE**  
**DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## **I. STATEMENT OF THE CASE**

This case concerns the unlawful interrogation and termination of Mayra Sagastume because of her husband's union activities, in violation of Section 8(a)(1) and (3) of the Act. The alleged violations occurred during the course of a bitterly fought union campaign to organize Respondent's drivers.

In or around August 2010<sup>1</sup>, Respondent's drivers' frustration with their working conditions reached a head. In response, Luis Hernandez, Mayra Sagastume's husband contacted the Drivers, Chauffeurs, and Helpers Local Union No. 639, affiliated with the International Brotherhood of Teamsters (Union). As a result, the Union initiated a drive to organize Respondent's drivers. Hernandez was the lead employee organizer.

Respondent learned of the Union's organizing campaign by October 6. In response, it engaged in the following to thwart the campaign: soliciting grievances; promising to change driver pay; changing its vacation policy and the driver bonus system; increasing security; paying drivers to attend captive-audience meetings; threatening plant closure; making statements of futility; engaging in surveillance; and interrogating employees.

In the midst of the campaign, Sagastume and Hernandez heard that Nixon Quinteros (Nixon), a driver, told management that they were behind the organizing campaign, while referring to Sagastume with particularly vulgar language. Fearful Respondent would retaliate, Hernandez met with John Corso, Respondent's president, and Ross Foca, the president of East Coast Fresh Cuts (ECFC), on November 2, 2010. In the meeting, Hernandez denied engaging in union activities, while exhibiting particular sensitivity to the rumors regarding Sagastume. Corso

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<sup>1</sup> All dates are in 2010 unless otherwise noted.

instructed Hernandez to contact human resources to start an investigation into the rumors.

Sagastume made a similar complaint to Corso around the same time.

On or about November 14, Joey Saia, a supervisor, interrogated Hernandez about his union activities, and pleaded with him to speak with Corso to resolve the drivers' problems. Hernandez ignored Saia's pleas. On November 15, Corso sent an email to Tracey Moore, the manager in charge of the transportation department, asking for a follow-up on the complaints of Sagastume and Hernandez.

On November 17, Julio Ramos, Sagastume's supervisor, interrogated her about Hernandez's union activities. Ramos told her to tell her husband to cease his union activities, talk to Corso, or face reprisal. Sagastume responded that she had already spoken to her husband, and he was going to continue with the campaign. Ramos immediately left the work area, presumably to share what he had just learned with upper management. That evening Foca, sent an email to Corso, telling him that he decided to eliminate Sagastume's position. The next day, November 18, Sagastume was terminated.

The administrative law judge (ALJ) held Respondent violated Section 8(a)(1) of the Act by coercively interrogating Sagastume, and Section 8(a)(3) by terminating her. The ALJ found Respondent's contention that Sagastume's termination was the result of the long-planned transfer of the department in which she worked to be pretext. The ALJ noted the following in support of his decision: (1) there was no actual department transfer; (2) Respondent claimed it would gain efficiencies by having an ECFC administrator perform Sagastume's work, while performing his or her own, yet it never made the necessary changes to the department so that an ECFC administrator could perform both jobs at the same time; (3) an ECFC administrator did Sagastume's work for only a few weeks, before the duties returned to Respondent's employees;

(4) the majority of the work Sagastume previously performed is now done by five employees, thereby proving the decision was spurious, and not related to efficiencies; (5) Respondent's testimony regarding the timing of the decision was irrational and contradictory; (6) Respondent's prehearing statement was inconsistent with the testimony regarding Sagastume's duties and the reason for termination; and (7) Ramos was never consulted about Sagastume's termination.

Respondent excepts to the ALJ's findings on the basis of insufficient evidence and errors in creditability resolutions. After setting forth the issues and the facts of the Case, the legal analysis that follows will show that the Judge correctly concluded that Respondent violated Sections 8(a)(1) and (3) of the Act.

## **II. ISSUES PRESENTED BY RESPONDENT'S EXCEPTIONS**

- (1) Was the Administrative Law Judge (ALJ) correct in holding that Respondent violated Section 8(a)(1) by coercively interrogating Mayra Sagastume (Sagastume) on November 17, 2010?
- (2) Was the ALJ correct in holding that Respondent violated Sections 8(a)(1) and (3) when it discharged Sagastume on November 18, 2010?

## **III. STATEMENT OF FACTS**

### **A. Respondent's Business Operation**

Coastal Sunbelt, Inc. is a holding company for three operating companies: Coastal Sunbelt Produce Co., East Coast Fresh Cuts, Inc., and Coastal Sunbelt Leasing. (TR 457-58, 787, R 10). Coastal Sunbelt Produce Co. (CSP or Respondent), is a produce distribution company, which also distributes East Coast Fresh Cuts (ECFC) products. (TR 457-58). ECFC is a food processor-manufacturing company. (TR 458). Coastal Sunbelt Leasing is a leasing company, which leases ECFC and CSP assets back to ECFC and CSP.<sup>2</sup> (TR 457-58).

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<sup>2</sup> Coastal Sunbelt Leasing has no employees, rather its used to hold trucks and equipment. (TR 866). The leasing company was essentially managed by Mike Flanagan, the chief financial officer Coastal Sunbelt Inc., during the relevant time period. (TR 866, GC 22).

## 1. Executives and Managers

Coastal Sunbelt, Inc. executives also manage ECFC and CSP. (GC 22). The highest ranking official for all three companies is John Corso (Corso). (TR 865-66, GC 21, GC 22). Corso is the president and chief executive officer of Coastal Sunbelt, Inc., and CSP; he sits on the board of both ECFC and CSP.<sup>3</sup> (TR 458,786,865, GC 22). Mike Flanagan (Flanagan), the chief financial officer of CSP during the relevant time period, was responsible for managing the books for all three operating companies.<sup>4</sup> (TR 866-67). He also held the highest position of authority in the human resources department for both CSP and ECFC. (GC 22). Jason Lambros (Lambros) is vice president of purchasing for both ECFC and CSP. (TR 102, 458, GC 22).

Ross Foca (Foca) is the president of ECFC, but is paid by Coastal Sunbelt, Inc. (GC 21, GC 22, TR 463-464). Prior to becoming the president of ECFC, he was the chief financial officer for CSP. (TR 462, 469-70). He continues to sit in on CSP operating meetings. (TR 470). Foca reports directly to Corso. (TR 787). Dave Zeleznik (Zeleznik) is the vice president and general manager of ECFC. (TR 458). He is paid by Coastal Sunbelt, Inc. (TR 464-465).

Jimmy McWhorter (McWhorter) is the vice president of sales for CSP. (TR 101, GC 22). McWhorter was the president of L&M Produce (L&M). (TR 106), prior to its acquisition by Coastal Sunbelt Inc. in December of 2007.<sup>5</sup> (TR 788). Tracey Moore (Moore) is the vice president of operations for CSP. (TR 102, 458, GC 22). She is in charge of both warehouse and distribution operations. (GC 22). Moore reports directly to Corso. (TR 790-91). During the 2010 summer-fall timeframe, Stalio Callos (S. Callos) reported to

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<sup>3</sup> Corso has held this position since January of 2007. (TR 786). Corso is also the president of the Coastal Sunbelt Leasing. (TR 866).

<sup>4</sup> At the time of trial, Flanagan was no longer employed by Respondent . (TR 866-67)

<sup>5</sup> At the time L&M was the third largest produce distribution company in the region. (TR 788). At least some employees employed by L&M were transferred to CSP. (TR 200, 255, 369). These employees maintained their dates of seniority from L&M. (TR 200, 255).

Moore.<sup>6</sup> (TR 790-91). S. Callos was the day manager of the warehouse. (TR 103-104). Justin Callos (J. Callos) was the night manager. (TR 105).

## **2. An Overview of CSP and ECFC**

CSP and ECFC are housed in the same facility. (TR 467). The rent is split according to the square footage used by each company. (TR 467-68, 601). Together the companies employ approximately 900 employees. (TR 50-51). Of those 900 employees, 550 are employed by CSP, and 350 are employed by ECFC. (TR 575).

CSP's distribution process works by taking pallets of produce from growers and brokers, breaking those pallets down, and redistributing the produce in cases, or other smaller units. (TR 461, 580). CSP distributes approximately 2,000 types of products. (TR 469). The primary customers are restaurants and hotels. (TR 461). Deliveries are made six days a week. (TR 461). Only two CSP departments are involved in the instant case: (1) the transportation department, and (2) the tomato department.

ECFC is a food processing company.<sup>7</sup> (TR 465). ECFC buys produce from CSP almost exclusively. (TR 465, 790). ECFC washes the produce (fruits or vegetables), slices or dices it, and repackages it. (TR 366, 465). The products are sold to other distribution companies, manufacturers, and grocery stores. (TR 465-66).

ECFC processes food so it is ready for consumption.<sup>8</sup> (TR 343). As such, ECFC has very high sanitary standards, much higher than CSP's tomato department. (TR 343-44). As a result, ECFC and tomato department employees are not permitted to walk back and forth between departments. (TR 344).

While ECFC and CSP are set up as separate companies, the employees have the

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<sup>6</sup> Unless otherwise noted all dates herein are in 2010.

<sup>7</sup> Employees also referred to ECFC as "precut[.]" (TR 366).

<sup>8</sup> Produce was cut in an enclosed production area. (TR 581). R33(e) is a picture of ECFC processing area.

impression that ECFC and CSP are the same company. (TR 467, 106). CSP drivers deliver ECFC product on a daily basis. (TR 106, 259). The ECFC deliveries have no effect on driver pay, and are not even noted on employee paychecks. (TR 260). Drivers transfer employment between ECFC and CSP without effect on their duties, supervision, or any other term or condition of employment. (TR 107-08, R 28, R 29). Once a customer relationship is established, the products, regardless of whether they are a product of ECFC or CSP, are sold by the company with the relationship.<sup>9</sup> (TR 543-45).

**i. CSP'S Transportation Department**

CSP's transportation department manages produce delivery. (TR 97-109, 254-261, 468). CSP employs approximately 200 drivers.<sup>10</sup> (TR 49). The drivers cover approximately 150 routes. (TR 98). The department is managed by Jennifer Caplinger (Caplinger). (TR 104-05). Caplinger first held the position of transportation manager, and in the fall she became the logistics manager. (TR 104). Joey Saia (Saia) is the fleet manager.<sup>11</sup> (TR 180). Walter Vasquez (Vasquez) is the driver supervisor.<sup>12</sup> (TR 161).

Javier Vargas (Vargas) works in the transportation department as a float driver. (TR 254). He came to Coastal by virtue of the sale of L&M, and has approximately 15 years of seniority. (TR 254-55). At the time of trial, Vargas was still employed by CSP. (TR 254). Vargas was the long-time friend of Luis Hernandez (Hernandez).<sup>13</sup> (TR 155-56, 306).

Hernandez worked in the transportation department as a float driver. (TR 98). Hernandez came to CSP by virtue of the sale of L&M, where he had been employed since 1997.

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<sup>9</sup> For example, an invoice for tomatoes, a CSP product, states that the tomatoes were sold by ECFC. (R 8).

<sup>10</sup> Most of the drivers spoke Spanish. (TR 53).

<sup>11</sup> Respondent stipulated that Saia was a supervisor. (TR 180).

<sup>12</sup> Vasquez's nickname is Chino. (TR 160).

<sup>13</sup> Hernandez has a few nicknames, including Fish and Fernando (TR 242, 249). His wife Mayra Sagastume and her supervisor, Julio Ramos, referred to him as Fernando. (TR 249, 370). Luis Hernandez shares the same last name with Alex Hernandez, a manager in the tomato department. (TR 332-33). Alex Hernandez is referred to as A. Hernandez in this brief.

(TR 97, 324). Hernandez left CSP's employment in January of 2011. (TR 96).

Hernandez's wife, Mayra Sagastume (Sagastume), worked in the tomato department.<sup>14</sup> (TR 322-33, 369-371, 572, 957). At all materials times, the managers and supervisors of CSP and ECFC knew Hernandez and Sagastume were married.<sup>15</sup> (TR 369-371, 572, 957).

## **ii. CSP'S Tomato Department**

Prior to delivering the produce, CSP sorted and divided it according to the customer order specifications. (TR 475, 735-37). Some of this work was done by CSP's tomato department. (TR 471-72). The tomato department consists of two lines: the tomato line and the repack line. (TR 472). There were approximately 36 employees employed in the department in 2010. (TR 943).

Julio Ramos (Ramos) managed the entire department, and reported to S. Callos. (TR 484, 503-04). (TR 944). Under Ramos were two supervisors: Oscar Perdomo (Perdomo) and Alex Hernandez (A. Hernandez). (TR 944). Perdomo only worked in the department for four to six months, and was in training, during the relevant time period.<sup>16</sup> (TR 332, 330, 340). Sagastume helped train Perdomo, and was still fielding his questions at the time of her termination. (TR 340, 401-02).

Ramos, A. Hernandez, Perdomo, and Sagastume worked in the office area of the tomato department, an open space with a few desks and computers. (TR 332-33, 381, 476). The area was incredibly noisy due to the work that went on nearby. (TR 333). A picture of the office area taken at the time of trial was admitted as R 33(a).

### **i. The Tomato Line**

Tomato line employees work on a moving belt. (TR 334, R 33(c)). As tomatoes move

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<sup>14</sup> Sagastume and Hernandez married in Guatemala in 1999. (TR 96, 370).

<sup>15</sup> GC 26 and GC 27 are from the personnel files of Sagastume and Luis Hernandez, both documents identify their spousal relationship. (TR 199, 396). An email dated November 18, clearly shows that Respondent knew of Sagastume and Hernandez's marital relationship. (GC 29).

<sup>16</sup> At the time of Sagastume's termination, Perdomo was absent due to medical problems. (TR 332).

down the line, employees remove rotten ones and sort the remainder by color. (TR 334, 791). The tomatoes are then repacked in the box they came. (TR 334). The tomatoes are either put into stock for delivery or warehoused. (TR 791). A. Hernandez performed the tomato line administrative work, and retrieved the tomatoes from the warehouse. (TR 340, 377).

#### ii. **The Repack Line**

While the tomato line works exclusively with tomatoes, the repack line<sup>17</sup> works with a multitude of products. (TR 345). The repack line prepares product, such as fruits or vegetables, in small units or quantities. (TR 324, 791). The size of the box used to contain the produce varies. (TR 335). There are about 30 different kinds of products which have their own corresponding size box. (TR 339). No machinery is used in the repack line. (TR 366). There are 11 or 12 employees dedicated to working the repack line. (TR 348). A picture of employees performing repack work at the time of trial was admitted as R 33(b). (TR 580).

The repack line fills orders for restaurants and small grocery stores. (TR 324, 898-99). The orders increase during busy seasons, which occur at the start of the school year and holidays, such as Christmas and Thanksgiving. (TR 327).

Sagastume, the repack administrator, performed the administrative work in repack since approximately 2007.<sup>18</sup> (TR 326-339, 360-63,726-28). She did the same work at L&M for approximately three years before coming to CSP.<sup>19</sup> (TR 323-24). Sagastume was familiar with most of the customers when she came to CSP, because the vast majority were L&M customers that CSP acquired. (TR 330, 798).

Before her termination, Sagastume averaged 35 hours a week in front of a computer

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<sup>17</sup> Employees also called the repack line is “broken.” (TR 405-06, 411 626). Respondent has a separate broken department, which is not involved in this proceeding. (TR 406).

<sup>18</sup> Respondent’s position statement erroneously reports that Sagastume worked with tomato products. (GC 30. p 5).

<sup>19</sup> Respondent credited Sagastume’s time with L&M produce in terms of seniority, treating her as an employee who started working for CSP in 1997. (TR 322, GC 42). At L&M, Sagastume input the same type of information on paper that she entered on the computer at CSP. (TR 330, 433-434).

performing administrative work.<sup>20</sup> (TR 359). This is consistent with Respondent's position statement, which states: "[t]he overwhelming majority of [Sagastume's] duties were spent in front of a computer working on various software and cost analysis. A small percentage of [Sagastume's] duties involved working on the tomato/ repacking lines." (GC 30 p. 5 n. 7). Sagastume entered information into a computer as the orders were completed, making it difficult to track exactly how much time she spent in front of the computer. (TR 952). The computer programs Sagastume used were written in English. (TR 359). She was trained to use the programs when she first arrived at CSP, as she was not proficient in English. (TR 359-60). English is not a necessary skill in the department, since all of the employees speak Spanish, and the supervisors are not proficient in English.<sup>21</sup> (ALJD 40).

The administrative work in repack consisted of retrieving reports which contained the sales from the evening before; requesting produce from the warehouse to complete orders;<sup>22</sup> verifying the inventory reports for accuracy;<sup>23</sup> making pallet labels; and completing the repack costing sheet. (TR 324, 332-40, 361-65, 491). The repack costing sheet recorded the product code; the amount of large boxes of produce taken to make an order; the amount each large box cost; the total cost of the large boxes used; the number of employees used to repack the produce into smaller boxes; the amount of time the employees took to do the repacking; the cost of the packing; the final amount of smaller boxes packed; and the cost per case of the repacked

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<sup>20</sup> Other estimations of time she spent on the computer are not based on actual knowledge and were properly discredited. (ALJD 60).

<sup>21</sup> Ramos testified that there was no reason for anyone to speak English in the tomato department. (TR 972-73). Ramos testified through an interpreter. (TR 942). The evidence shows that Ramos could not read English. (TR 961). For example, Ramos was unable to read a two-paragraph email written in English. (TR 961, R 16). A. Hernandez's application reflects low level English skills. (GC 45). For example, only a few words are written in English, and the majority of the those words are misspelled, for example, "ani time" is written instead of "any time[.]" "friend" is recorded as "frend[.]" (GC 45).

<sup>22</sup> In order to know how much produce to request, Sagastume had to know how many small boxes could be composed from each large box of produce. (TR 339).

<sup>23</sup> Sagastume physically checked the warehouse inventory against what was in the computer system, and updated the inventory in the computer accordingly. (TR 325, 338, 362).

produce. (TR 361-62, 491, GC 40(a)).

Aside from repack administrative work, Sagastume also checked the quality of each pallet after its completion, and prior to the start of a new pallet (TR 347); ensured proper materials were available to the line workers (TR 325); monitored the chlorine level on the tomato line; and completed department cleaning reports. (TR 325, 365). When she had a free moment, she packed boxes with repack line employees. (TR 334-35, 363-365). Occasionally, she checked the quality of repacked tomatoes from the tomato line.<sup>24</sup> (TR 357-59).

Sagastume worked Monday through Friday; arriving between 6:00 a.m. and 6:30 a.m. (TR 326). Her departure time depended on the amount of work to be done. (TR 327). On slow days she left between 2:00 p.m. and 4:00 p.m. (TR 327). On busy days she left work as late as 7:30 p.m. (TR 327). She earned \$21.67 an hour. (TR 405, GC 42).

Sagastume also had experience in food processing, where produce is cleaned, peeled, and cut so that it is ready for consumption. (TR 366). From 1997 to 2003, she worked in L&M's precut department, where she processed produce.<sup>25</sup> (TR 343, 366). Sagastume performed the same work in CSP's processing department for a year and a half, prior to 1997. (TR 342).

### **iii. Giant Tomatoes**

The interrelationship between CSP and ECFC is exemplified by the sale of tomatoes to Giant Landover (Giant). (TR 493, 499-500). ECFC holds the business relationship with Ahold, the holding company of Giant Foods' grocery chain in the Maryland area. (TR 493). ECFC manages the sale of the tomatoes to Giant. (TR 500). CSP employees perform the labor associated with the tomatoes sold to Giant. (TR 502- 515). CSP's profit and loss statement records the Giant tomato sales. (TR 500, 502).

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<sup>24</sup> Sagastume did not pack tomatoes. (TR 358).

<sup>25</sup> The department was actually called repack at L&M, but to be clear, it did not perform the same functions as the repack line at CSP. (TR 340-42, 366). The repack work at L&M was akin to what ECFC does. (TR 342).

Respondent claims that the sale of tomatoes to Giant was so new and different that it led to the transfer of the entire tomato department to ECFC. (TR 493-506). However, the record evidence shows the opposite. (TR 707). Tomatoes sold to Giant are sorted by size and color.<sup>26</sup> (TR 711). Tomatoes processed through the tomato line have always been sorted by size and color. (TR 707). Ramos managed the Giant tomato production, just as he had for the rest of the tomato line business. (TR 438, ALJD 41). The only significant change to tomato line work was the volume of tomatoes produced for one customer.<sup>27</sup> (TR 523, 707). In October, Respondent hired between four to six employees to compensate for the increased workload. (TR 439, GC 42).

In April, Giant communicated that it would get its tomatoes from CSP. (TR 503, 703). Supposedly, Respondent was to start taking orders in August, possibly even earlier. (TR 525, 722-23). Samples of tomatoes were created for Giant in late June. (ALJD 29). An email dated September 24, requesting a sample of tomatoes, is the only documentary evidence of a sample request in the record.<sup>28</sup> (R 16). The first order of Giant tomatoes was not delivered until October 14. (TR 762). Foca testified to having multiple problems with the first delivery, such as with sticker placement, color sorting, and the weight of cases.<sup>29</sup> (TR 549). He claimed that Giant was “very upset.” (TR 549). Zeleznik, the general manager of ECFC (TR 458), testified that complaints are generally documented, often in the form of an email. (TR 763-64). Foca could not recall receiving any written complaints about Giant tomatoes. (TR 661-62). Moreover, no evidence of complaints was turned over pursuant to the subpoena. (TR 763).

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<sup>26</sup> Giant tomatoes had to be 3 inches in size. (TR 711). There had to be no more than 20 Giant tomatoes per layer in a box. (TR 429, 711).

<sup>27</sup> Giant tomato orders were to compose ten percent of the weekly volume of tomatoes processed by the tomato line, (TR 523, 707).

<sup>28</sup> The email cannot be used to establish Ramos’ knowledge because its clear from his testimony that he did not recognize the email, nor could he read it. (TR 959- 63).

<sup>29</sup> Corso gave vague testimony as to what he was told about complaints. (TR 802-803).

In response to the sample problems and poor initial delivery, Foca claimed he immediately put Jeremy Clark (J. Clark) and Zeleznik on the Giant tomato project to make the tomato line more efficient. (TR 493-94, 501). The ALJ discredited Foca and Zeleznik's testimony that their studies examined Sagastume's duties. (ALJD 57-58).

### **B. Employee Discontent and the Union's Organizing Efforts**

The Drivers, Chauffeurs, and Helpers Local Union No. 639 affiliated with the International Brotherhood of Teamsters (Local 639 or Union) represents drivers, warehousemen, custodians, and food service workers.<sup>30</sup> (TR 42). Starting in late summer of 2010, Local 639 sought to organize the drivers of Coastal Sunbelt Produce Co. (TR 48, 120-130). Local 639 demanded recognition by letter, which Respondent received October 15. (GC 3). Respondent declined to recognize the Union by letter, dated October 20. (GC 25). Teamsters Local 639 filed a petition for election on October 27. (GC 7). The election was held December 17, and the voting sessions were from 3:00 am to 7:30 am and 9:30 am to 12:30 am. (GC 10, GC11). Local 639 lost the election, 41 to 136. (GC 10).

#### **1. August 2010: Drivers Discuss Whether to Strike or Organize Under a Union**

The roots of Local 639's union campaign began at a company soccer game four to five months prior to the Board election.<sup>31</sup> (TR 108-10). ECFC employees played CSP employees. (TR108-09). After the match a group of employees, many of them drivers, gathered to talk about the problems they were having at work.<sup>32</sup> (TR 109-10). The employees discussed three possible ways to solve their problems: (1) send a letter to John Corso, (2) hold a strike on Saturday,<sup>33</sup> or (3) bring in a union. (TR 110). David Montenegro, an ECFC supervisor, was present for this

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<sup>30</sup> Local 639's jurisdiction covers Northern Virginia, Washington, DC and Maryland. (TR 41). The offices of Teamsters Local 639 are located in Washington, DC. (TR 120).

<sup>31</sup> The ALJ credited the testimony of Hernandez with regard to what was said at the soccer game, noting it was corroborated by Ramos and Vargas. ALJD 5 n. 12.

<sup>32</sup> The employees were particularly upset about the way they were treated by Caplinger. (TR 120-121).

<sup>33</sup> Saturday was chosen because it is a particularly busy day. (TR 110).

conversation. (TR 110).

## **2. August 2010: Corso Interrogates Hernandez about Strike Rumor**

In response to talk of a strike, all of the supervisors, including Corso, came to work the Saturday after the soccer game. (TR 111, 836, 966). At around 1:00 pm in the afternoon, Corso approached Hernandez near the loading dock. (TR 110-11). Corso asked Hernandez if he heard anything about employees going on strike.<sup>34</sup> (TR 111). Hernandez replied that he did not believe a strike would occur, but asked Corso to ask himself why so many drivers were leaving the company. (TR 113). Corso replied that he thought “those people weren’t doing their job in an appropriate manner.” (TR 113). Hernandez responded that perhaps the problem was with the supervisors. (TR 113). No strike occurred. (TR 113).

## **3. August to December 2010: Hernandez Meets with Teamsters Local 639 and the Union Organizing Campaign Launches**

In response to the conversation at the football field, Hernandez contacted Local 639. (TR 120) After completing their routes, Hernandez and Hector Aguilar went to Local 639’s office.<sup>35</sup> (TR 120, 125). They met with John Gibson (Gibson), the Secretary Treasurer for Local 639, discussed their work problems, and set up another meeting for which they would bring their coworkers. (TR 120-25).

The next meeting occurred on or about September 8, at Local 639’s office. (TR 81,126, GC 14). At this meeting, Gibson gave Hernandez about 200 blank authorization cards, which he passed out to employees for their signature.<sup>36</sup> (TR 127-28, GC 13).

The union campaign formed an organizing committee composed of Respondent’s employees.<sup>37</sup> (TR 57). Hernandez was a member of the committee.<sup>38</sup> (TR 58). Scott Clark

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<sup>34</sup> The ALJ credited Hernandez’ testimony with respect to this conversation. ALJD 5 n. 12.

<sup>35</sup> This meeting was also confirmed by the testimony of S. Clark. (TR 52).

<sup>36</sup> This is also confirmed by the testimony of Vargas. (TR 261-63, GC 17).

<sup>37</sup> Not all members of the organizing committee were equally active. (TR 57).

<sup>38</sup> Javier Vargas was also a member of the committee. (TR 58).

(S. Clark), the lead organizer (TR 52), testified that with regard to the campaign work, “Mr. Hernandez was hands-on. He was probably my lead committee person who helped me gather information and disseminate information to the other employees.” (TR 54).

In addition to being an active committee member, Hernandez attended union meetings at Local 639’s office and various restaurants, as well as hosting a few in his home. (TR 56-64, 74, 76, 129, GC 4, 5, 14). Hernandez estimated that he went to about 12 meetings. (TR 129-30). He also arranged the dates and times of the meetings with Gibson and S. Clark. (TR 114). He made calls for the union organizing campaign August through December. (TR 115). He passed out flyers to employees September through December. (TR 118-119). Hernandez estimated that he passed out flyers to at least 50 different employees.<sup>39</sup> (TR 118). Hernandez also signed a letter, dated December 13, identifying himself as a member of the organizing committee, which was sent to Corso. (TR 194, GC 9). Finally, Hernandez acted as the Union’s observer at the election (TR 194-95). The Union informed Respondent by letter dated, December 14, that Hernandez would be the observer. (GC 24).

**C. September/ October 2010: Respondent Learns of the Union Organizing Campaign**  
Respondent learned of the union organizing campaign by October 6. (ALJD 6-7, 45).

Corso received an email from McWhorter on October 6, with the subject line “Driver Thing[,]” which stated:

Larry Hooker – one of the older black drivers – called me yesterday and told me that the black guys are now being approached to sign petitions. He told me that Javier<sup>40</sup> approached him and said they had 120 signatures... is there any way you and I can sit down with the leaders of this thing somewhere off site and have a talk with them? (GC 73).

The ALJ did not credit Corso’s testimony that he did not know the “driver thing” referred

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<sup>39</sup> Foca admitted to seeing Hernandez pass out flyers to employees in December. (TR 573).

<sup>40</sup> Corso admitted to assuming the Javier referred to in the email was one of their drivers. (TR 838). He admitted he knew that Javier Vargas was a driver. (TR 838).

to the union campaign. (ALJD 6-7). Nor did he credit Corso's denial that he never met with McWhorter, as requested in the email.<sup>41</sup> (ALJD 6-7). The ALJ inferred that Corso followed up on the email, and that Corso understood that the 120 signatures referred to authorization cards.<sup>42</sup> (ALJD 5-6). The ALJ's finding is consistent with the evidence of Corso's leadership role in Respondent's anti-union campaign and its efforts to crush the organization drive discussed further in this brief.

The Union made a formal demand for recognition by letter, dated October 13. (GC 3) Corso testified that after he received the October 13 demand letter from the Union, he spoke with the other managers about it, including Foca and Moore. (TR 822-23). Corso admitted that senior management was already aware before receipt of the demand letter, "that something was going on." (TR 823-24).

#### **D. September to December 2010: Respondent Conducts a Forceful Anti-Union Campaign**

On October 27 Corso held a Board of directors meeting, which Foca attended.<sup>43</sup> (ALJD 7-9, TR 826, 829-30, 839-40, GC 72). On the morning of October 27, Corso emailed the board of directors an initiative summary he created. (TR 826-27). The summary was drafted before Respondent learned of the petition for election.<sup>44</sup> (GC 72). The initiative summary makes clear that Respondent started its anti-union campaign prior to October. (GC 72). The initiative summary shows that Respondent had begun a litigation strategy; found employees to speak out

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<sup>41</sup> This denial was not credible given Corso's conflicting testimony that he was aware of rumors, understood that "something was going on"; but did not lean of the union campaign until he received the Union's demand for recognition letter.. (TR 823-24, 835-38).

<sup>42</sup> When asked by the ALJ, if Corso knew to what the word "petitions" referred, Corso evaded the question with a non-responsive answer. (TR 838).

<sup>43</sup> Foca was present at the meeting. (TR 830).

<sup>44</sup> The summary states, "there will be no voluntary recognition, they will have to petition the NLRB for a hearing and an election; ball in their court – assumption is Union will file." (GC 72)

against unions;<sup>45</sup> hired a consulting group to examine driver pay; changed workings conditions; and held anti-union meetings with the drivers. (ALJD 8-9, GC 72).

## **1. Respondent's Initiative Summary Evidences Unlawful Response to Union Organizing Campaign**

### **a. Solicitation of Grievances**

Respondent began holding focus groups with the drivers by September 14. (TR 833, 929, R 27 p. 3). Employees were paid \$50 per meeting. (TR, 224, 929, R 27 p. 3). The purpose of the groups was to get information to make changes in the workplace. (TR 833-34). In October, Respondent instituted a suggestion box. (TR 816, GC 72 bates 1586, GC 60 p. 2). Respondent discontinued the changes in response to the demand letter. (TR 833-34, GC 60 p. 2).

### **b. Promises of Pay Changes**

Corso admitted that he told drivers that Respondent had contracted with Hay group to analyze their pay. (TR 833) He also admitted to telling drivers that no pay increases would occur until after the union campaign was over. (ALJD 9 n. 20, TR 833). The record further shows that Respondent continued to speak to employees about making changes to their pay during the critical period, as evidence by a December 11 email exchange between Corso and Caplinger in which Caplinger wrote: "I spoke to Montague this morning about his pay....Here is some of the feedback he shared. He is happy that John knows that he hasn't had a raise in 5 years and is doing something about it." (GC 74)

Changes were made to driver bonuses. (ALJD 45, TR 814-15, GC 60 p. 2, 72 p. 1585). Traditionally, driver bonuses were not issued if drivers failed to meet certain specifications, such as timeliness. (TR 814). Respondent knew drivers were unhappy with the bonus system prior to the union organization drive. (TR 814-15). However, it was not until October that the system by which a bonus could be eliminated was suspended. (TR 814-16, GC 60, 72).

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<sup>45</sup> Corso claimed that employees voluntarily approached him and told him that they did not want the Union. (TR 813). Corso admitted that he encouraged these employees to speak out against the Union. (TR 813).

**c. Vacation Policy Changes**

In early October, employees were notified that Respondent was going to change its vacation policy.<sup>46</sup> (ALJD 45, TR 816-17). Traditionally, employees were only allowed to take one week of vacation at time. (TR 816). In reaction to the organizing campaign, the policy was changed to allow for two consecutive weeks. (TR 816, GC 72 p. 1585, 60 p. 2).

**d. Increased Police Presence**

In response to the organizing campaign, Respondent increased its police presence from Friday nights to 24 hours a day.<sup>47</sup> (TR 678, 680-81). While the officers were off-duty when guarding the facility, a police vehicle was present in the parking lot. (TR 679). Corso admitted the increased police presence began after the petition was filed. (TR 818). Foca was involved in scheduling extra police officers for the election. (GC 69). No legitimate justification for the presence was ever provided.

**e. Captive -Audience Meetings**

Respondent began holding regular captive-audience meetings in October, after receiving the demand for recognition. (TR 131, GC 72 bates 1585, GC 6). The meetings were held on weekdays, at multiple times during the day. (TR 133, 267, 844). Drivers attended these meetings one or two times a week. (TR 131, 267). Attendance was mandatory, and drivers signed a sign-in sheet to show their attendance. (TR 131, 267). The Employer communicated which meetings each driver must attend via a notice in their mailbox.<sup>48</sup> (TR 268). Drivers were paid \$25 per meeting. (TR 132, 268, 929-30, GC 18(b) R 27). Until this point, drivers were not paid extra to go to work meetings.<sup>49</sup> (TR 222). Regular driver meetings were canceled during this time

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<sup>46</sup> Corso stated that the change was made in response to employee complaints that one week did not allow employees enough time to travel back to their home country. (TR 816).

<sup>47</sup> The contracting for the increased presence was done by the human resources department. (TR 820). However, it is unclear which operating company, ECFC or CSP paid for the presence. (TR 819-20).

<sup>48</sup> Anti-union literature was delivered with employee paychecks. (TR 144, GC 15).

<sup>49</sup> For example, drivers were required to attend a meeting on Fridays to go over problems, such as checking trucks or snowfalls. (TR 222, 303-04). These meetings were not paid. (TR 222, 204). Any argument that Respondent was paying drivers to attend anti-union meetings because of wage and hour laws is rebutted by the fact Hernandez was

frame. (TR 303). Hernandez and Vargas estimated that they each attended somewhere between six and eight meetings. (TR 224, TR 271-73).

Corso spoke at these meetings. (TR 811-12). Corso did not follow a written script, but used talking points over the course of six or seven meetings. (TR 844-45; GC 60). The talking points discuss the improvements Respondent was making, such as hiring a consultant to “perfect the distribution of late work[,]”<sup>50</sup> changes to pay, bonuses, vacation, and the termination policy. (GC 60 bates 355-56).

#### **i. The Demand for Recognition Speech**

Corso held a meeting with the drivers in response to the demand for recognition. (TR 136-37, 276-77, 820-21). Corso spoke in English, and Vasquez translated what he said into Spanish. (TR 135-37, 272). Vargas testified that Corso said the following:

Mr. John Corso was very upset with the drivers. He told us that he tried to change things in the company. For instance he had changed Jennifer, who harassed the drivers. And he wanted to know why we were so discontented. What he implied ... we had stabbed him in the back. Because he said he tried to change things. And I had received a letter from the Union saying that the Union wanted to represent the workers...Mr. John Corso was very upset with the drivers. He said that he tried to change things, that they talked about a raise, that *he would not accept a union in his company*.<sup>51</sup> He told us he wouldn't accept the Union in his company, that that would be a process, that there would be elections. And he said that due to the Union, he wouldn't be able to offer raises to the people because the Union had messed things up. He said that if something happened after the elections, that he wouldn't accept the Union. He wasn't -- he didn't agree with that. And that he couldn't fix anything until all of this is over... He said that this involved a process, that there had to be an election. *After the election if the Union won, he would not accept the Union in this company.*

(TR 276-77, emphasis added).

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paid by the day, not by the hour. (TR 134). Hernandez earned around \$240 or \$250 a day. (TR 219). Any argument that the payment for meetings was consistent with Respondent's policy to pay drivers for taking work after returning from their route, must also fail because regular driver meetings were unpaid. (219- 223).

<sup>50</sup> Drivers could earn extra money by taking late deliveries. (TR 220).

<sup>51</sup> This statement is consistent with the talking points: “As far as I am concerned the UNION is absolutely not an option for Coastal.” (GC 60 p. 2). Corso could not recall what he told employees with respect to this talking point. (TR 847). Corso admitted that he may have told employees some version of what was written on his talking points. (TR 847).

Vargas' testimony is corroborated by Hernandez.<sup>52</sup> (TR 136-137). The ALJ credited Vargas' and Hernandez' testimony regarding Corso's speech. (ALJD 7-8).

### **ii. Plant Closure Speech**

Vargas testified that in another meeting, in the small meeting room, Corso said via a translator:<sup>53</sup>

They told us that if the Union won, the first thing that they would do is they would ask us to hold a strike because *Mr. Corso would not accept their conditions, nor would he sit down and negotiate with them.* He also said that if there were a strike, any one of the drivers could be terminated permanently and replaced by another driver. He also let us know that the strikes that took place take months, years, and that he was not about to let that stop his company. And for that reason, we could all be replaced permanently... *He told us that he preferred to shut down his company than to have the Union come and tell him what to do with his company.* (TR 278-280, emphasis added).

### **iii. Corso's Anti-Union Speech to Non-Driver Employees**

Non-driver employees also attended mandatory captive-audience meetings. (TR 140, 377-80, GC 30 p 4-5). Two to three weeks before Sagastume's termination, she attended a captive -audience meeting, at which Corso said he was against having a Union and encouraged employees to tell management if they saw anyone engaging in union activities. (TR 377-80).<sup>54</sup>

## **2. October to December 2010: Respondent Engages in Surveillance**

Respondent's emails evidence it engaged in surveillance of employee union activity and kept Corso informed. (ALJD 56, TR 876-878, GC 31, 59, 73). For example, in an email sent on

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<sup>52</sup> Hernandez also testified that in a meeting, perhaps the same one, Corso said, "[he] had lawyers, and that if they presented him with a contract, that years would pass before he would sign it." (TR 137).

<sup>53</sup> The ALJ credited Vargas' testimony regarding the meetings he attended. (ALJD 8 n. 17)

<sup>54</sup> Sagastume testified that Corso stated the following at the meeting:

Well, he said that he had held the meeting because he had found out that the department of drivers wanted to form a union. That he had heard those rumors, and that he was very worried, and that's why he held the meeting... He wanted to let us know that the Union was a bad thing. It was a bad thing for the company and for us. He said that when a company worked under a union, that the rules changed. And, for instance, he said that the check that they would take money out of your check every week. He said that nothing is free, that you won't be able to talk to me every time. That you won't be able to talk to me directly -- that you won't be able to talk to me, because when you want to ask for a raise, for example, you have to do it on the basis of the Union, and it's the Union there that wants to decide whether or know if it's possible. *That he was totally against the Union coming in, and then... he told us that please, if we found anybody in the parking lot distributing bulletins or pamphlets, please ignore them and tell him about it.* (TR 379-80 emphasis added)

October 30, S. Callas informed Moore and Corso that “Volker<sup>55</sup> walked up on about 10 drivers...and heard them talking negatively about the union...the meeting seemed to be led by Quinn...Danny Jimenez walked up and another driver...started yelling at him saying it was his fault the union is here[.]”<sup>56</sup> (GC 31). In an email on November 16, in response to a request for an update from Corso, Moore wrote: “Not so good, guess there was some pro-union talk from the night warehouse team. I will go over the issues when you are in today.”<sup>57</sup> (GC 37). Another email evidence that on the morning of the election, Foca engaged in surveillance.<sup>58</sup> (GC 59, GC69 TR 683-84). On December 17, at 1:40 a.m., Foca sent Corso an email reporting: “Union van out front with what appears to be one guy[.]”<sup>59</sup> (GC 59). Foca admitted to watching from the guard shack in the parking lot.<sup>60</sup> (TR 683-84).

### **3. November 2010: Respondent Hires Russ Brown Associates to Direct its Anti-Union Campaign**

Respondent hired Russ Brown Associates (RBA), a consultant group, to run Respondent’s anti-union campaign.<sup>61</sup> (TR 853-54). Respondent paid RBA between \$125 and \$225 per hour for its services. (TR 863). On November 4, Russ Brown sent Corso a proposal for the consulting work he was to provide to Respondent. (TR 867-68 GC 32). The proposal outlined a program in which RBA would hold employee group meetings, one-on-one employee meetings, produce campaign literature, and supervisor training. (GC 32 bates 01485).

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<sup>55</sup> Volker either held the position of driver check-in or driver during this time period. (TR 878).

<sup>56</sup> Quinn and Danny Jimenez are drivers. (TR 876).

<sup>57</sup> The ALJ discredited Corso’s denial he could not recall if he followed up on this email. (ALJD 21 n. 44).

<sup>58</sup> Foca was present on Respondent’s property on day of the election at 1:00 a.m. (TR 681). Foca normally starts work at 7:00 am. (TR 682). Corso testified that Foca came in early at his direction. (TR 937-38).

<sup>59</sup> Foca’s denial that he reported what he saw to Corso is clearly rebutted by this email. (TR 680, GC 59).

<sup>60</sup> Foca sent an email to S. Callos stating Foca wanted a guard there “in case a few union reps decide to...greet drivers on the way in.” (GC 69). Respondent asserted that Foca was waiting to escort the Board agent (TR 700, 939). However, the election did not start until 3:00 am. (GC 11).

<sup>61</sup> Corso admitted to signing a contract with RBA. (TR 869-70). However, a signed contract was not produced pursuant to the subpoena. (TR 869-70). An agreement signed on November 5, by Russ Brown only was entered into evidence. (GC 34). Corso could not recall making any changes to the contract that was entered. (TR 870).

Respondent decided to use RBA by November 6.<sup>62</sup> (GC 39, 58).

#### **4. Foca's Heavy Involvement in Respondent's Anti-Union Campaign**

The ALJD finding that Foca was closely involved with anti-union campaign is well supported by the record. (ALJD 57). Foca attended important meetings about the campaign, including one just after the petition was filed, and another with the board of directors in which the initiative summary was discussed. (TR 824-25, 830). Corso forwarded the November 6 email he sent to the board of directors regarding the decision to use RBA to Foca the same day he sent it. (GC 58). Foca met with Russ Brown as part of the anti-union campaign. (TR 875). Foca engaged in surveillance of employee union activities. (GC 59, GC 69, TR 683-84). Foca admitted to discussing the union with ECFC employees. (TR 675). Foca sent out anti-union material to managers and to Siang Kung (Kung), the chairman of the church that a lot of ECFC employees attend.<sup>63</sup> (TR 689, GC 54, GC 55). Kung was also a realtor. (TR 691). Foca just so happened to be helping one of his employees buy a house using Kung's realtor services. (TR 691, GC 55). On December 12, Foca sent Kung anti-union materials "to assist you in conversations with members of your community." (TR 691, GC 55).

#### **5. November 2, 2010: Hernandez Complains to Corso and Foca about Rumors that he and Sagastume Brought in the Union and the Subsequent Human Resources Investigation**

During the course of Respondent's anti-union campaign, rumors started to circulate that Edinixon Quinteros (Nixon)<sup>64</sup> told management that Sagastume, Vargas, and Hernandez were involved with the union. (TR 152-53, 155-59, 310). In response, on November 2, Hernandez and Vargas met with Corso, in Corso's office. (TR 154, 163, 286). Foca joined the meeting

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<sup>62</sup> November 6 was a Saturday. (GC 39). Corso claimed he could not recall when he signed the document. (TR 873-74).

<sup>63</sup> Foca knew Kung because of some of the assimilation work ECFC does with its Burmese employees. (TR 689).

<sup>64</sup> Edinixon Quinteros was known by employees as Nixon. (TR 152).

once the union was mentioned.<sup>65</sup> (TR 155, 206, 913). Hernandez told <sup>66</sup> Corso that Nixon was spreading rumors saying “this mother fucking Luis and Javier, and that bitch Mayra... they try to bring the Union here[.]”<sup>67</sup> (TR 164). Hernandez denied they were involved with the Union.<sup>68</sup> (TR 163-64). Hernandez also told Corso that he would fight Nixon if he caught him making insults about Sagastume. (TR164). Corso directed Vargas and Hernandez to human resources to make a formal complaint. (TR 164, 286-288).

Hernandez immediately went to human resources.<sup>69</sup> (TR 160). Hernandez met with Erin Morgan (Morgan) and Vasquez, who translated for Hernandez.<sup>70</sup> (TR 160). Hernandez testified:

I went into Erin's office and I saw Walter there. And I said, Chino,<sup>71</sup> why so much problem with this business of the Union. And I'll see Erin, and I'll say, Erin, sorry, hello, how you doing? And she asked me, hey, Luis, what is the reason why you come here. Well, the reason I come here is because yesterday, Hugo Arias, they call me because Nixon, he talking about my wife, Javier, and me, really bad things. They say we are the person that tried to bring the Union here. And that is not the truth. If he got the proof I'm the person that tried to bring the person here, they can show it to John or to anybody. And she told me, well, I don't know why Nixon he talk about your wife like that, because I'm not really upset for that because he don't have to talk to about a woman like that. And what did they say, yeah... He said, no, that this business of Nixon should not be bad-mouthing your wife, even if it were true, he shouldn't bad-mouth her... Then Erin went out because she heard somebody knocking on the door. And so I told Walter, well, listen, Nixon is talking about my wife saying all these things. And to speak about the Union was a subject that was very, very delicate and very serious. I told him, yes, that he told me that truly what was a very delicate matter to talk about the Union. I told them that if the company

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<sup>65</sup> Foca's testimony that he was invited to join the conversation from its inception is uncorroborated, even by Corso. (TR 569, 913). Foca's claim that he did not know who Hernandez was prior to this meeting is inconsistent with his testimony that he knew Sagastume and Hernandez were married at the time of the meeting, and understood Hernandez was referring to Sagastume when he spoke about his wife. (TR 569-70, 572).

<sup>66</sup> Hernandez is fluent in Spanish, and speaks a little English. (TR 93-94). Hernandez testified to the conversation in Spanish. (TR 154-60). However, the translation was not accurate. (TR 154-60). As a result, Hernandez was asked to testify to what was said in English. (TR 163). The ALJ credited Hernandez' testimony. (ALJD 10).

<sup>67</sup> Corso knew Sagastume and Hernandez were married at the time of this conversation. (TR 916).

<sup>68</sup> Respondent's argument that Hernandez is not credible because he lied about his union activities to Corso and Foca is meritless. As the ALJ noted Hernandez's denial was the result of Respondent's fierce anti-union campaign and unlawful intimidation techniques. (ALJD 47 n. 71).

<sup>69</sup> Vargas met separately with human resources regarding his complaint concerning Nixon. (TR 289-292, 315-16).

<sup>70</sup> Hernandez testified that he spoke to Morgan in English, and Vasquez in Spanish, which Vasquez translated to English so Morgan could understand. (TR 161-62). Hernandez testified to the conversation in Spanish and English, as it had occurred. (TR 166-67).

<sup>71</sup> Chino is Walter Vasquez's nickname. (TR 160).

ever found out that I was doing that, that they would terminate. But they wouldn't fire me directly, they would look for an excuse to fire me or they would pressure me into resigning.

(TR 166-67).

Vasquez and Moore never told Hernandez he would not be terminated for union activities. (TR 168-69). The ALJ credited Hernandez's testimony, and noted Respondent failed to call Moore or Vasquez.<sup>72</sup> (ALJD 11 n. 26).

Sagastume also met with Corso, in November, about Nixon's rumors.<sup>73 74</sup> (TR 373-75).

At this meeting, Sagastume told Corso that Nixon said about her: "that old whore, who is his wife, that she was taking information to the people in the tomato lines so that they would go into the Union. Because Luis was the union organizer." (TR 374). Sagastume asked Corso to put a stop to it. (TR 373). Corso said he would speak with Nixon. (TR 375).

Notes taken by a human resources manager, dated November 2, show that Nixon reported employee union activities, including Vargas' attempt to get Nixon to sign an authorization card. (TR 886, GC 43). According to the notes, Nixon told J. Callos, Erika Perez<sup>75</sup>, and Steven Griffen about the attempt. (GC 43). Finally, the document states that an "investigation" will be "conducted."<sup>76</sup> (GC 43). Respondent relied upon the investigation in its position statement. (GC 30 p. 4).

Corso admitted to talking to Hernandez, Vargas, and Sagastume about their problem with Nixon, and referred the matter to human resources. (TR 883-84, 888, 917). On November 15 at 11:22 p.m. Corso sent Moore an email, asking "[d]id we ever follow up on

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<sup>72</sup> Hernandez testified consistently on cross. (TR 216).

<sup>73</sup> The conversation occurred in November. (TR 373, 883-84).

<sup>74</sup> Morgan and Millie were also present. (TR 373-75). The transcript records the question and answer as "Q. Okay, and who was president before this conversation? A. It was just John Corso, Joey, and Erin, Millie, who worked for human resources." The following was actually said: "Q. Okay, and who was *present* for this conversation? A. It was just John Corso, *me*, and Erin, Millie, who worked for human resources."

<sup>75</sup> Erika Perez is Vasquez' assistant. (TR 236).

<sup>76</sup> Respondent's claim that GC 43 is hearsay is misplaced. The human resources notes are a business record, and evidence Respondent's knowledge/ belief of employee union activities.

complaints Nixon, Javier, Luis, and Myra lodged?” (GC 37). Moore responded at 6:25 a.m. the next day that she would check with Erin [Morgan]. (GC 37). The ALJ found Corso followed up on the investigation; discrediting Corso’s claimed memory loss on the basis of his demeanor, evasive testimony, convenient memory loss when questioned by Counsel for the Acting General Counsel.<sup>77</sup> (ALJD 12 -13, 21 n. 44).

**6. November 14, 2010: Saia’s Interrogation of Hernandez About His Union Activity, in which Saia Pleads with Hernandez to Stop the Union Organization Drive and Meet with Corso**

Sunday, on or about November 14, Saia, the fleet manager, called Hernandez. (TR 180 - 81,187-188). Saia told Hernandez they needed to talk. (TR 183). In response to Saia’s request, Hernandez went to Saia’s home around 5:00pm that day. (TR 183). Hernandez testified in English to the following conversation:

He tell me, hey, Luis, I want to know what's going on with the Union. And, well, Joey, really, I don't know what's going on with the Union. There is a lot of people involved in this problem. And he tell me, well, I hear something, you are the head of the Union. I said, well, they lie to you. And he told me I'm asking who put you to talk to me, that was John Corso? Well, he told me no. Well, they<sup>78</sup> got a conversation and I'm offer to talk to you because I'm your friend. I said, well, I know you are my friend...[He said] Well, I want to know who are the person in charge on the Union. Well, Joey, there's too many people on board. There is not me, there is not only Javier, there is like 20 people, 25 people, and [he said] please you need to talk to John Corso. He's a really nice person. He's a nice man... You can meet him, if you want to talk to... [Y]ou can go out somewhere place, restaurant, coffee place and talk to him...Joey, believe me, I don't trust in John because sometime we have some problems. I know maybe he is a good person, but he's coming downstairs, talked with the supervisor, and he's come back upstairs, and all the problem, they stay downstairs. Stalio Callas, Justin, Jennifer, they can get you fired right away. That's what I tell. Just like that. And he tell me, no, but you have to let her know. Maybe they can change a supervisor. And I'm explain him, Jennifer, she's in charge, and she don't know what she's doing because only she can do is what the computer tell... If we have like 20 stops and 20 stop, you know, some days they order like 10 cases. Friday or Saturday, they order like 50, 60, 100... That's a heavy day. If you 20 stop, they order like 50 or 70 cases, that's a really

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<sup>77</sup> Corso admitted he knew Nixon made complaints, but claimed he could not recall how he learned of them, or followed up. (TR 884, 887, 939-41). Corso referred Nixon complaints to human resources. (TR 888). Such inconsistencies and convenient memory loss support the ALJ’s creditability finding. (ALJD 11- 13).

<sup>78</sup> Hernandez clarified that “they” referred to Corso and unnamed individuals. (TR 185).

heavy. And she don't know and she don't care. And he told me talk to John, explain everything to him, maybe they can give a different position because you know all the routes. And I say, Joey, I'm really sorry but I don't trust in John. There was Jimmy, Mr. Jimmy McWhorter, I'm going to talk to him because I'm at work with him before. And all the problems when I have any issue, I go with him and he fix it right away, personally... And he told me, please, Luis, talk to the people and please try to stop the Union, that is not good for the company. I said, well, that is not good for the company, but I need respect, Joey. And that's the point. I know I don't have too much issues in the company because I'm making really good money... And I don't know if one day I come to the work and Jennifer decides to fire me, and I don't want that. I want protect my job. Well, he told me, please, talk to the guys and try to stop the Union. I said, well, Joey, let me try to talk to them[.] (TR 185-186).

Hernandez never met with Corso as Saia requested. (TR187). Approximately a week after this conversation, Sagastume was terminated.<sup>79</sup> (TR 187-188).

#### **7. McWhorter's Interrogations of Vargas and Hernandez**

Both Hernandez and Vargas testified to interrogations by McWhorter. (TR 191-92, 294-96, 317-19). Vargas testified that a few days before Sagastume was terminated, McWhorter called Vargas to his office and asked Vargas what he thought about the Union.<sup>80</sup> (TR 293-94). Vargas admitted he supported the Union, and McWhorter responded his position was "crazy[.]" (TR 293-94). The ALJ credited Vargas' testimony regarding the interrogation, and found it was part of Respondent's strategy to conduct one-on-one meetings. (ALJD 18, 18 n. 37). McWhorter questioned Hernandez after Sagastume's discharge.<sup>81</sup> (TR 190-92, 294-96). These interrogations were consistent with Respondent's anti-union campaign strategy. (GC 32 p. 2).

#### **8. December 16, 2010: Respondent's Sabotage of Hernandez's Load the Day Before he is to Act as the Union's Observer**

Hernandez was the Union's observer at the election. (TR 196). The day before the

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<sup>79</sup> Vargas also testified that Saia asked him who was behind the organizing campaign, prior to Sagastume's termination. (TR 307-08). Vargas told Saia someone in the upstairs office was involved, in an effort to throw Saia off track. (TR 207-308).

<sup>80</sup> Vargas testimony about this meeting was consistent on cross examination. (TR 317-19).

<sup>81</sup> McWhorter called Hernandez and Vargas into his office, and asked Hernandez, what he thought about the Union. (TR 190-92, 294-96). Hernandez admitted he supported the Union. (TR 190-92, 294-96).

election, Hernandez was assigned a Virginia Beach route. (TR 196). He started the route at 2:30- 3:00 a.m., but did not return until 10:00 p.m. or 10:30 p.m. (TR 197). The election started only four hours later. (GC 11). The route took so long because the truck load was sabotaged; about 25 percent of the boxes were cut, so that when lifted, all the produce would fall out.<sup>82</sup> (TR 197-98, GC 16a-g). The sabotage forced Hernandez to retrieve the produce, put it back in the box, and then take it to the customer. (TR 198). Hernandez informed his supervisor of the sabotage, but there is no evidence that Respondent attempted to find out who sabotaged the load.<sup>83</sup> (TR 197-98, 235, GC 28).

**9. November 17, 2010: Ramos' Interrogation of Sagastume About Her Support for the Union and Activities of Hernandez, in Which He Tells Her That Hernandez Cease Participation with the Organizing Campaign or Face Reprisal**

After the organizing campaign began, Ramos told Sagastume on various occasions he did not want a union, claiming a union equalized employee pay, deducted money from employee paychecks, and interfered with vacation. (TR 435). On two or three occasions, Ramos asked Sagastume about her husband's union activities.<sup>84</sup> (TR 425-26). Sagastume always denied her husband's involvement with the Union. (TR 426). However, on November 17, Sagastume admitted Hernandez was involved with the Union. (TR 425-26).

November 17 was a very busy day. (TR 380-81, 422-23). Sagastume was working on the computer, when Ramos approached her around 3:30 - 4:00 p.m., and asked to talk to her. (TR 380-81, 420-423). Ramos assigned A. Hernandez to the task Sagastume was performing, and they stepped away. (TR 381-382). A. Hernandez was not within earshot of the conversation. (TR 384-85). Sagastume testified to the following conversation between Ramos

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<sup>82</sup> Hernandez took pictures of the boxes. (TR 197, GC 16a-g).

<sup>83</sup> Vasquez, Erika Perez, Vasquez's assistant, and J. Callos, the night manager all had the ability to find out what truck Hernandez was assigned. (TR 236-37).

<sup>84</sup> Ramos asked such questions as: "is it true that Fernando is messing around with the Union[?]" or "is Fernando fooling around with the Union?" (TR 425).

and herself:

He said that he was very nervous and worried that this business of the Union had him very nervous and worried. And yes, I told him that a lot of us were in the same frame of mind... He said, 'What do you think of the Union?' I told him that I -- well, that we didn't have anything to do with the Union. This is something to do with the drivers, not with us... Then he asked me again what would I do if the Union came in. I answered him that 'yes, that if the Union came in, I would support it'... Then he said, 'Well, I don't think that's going to happen. John Corso is not going to allow that to happen. So, let's talk [as]<sup>85</sup> friends because he told me he prefers to shut down the company rather than allow the Union to come in.' Then he said, 'I don't think this is a good idea.' I said first of all, 'Well, what can we do?' And he said, 'Well, what you have to do is talk to Luis, and he should talk to John Corso, and he should talk to the other managers in the company.' And that he should go and tell them that he repents of what he's done, that he should apologize because they worried. He told me that if he apologizes, that he will continue with his job, and nothing would happen.

'Look,' I said, 'I don't think that they're going to overlook this and pretend that nothing happened.' And he said, "Well, in any case, he should talk to them because so many things have changed. Many things have changed, for instance, with the drivers. For example, they didn't like the supervisor, and they've changed the supervisor. And maybe they might change their mind, and they can continue working well.' And I told him, 'Oh, I don't think that's going to happen. I don't think the drivers are going to go back. And speaking personally for Luis, I don't believe that he is going to step back and undo what he did.'

And he said, 'Well, I don't know what's going to happen, but if the Union does not come in and does not prevail, then what's going to happen is that each of those drivers, one by one, they're going to send them to hell.' And those are the words that he used. Well, I told him that that's what they thought. That was their problem, and I had spoken to Luis about this, and that I had told him to think it over to see the good things and the bad things. But I had spoken to him, and that's what they've decided. And he said -- then he answered me, and he said, 'Well, look at all this shit that's going on.' And he stood up and walked away and left the place where we had been talking.

(TR 381-84).

The ALJ credited Sagastume's testimony, and discredited that of Ramos. (ALJD 22-24).

After the conversation, Sagastume did not see Ramos until around 6:00 p.m. (TR 385). Ramos was coming down the stairs that lead to the offices of Corso, McWhorter, Moore, and Foca. (TR 385-86, 982).

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<sup>85</sup> There is an error in the transcript, it states: "let's talk *to my* friends[.]" The witness' actual words are quoted.

### **E. November 18, 2010: Respondent Terminates Sagastume**

On November 18, at 8:00 a.m., Ramos told Sagastume to report to human resources. (TR 388-89). When she arrived, Morgan, Flanagan, and a translator were already present. (TR 388). Morgan asked Sagastume if she knew why she was there. (TR 389). Sagastume replied in the negative. (TR 389). Morgan told Sagastume that she was terminated because there was someone else to do her job. (TR 389). Sagastume was shocked; she had no notice.<sup>86</sup> (TR 389-90, 398). Morgan asked her to sign a document, but Sagastume refused.<sup>87</sup> (TR 390, GC 20).

Sagastume was refused permission to go back and gather her things. (TR 390). Respondent immediately disabled Sagastume's building and system access. (GC 29). Morgan sent out an email, on which Vasquez was copied, stating Sagastume was "not [to] enter CSP property without security/ HR escort. Her husband, Driver, Luis F. Hernandez is still employed with us[.]" (GC 29).

### **F. Respondent's Supposed Transfer of the Tomato Department**

At 8:32 p.m., on November 17, Foca sent out an email stating that the tomato department would be transferred to ECFC the next day.<sup>88</sup> (TR 550, 557, 804-805, R10). Foca sent this email before leaving work for the day.<sup>89</sup> (TR 672). The email also announced the elimination of Sagastume's position. (TR 556, R10). On November 18, either Zeleznik or Foca told the tomato department employees that their department had been transferred to ECFC. (TR 488, 506, 749,

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<sup>86</sup> Foca admitted Sagastume did not receive advance notice that her position was going to be eliminated. (TR 540).

<sup>87</sup> Sagastume cannot read English. (TR 322). The document offers six weeks of severance pay in exchange for a waiver. (GC 20). Respondent produced no witnesses as to when Sagastume's severance package was created.

<sup>88</sup> Foca's testimony regarding this email was gleaned by Respondent counsel's leading questions. (TR 553-55). Corso's testimony about the email was equally untrustworthy, as he could not even recall if the email said that the transfer was going to occur the next day. (TR 805).

<sup>89</sup> It's curious that Foca made this announcement in an email before leaving work, and not in the leadership committee meeting that was scheduled for that morning. (TR 747). The leadership committee meetings are attended by upper management, including: S. Callos, J. Callos, Tom Brown, Caplinger, Flanagan, and Foca. (TR 747). It's likely that Corso was also present. (TR 748).

795). Sagastume was terminated the same day. (TR 387-90).

### **1. The Timing of the Tomato Department Transfer Does Not Support Respondent's Defense**

Respondent's explanation of the transfer's timing is incoherent. Foca testified that the 18<sup>th</sup> was chosen so he could be present for the announcement. (TR 562). He testified that the transfer was made on Thursday, as opposed to Monday, because of his travel schedule.<sup>90</sup> (TR 562). However, Foca was present Monday, November 15. (TR 564). Zeleznik, who Respondent asserts was heavily involved in the transfer, did not know why the transfer occurred on November 18.<sup>91</sup> (TR 755). Zeleznik testified that he may have first learned on November 17 that the transfer was to occur on November 18.<sup>92</sup> (TR 757). This is consistent with Ramos' testimony that he did not know about the transfer or the possibility of a transfer of the tomato department to ECFC until November 18, the day it occurred.<sup>93</sup> (TR 983-84).

Furthermore, the timing is illogical from a business perspective. The payroll periods start on Tuesdays, not Thursdays. (TR 754). Zeleznik testified that the start of a payroll period would have made the most sense for a personnel action. (TR 754-55). In addition, the week of Thanksgiving is an incredibly busy time for both ECFC and CSP.<sup>94</sup> (TR 753, 757) Respondent admitted there was no reason the transfer could not wait until the week after Thanksgiving. (TR 757-58).

The only reason Respondent had to announce a transfer of the tomato department to

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<sup>90</sup> He later admitted that he was present on Monday and Friday of the week prior to the transfer. (TR 563). Zeleznik could not corroborate Foca's claim that Foca was out of town the week of November 15. (TR 778).

<sup>91</sup> Zeleznik did not know if the transfer was scheduled for November 18, or if that was the date, "everything's ready to go. Let's make an announcement." (TR 756).

<sup>92</sup> Zeleznik was extremely evasive regarding when he learned that the transfer was going to take place, even when asked by the ALJ. (TR 750-54). He testified to a few different dates aside from the November 17 date. (TR 753-54, 777-78). At one point he said he learned on November 14 that the transfer was to take place on November 18. (TR 753). This is unlikely because November 14 was a Sunday. He also testified that he knew by November 4, but later admitted he had no actual memory of such a discussion. (TR 753-54, 777-78). Zeleznik's itinerary for the week of November 15, does not reflect a plan to transfer the tomato department. (GC 71).

<sup>93</sup> Rebutting Foca's claim that Ramos knew that Zeleznik was going to be his new boss sometime between September and October of 2010. (TR 505).

<sup>94</sup> The second busiest week of the year for ECFC is the week of Thanksgiving. (TR 753).

ECFC on November 17, was Hernandez's refusal to meet with Corso, as Saia pleaded, and Sagastume's interrogation, in which she confirmed Hernandez would not stop his efforts to bring in a union. (TR 185-88, 381-84). This is what the ALJ found, and his decision is fully supported by the evidence. (ALJD 58-63).

## **2. The Transfer's Effect on Tomato Department Employees: A Nominal Management Change, Promotions, and Pay Raises**

Upon the transfer, the tomato department was brought under ECFC management. (TR 484). While A. Hernandez, Perdomo, and Ramos retained their former positions, they now reported to Zeleznik, who in turn reported to Foca. (TR 702). Three employees were promoted to line leads, given pay raises, and trained on how to lead a line.<sup>95</sup> (TR 488). Other employees were also given raises.<sup>96</sup> (TR 557-58). Curiously, the employees remained on CSP's payroll and retained their dates of seniority. (TR 482-83). The portion of the rent covering the tomato department remained borne by CSP. (TR 601-02). Sagastume was the only individual terminated as a result of the transfer of the line. (TR 398).

Respondent's claim that Sagastume's duties were subsumed by an ECFC administrator is unsupported by the record evidence. Foca testified that the first *two or three months* after Sagastume's termination an employee from the ECFC administrative team sat at one of the desks in the tomato department and performed Sagastume's duties.<sup>97</sup> (TR 477) Zeleznik identified the

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<sup>95</sup> Zeleznik testified that Mira Rivera, Blanca Rosales, and Rosa Vasquez were promoted to the line lead position. (TR 719). In repack, the line lead must do counts of how many products had been boxed and how many remained. (TR 738). However, the picture of the repack line taken during the course of trial shows the repack line lead packing a box. (TR 740, R 33b). Ross Foca was unable to testify who the line leads were or how much they received in the form of a raise, which is curious considering that he drafted the email in which the decision to transfer the line, create these three positions, and issue raises was announced. (TR 490, R10).

<sup>96</sup> The pay raises were supposedly done to bring employees in line with the ECFC pay scale. (TR 723-24, R10). However, this does not make sense because the new wages were not uniform. (GC 41, GC 42). GC 42 reflects what employees were paid prior to the transfer, and GC 41 reflects what they were paid after the transfer. For example, with respect to the line leads, Mira Rivera's pay at \$8.90 an hour rose to \$10.40 an hour. (GC 41, GC 42). Blanca Rosales' pay moved from \$8.15 an hour to \$9.65 an hour. (GC 41, GC 42). Rosa Vasquez's pay moved from \$7.70 to \$9.20. (GC 41, GC 42).

<sup>97</sup> Foca was unable to recall the employee's name. (TR 650).

employee as Lorena Cruz.<sup>98</sup> (TR 768-69). Zeleznik testified that Cruz performed the work for *a few weeks*, after which Ramos, Perdomo, and A. Hernandez took over the duties. (TR 769).

Then Zeleznik testified that Perdomo performed the work for the first three months after the transfer, and Cruz only did the spreadsheet on Perdomo's day off.<sup>99</sup> (TR 781-82). When asked why tomato department management took on the repack administrative duties, Zeleznik admitted "it's just as efficient to them to do it real time as things are completed."<sup>100</sup> (TR 769).

It was not until probed that Respondent's witnesses admitted that an employee from the line was also performing the repack administrative work. (TR 770-74, 974). Marcelina Robles (Robles) was trained by the tomato department managers to do the repack administrative work after Sagastume's termination.<sup>101</sup> (TR 771-74). Like Sagastume, when Robles was not working on the computer, she worked on the line. (TR 771-72). Robles also only spoke Spanish. (TR 774). However, unlike Sagastume, whose seniority dated back to September 1997, Robles' seniority dated only to October 2007. (GC 41, GC 42). While Sagastume had performed repack administrative work for five to six years prior to her termination (TR 323-326, 329-30), Robles had only worked in the tomato department for a matter months before the supposed transfer of the entire department to ECFC. (TR 772).

### **3. Respondent's Fictitious Plan to Transfer the Tomato Department**

Respondent claims that Sagastume's termination was the result of her position being eliminated due to the transfer of the tomato department to ECFC. (TR 30-31, GC 30). However, this claim is unsupported by the evidence. Corso claimed that in July, Foca came to him about

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<sup>98</sup> Cruz was not a regular ECFC administrator, but was a fill-in when regulars were absent. (TR 650). Cruz worked as an administrator for only a few months when she briefly picked up Sagastume's duties. (TR 652, 769). The work was also performed by ECFC employees Hawla Blikner and Julianne Giraldo. (TR 768-69).

<sup>99</sup> Ramos testified that Cruz worked in the tomato department on Thursday and Fridays. (TR 970).

<sup>100</sup> There were also problems with the work done by the ECFC administrative team, there were questions regarding the integrity of the data. (TR 658).

<sup>101</sup> Ramos also attempted to teach the line leads how to do the repack administrative work, but was unable to get them to perform the work. (TR 974). This would seem to rebut his claim that five individuals- Ramos, Perdomo, Alex Hernandez, Robles, and Cruz- did the administrative repack work "because it's easy." (TR 976).

taking over the tomato department. (TR 795). However, Corso was unable to recall specifics of the conversation, such as what was actually said, but claimed he told Foca to work something out with Moore. (TR 796-97). While both Corso and Foca claimed that some sort of agreement for ECFC to take over the tomato department was made in September,<sup>102</sup> neither was able to give specifics as to where discussions between Moore and Foca took place, and when the decision was supposedly announced.<sup>103</sup> (TR 502, 509-10, 531-32, 663, 797-802). No notes of the supposed discussions were taken. (TR 663-64, 801).

If there were such discussions, they certainly were not well announced because Zeleznik, the vice president and general manager of ECFC, the very person envisioned to manage the department, had no idea who made the decision to transfer to the tomato department to ECFC. (TR 532-33, 719, GC 21). Zeleznik testified that in September, he was only aware that ECFC was going to look into whether it should take over the tomato department.<sup>104</sup> (TR 706). When the ALJ asked whether Zeleznik knew in September that the tomato department would be transferred to ECFC, Zeleznik replied: “That we were going to take it -- to *look* into it and taking a *serious look* and taking over the tomato department, yes.”<sup>105</sup> (TR 712).

Foca testified that Zeleznik unofficially took over managing the tomato department in September. (TR 505). This testimony conflicts with that of Zeleznik who claimed that he did not even begin to study the tomato department until September.<sup>106</sup> (TR 760-61). Zeleznik testified the department remained under S. Callas’ management at the time.<sup>107</sup> (TR 760-61). Ramos did not start reporting to Zeleznik until the November 18 transfer. (TR 760-61, 778).

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<sup>102</sup> Neither Foca nor Corso was able to testify to the actual date when Corso was informed of the decision. (533, 797-799). Moreover Corso’s testimony was adduced through leading questions. (TR 797-98).

<sup>103</sup> Moore never testified. Corso switched between testifying that the discussions occurred in conversations in the hallway, and claiming that they occurred in regular partnership meetings. (TR 798-800).

<sup>104</sup> Zeleznik testified about this event pursuant to leading questions. (TR 711-12).

<sup>105</sup> When asked for further detail by the ALJ, Zeleznik became very evasive. (TR 712-13).

<sup>106</sup> Zeleznik also testified that he could not have taken over something he did not understand. (TR 760-61).

<sup>107</sup> This assertion is supported by the fact that department budget and payroll were under CSP at the time. (TR 758).

#### **4. Respondent's Decision to Terminate Sagastume**

Respondent claims Sagastume's position was eliminated as a result of the analysis of the tomato department conducted by ECFC. (TR533-34). The ALJ discredited Foca's assertion that he alone made the decision to eliminate the position, and his decision was based on the analysis done by Zeleznik and Jeremy Clark.<sup>108</sup> (ALJD 57-58). The ALJ found that Corso was consulted. (ALJD 57-58). The ALJ's conclusion is supported by the record.

##### **c. The Timing of the Decision to Terminate Sagastume Does Not Support Respondent's Defense**

Foca asserted that he made the decision to eliminate Sagastume's position before November 5.<sup>109</sup> (TR 642). Foca made the decision without ever looking at the spreadsheet Sagastume used to do repack administrative work. (TR 606). No written analysis of repack or the repack administrative position was ever made.<sup>110</sup> (TR 640, R-17). When confronted with this, Foca testified that there was no need to analyze the work that repack performed or Sagastume's position because "We understood the repack line by November 5th. We knew what was going on over there." (TR 644). However, this claim is undercut by an email Zeleznik sent on the afternoon of November 5, stating: "I was thinking about the tomato line etc...Repack, not even sure how is (sic) designated in SBT to start looking

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<sup>108</sup> Zeleznik testified that the purpose of the tomato department analysis was to find improvements, increase production, increase efficiency, decrease labor costs, and take on tomato production for Giant "without major disturbance or without massive overtime or run the risk of not filling orders[.]" (TR 714-15). Zeleznik admitted that raises issued upon the transfer of the department were inconsistent with the goal of reducing labor costs, and had nothing to do with efficiency. (TR 733-35).

<sup>109</sup> Foca could not recall the date of the actual conversation in which the decision was made. (TR 539). At one point he claimed the decision was made in October (TR 537-38). He later stated that he knew four to two weeks in advance of Sagastume's termination that her position was going to be eliminated. (TR 540). Zeleznik testified that he learned of the decision from Foca sometime between "early or mid- November." (TR 729).

<sup>110</sup> Foca claimed that Sagastume only performed 15 to 20 hours on the computer, and the rest of the time she was working on the line. (TR 496). It's unclear how Foca would have known how many hours Sagastume worked on the computer, since Zeleznik never timed it or spoke to Sagastume about what she did. (TR 743,766). Zeleznik admitted that Ramos had never been consulted about the elimination. (TR 729). This admission invalidates Foca's testimony that Ramos was consulted, and that the conversation occurred between Zeleznik and Ramos before November 5. (TR 559-60).

up trends. Access to that teams (sic) payroll, I probably should have it.”<sup>111</sup> (GC 46). Also calling into question the claim that the decision to eliminate Sagastume’s position was made before November 5, is the fact that Ramos was not told that her position was going to be eliminated until November 18. (TR 729, 955).

**d. Respondent’s Stated Rationale for Sagastume’s Termination is Unsupported by the Record**

Foca claimed that Sagastume position was eliminated because it would be more efficient if a member of the ECFC administrative team did the work.<sup>112</sup> (TR 534-35, 729-30) ECFC administrators took customer calls, input customer orders, took customer complaints, and did the daily costing.<sup>113</sup> (TR 535). Foca claimed that greater efficiency could be gained by having an administrative team member input the repack information into the system while taking customer service calls.<sup>114</sup> (TR 534). Foca testified that ECFC administrator would simply transfer the customer service calls so they could be received while they were working in the tomato department. (TR 536-37). Foca admitted that on November 18, there was no telephone in the office area of the tomato department. (TR 654). Foca was sure one was installed soon after. (TR 654). However, when asked to identify where the phone was in the picture of the office area of the tomato department he had taken on July 20, 2011, he could not do so. (TR 655 -56 R 33). Foca could not recall seeing a phone in the area when he took the picture. (TR 656-57). Foca admitted that none of the managers who performed

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<sup>111</sup> This email conflicts with Foca’s claim that Sagastume was terminated in part because of her high salary, since Zeleznik did not even have access to payroll at the time Foca claimed to have made the decision. (TR 642, GC 46).

<sup>112</sup> The ECFC administrative team is composed of nine administrators. (TR 534-35).

<sup>113</sup> Zeleznik testified that the ECFC administrative team could take over repack’s “up purchasing, purchase orders, sale orders, shipping and bills.” (TR728). When asked by the ALJ if Sagastume had done those things, Zeleznik was evasive. (TR 728). Zeleznik admitted that he never saw Sagastume do a purchase order, but thought she could do one. (TR 770-71).

<sup>114</sup> Cruz had to be trained how to do the repack costing spreadsheet because product codes were different in the tomato department than ECFC. (TR 967). Cruz had to learn hundreds of product codes. (TR 967-68). Cruz had to use a sheet to help her, so it would have been impossible for Cruz to complete the task in a more efficient manner than Sagastume who had already memorized the codes. (TR 968).

administrative work, repack or otherwise, took calls from customers.<sup>115</sup> (TR 626-28).

It is curious that Foca believed that the ECFC administrative team was going to take on Sagastume's repack administrative work, because Zeleznik testified that he planned on having Perdomo take over the daily costing spreadsheet Sagastume had maintained.<sup>116</sup> (TR 727, 780). This asserted plan is also questionable because Perdomo was on medical leave at the time of Sagastume's termination. (TR 332) Perdomo performed the work upon his return for the first three months after the transfer. (TR 781-82).

Respondent's argument that Sagastume was terminated because she did not know how to use ECFC computer programs is rebutted by the fact that the tomato department still uses the same computer program for administrative work that Sagastume used -- Excel.<sup>117</sup> (TR 604, 620-21) No evidence was produced that changes were made to the costing sheet Sagastume used, or that Sagastume would not have been able to adopt any changes. (TR 603, 658-59). ECFC computer programs were never used in the tomato department. (TR 621). No training was ever given to Ramos, Perdomo, or A. Hernandez on how to use ECFC computer programs because there was no need for anyone working in the tomato department to know how to use this software. (TR 621).

## **VI. ARGUMENT**

The record evidence in this case solidly supports the ALJ's findings that Respondent violated Section 8(a)(1) by coercively interrogating Mayra Sagastume on November 17, and Sections 8(a)(1) and (3) by discharging her on November 18. In his decision the ALJ cited the

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<sup>115</sup> The calls are handled by the ECFC administrative team. (TR 649).

<sup>116</sup> Zeleznik never explained why he wanted Perdomo to do that task as opposed to Sagastume. Perdomo only worked in the tomato department for a short time before the transfer, and was only "learning how to edit and update" the Excel program used in repack. (TR 741). Sagastume had considerably more experience working in the tomato department than Perdomo, and they earned similar wages. (TR 636, GC 42).

<sup>117</sup> When asked to identify if GC 40(a) was the costing sheet Sagastume used in her job, Foca admitted that he was not familiar with the spreadsheets used in repack. (TR 605-06). Foca admitted he was the one who printed the spreadsheet, and 40(a) was used by repack at the time of trial. (TR 607-09). He had no knowledge if changes were made to the document since Sagastume used it. (TR 609).

relevant Board case law, applied the case law to the facts of the instant case, clearly noted the evidence upon which he relied, and explained his reasoning for finding the violations. With regard to the testimony adduced at hearing, the ALJ repeatedly credited the General Counsel's witnesses, including Hernandez, Vargas, and Sagastume. In contrast, the ALJ discredited some, if not all, of Respondent's witnesses, including Corso, Foca, Zeleznik, and Ramos. The documentary evidence likewise affirms the ALJ's conclusions.

**B. The ALJ Properly Found Respondent Violated Section 8(a)(1) of the Act on November 17, 2010, When Supervisor Ramos Interrogated Sagastume About Her Support for the Union and the Union Activities of Her Husband**

The ALJ credited Sagastume's testimony that Ramos coercively interrogated her about her support for the Union and her husband's union activities. (ALJD 52-53). The ALJ discredited Ramos because of his demeanor and inconsistent testimony. (ALJD 22-24). The ALJ cited *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9<sup>th</sup> Cir. 1985); *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000); and *Carroll & Carroll, Inc.*, 340 NLRB 1328, 1332 (2003) for the appropriate test to determine if a supervisor's questions constitute an unlawful interrogation. (ALJD 50-51, 53).

Respondent claims the ALJ improperly credited Sagastume's because: (1) she was unsure of the date of her interrogation; (2) she did not make an internal complaint about the interrogation; (3) no one overheard the interrogation; and (4) she did not file an unfair labor practice charge until seven weeks after discharge. These factors do not meet the "clear preponderance of all relevant evidence" standard required to overrule an ALJ's creditability determination. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950) enfd. 188 F.2d 362 (3<sup>rd</sup> Cir. 1951). Moreover, these factors fail to discredit Sagastume. First, as the ALJ noted, Sagastume consistently testified the interrogation occurred the day before her termination, she was merely unsure of the date. (ALJD 22, TR 420- 23). Second, Sagastume had no time to

make an internal complaint as she was terminated the morning after the interrogation. (TR 422). Third, no one overheard the interrogation because it occurred in a noisy work environment, away from A. Hernandez, the only other individual in the administrative area.<sup>118</sup> Forth, a seven-week timeframe to file a charge does not affect credibility, as the Act provides for six months. 29 USC §160(b).

Respondent further asserts no interrogation occurred because Sagastume and Ramos are friends.<sup>119</sup> Board law is clear, a friendly relationship with a supervisor does not render a coercive interrogation harmless. See *Bruce Packing Co. Inc.*, 357 NLRB No. 93 slip op at 3, 10 n. 7 (September 28, 2011) (finding an 8(a)(1) violation even though the employee and supervisor were friends, the supervisor was godfather to the employee's son, and the conversation occurred after work); *Regal Health and Rehab Center, Inc.* 354 No. 71, (August 28, 2009) slip op at 48, reaffirmed and reincorporated by reference 355 NLRB No. 62 (August 5, 2010) (finding an 8(a)(1) violation when the violative statements were made while driving with employee to a restaurant after work). Indeed, Ramos and Sagastume's friendly relationship only makes Ramos' threats of plant closure, retaliation, and impression of surveillance more coercive. (ALJD 53 n. 80).

**C. Respondent Violated Section 8(a)(3) of the Act on November 18, 2010, When it Terminated its Employee Sagastume Because of Her Support for the Union, and to Discourage Employee Support and Activities on Behalf of the Union**

The Board has long held that it violates the Act to terminate an individual because of the familial relationship to an active union supporter. *Cibao Meat Products*, 338 NLRB 934 (2003); *Kenrich Petrochemicals*, 294 NLRB 518 (1989); *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986);

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<sup>118</sup> Respondent never called A. Hernandez to testify to the contrary.

<sup>119</sup> Respondent cites *Borders, Inc.*, Case No 34-CA-7800 (1998)( ALJ Decision) and *Bates Nitewear Co.*, 283 NLRB 1128 (1987). Neither case is on point. In *Borders, Inc.* an ALJ decision, does not serve as persuasive authority, since the supervisor only asked what was going on with the Union once and did not make any threats. *Id.* at \* 2, 10. In the instant case, the ALJ found that Ramos continually questioned Sagastume, and made multiple threats. In *Bates*, it was the employee, not the supervisor who initiated the conversation and brought up the Union. 283 NLRB 1128, 1138-39. In the instant case Ramos initiated the interrogation.

*Dewey Brothers, Inc.*, 187 NLRB 137 (1970); *Brookside Industries, Inc.*, 135 NLRB 16 (1962); *Golub Bros. Concessions*, 140 NLRB 120 (1962). A complete reading of the ALJ's decision shows that the ALJ clearly set forth the *Wright Line* analysis, *Wright Line*, 251 NLRB 1083 (1981), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert denied 455 US 989 (1982); *NLRB v. Transportation Management Corp.*, 462 US 393 (1983), unambiguously identified the facts that supported each element of the analysis, made credibility resolutions, and explained his basis for concluding that Respondent's asserted reasons for the discharge were either false or were not, in fact, relied upon. Respondent excepts to the ALJ's finding<sup>120</sup>: (1) Respondent knew of Hernandez' union activities, (2) harbored anti-union animus, (3) of a causal connection between Hernandez' union activities and Sagastume's discharge, and (4) Respondent's asserted reasons for Sagastume's discharge to be pretext.

**1. The ALJ Properly Found Respondent Knew of Hernandez's Union Activities Prior to Sagastume's Discharge**

Respondent exception to the ALJ's determination that Respondent knew of Hernandez's union activities is largely based on credibility. Respondent fails to meet its burden to overturn the ALJ's credibility resolutions, and the record amply supports the ALJ's finding that Respondent knew of Hernandez's union activity. First, the ALJ credited Hernandez's testimony that Saia, a supervisor, interrogated Hernandez about his union activities approximately a week prior to Sagastume's discharge.<sup>121</sup> (ALJD 16-17, 49-5). During this interrogation, Hernandez

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<sup>120</sup> With respect to Respondent's argument regarding recess appointments to the Board, it should be noted that in similar circumstances, the Board has found it not appropriate for it to decide whether the Presidential appointments are valid. Instead, the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." *Lutheran Home at Moorestown*, 334 NLRB 340, 341(2001), citing *U.S. v. Chemical Foundation*, 272 U.S. 1 14-15 (1926).

<sup>121</sup> Respondent argues that Saia was not an agent because of his friendly relationship with Hernandez and/or he was acting outside the scope of his employment. Case law does not support Respondent's assertion. As the ALJ explained in his decision, an Employer is bound by the acts of its supervisors, specifically authorized or not. (ALJD 51). See case law cited supra. Indeed, the evidence supports an inference that Saia interrogated Hernandez at Respondent's request. McWhorter's October 6 email to Corso, "is there any way you and I can sit down with the

admitted he was involved with the Union. Respondent never produced Saia as a witness; thus, Hernandez' testimony stands unrebutted. The Board has long followed the rule that if a party fails to call a witness, an adverse inference may be drawn regarding the factual question on which the witness is likely to have knowledge. *Guardian Industries Corp.*, 319 NLRB 542 (1995). The ALJ properly cited *State Plaza, Inc.* 347 NLRB 755, 756-57 (2006) and *Dobbs International Services*, 335 NLRB 972, 973 (2001), for the proposition that a supervisor's knowledge may be imputed to the employer, absent a credible denial. See also *Rogers Electric, Inc.* 346 NLRB 508, 516 (2006) and *Redline Transfer & Storage Co.*, 204 NLRB 116, 17(1973).

Second, Respondent's human resource department conducted an investigation into complaints that Nixon was spreading "rumors" that Sagastume, Hernandez, and Vargas were involved with the Union. The investigation was initiated at Corso's suggestion after he and Foca met with Hernandez and Vargas on November 2. The investigation notes, dated November 2, evidence that Respondent knew of Vargas' union activities.<sup>122</sup> On November 15, Corso sent an email to Moore requesting an update on the investigation. By email, dated November 16, Moore promised to get Corso an update. Respondent failed to call Moore or any witnesses regarding the investigation, despite relying on the investigation in their position statement. The ALJ found that Corso received the investigation results. The ALJ's discrediting of Corso's testimony was based on his demeanor, inconsistent memory, and convenient memory loss.

Third, the ALJ credited Sagastume's testimony that Ramos interrogated her about her union activities and those of her husband the afternoon of November 17, the day before she was

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leaders of this thing somewhere off site and have a talk with them?" Russ Browns proposal also calls for one-on-one meetings.

The cases Respondent cites are not on point: *Precision Piping & Instruments, Inc. v. E. I. Du Pont de Nemours & Co.*, 951 F.2d 613 (4<sup>th</sup> Cir. 1991) concerns an anti trust action, and *Aliotta v. Amtrack*, 315 F.3d 756 (7<sup>th</sup> Cir 2003) concerns a wrongful death action. Neither case touches upon Board law or the NLRA.

<sup>122</sup> Respondent incorrectly argues that these notes are hearsay. The notes were admitted into evidence to show Respondent's knowledge/ belief of employee union activity, not to prove that Vargas passed out authorization cards. The notes are a business record of Respondent's investigation. Fed R. Evid. §803(6)

terminated. In their conversation, Sagastume finally admitted to supporting the Union and to her husband's involvement. Moreover, Sagastume confirmed that her husband would not cease his union activities. Sagastume did not see Ramos again until 6:00 pm that evening as he was descending the stairs that lead to the Foca and Corso's offices. Just a few hours later Foca sent the email announcing Sagastume's termination. The ALJ reasonably inferred from these circumstances that Foca and Corso had knowledge. (ALJD 55-56).

Respondent excepts to the ALJ's discrediting of Foca and Corso denials regarding their knowledge of Hernandez's union activity prior to Sagastume's discharge.<sup>123</sup> The ALJ's determination was based on their demeanor and inconsistent testimony. As the Supreme Court stated in *NLRB v. Walton Manufacturing Co.*, 369 US 404 (1962) "the demeanor of [a] witness" may be such "as to give assurance that he is fabricating, and that, if he is, there is no alternative but assume the truth of what he denies." (Id. at 408). None of the cases Respondent cites support its position. *Mission Foods*, 350 NLRB 336 (2007),<sup>124</sup> does not apply because the holding was based on the ALJ's crediting of the decisionmaker's denial of knowledge.<sup>125</sup> Id. at 338. The evidence shows that Foca was highly involved in the anti-union campaign, bore personal animus toward unions, and regularly consulted with Corso regarding the campaign. *Goldtex v. NLRB*, 14 F.3d 1008 (1994), is not applicable because two years passed between the employer learning of the discriminatee's union sentiments and the adverse employment action. Id. at 1011. In the

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<sup>123</sup> Respondent also accepts to the findings that Morgan and McWhorter knew of Hernandez's union activities. No discussion of this argument is necessary because it's clear that there is knowledge (The ALJ credited Hernandez's testimony regarding McWhorter's interrogation and Morgan's knowledge is inferred from the human resources notes she authored), and the findings are collateral to the finding of Foca and Corso's knowledge.

<sup>124</sup> Respondent erroneously refers to this case as *Gruma Corp* in its brief.

<sup>125</sup> *INOVA Health System*, Case 05-CA-035104 (ALJD) (August 18, 2010), cited by Respondent, supports the ALJ's finding in the instant case. In *INOVA*, the ALJ discredited the decisionmaker's denials and found employer knowledge of the charging party's protected concerted activity prior to termination, and held her termination violated the Act. Id. at \*23 n. 29. 24-27).

instant case, the evidence shows Respondent took swift action against Hernandez's wife upon confirmation that he would not repent for his union activities and stop the union campaign

## **2. The ALJ's Finding of Animus is Supported by Ample Record Evidence**

The ALJ's finding of animus, the third element of the *Wright Line* test, is more than satisfied by the record evidence. In this case, motive may be inferred from the solicitation of grievances, promise of a wage change, a change in the vacation policy, increased police presence, extra payments to attend anti-union meetings, threats of plant closure, statements of futility, interrogations, sabotage of the union organizer, surveillance, the hiring of an anti-union consultant company, and the distribution of anti-union literature.

The evidence shows that Respondent solicited grievances from the drivers as part of its anti-union campaign.<sup>126</sup> Grievances were solicited during the focus group meetings with the drivers, and via a suggestion box. Respondent's initiative summary clearly shows that the suggestion box was instituted as part of Respondent's plan to defeat the union organization drive. The talking points that Corso used in his speeches indicate that the focus group meetings were used to solicit employee grievances in order to remedy them in an effort to show employees that the union was not necessary. Solicitations of grievances under these facts constitute a violation of 8(a)(1). *Reliance Electric Company*, 191 NLRB 44 (1971). As such, this evidence may be used to prove union animus.

Respondent admitted to increasing its police presence from once a week to 24 hours a day. It admitted it did so in response to the union campaign. Respondent presented no evidence

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<sup>126</sup> Corso's talking points illustrate that Respondent's solicitation of grievances led to the announcement that it would change its vacation policy, and the promise of wage changes. The evidence also shows that Respondent retracted its promise to change employee wages because of the petition, and told employees it would go forward with the wage changes after the election, so long as the Union was not elected. Changes to employer policies prior to the critical period are unlawful if it can be shown that Respondent was aware of the possibility of an election. *MEMC Electronic Materials, Inc.* 342 NLRB 1172 (2004); *Keller Columbus, Inc.*, 215 NLRB 723 (1974). In this case, not only was Respondent aware of the possibility of an election, the evidence shows that Respondent's motivation for making these changes was to defeat the union organization campaign. In sum, the promise to change employee wages and the change in vacation policy constitute evidence of union animus.

of a change in circumstances to otherwise motivate it to increase its police presence.<sup>127</sup> As such, the increased security constitutes a violation of 8(a)(1) because of its coercive nature. *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1191-92 (2007). This evidence may be used as evidence of animus.

It is uncontested that Respondent paid employees to attend captive-audience and focus-group meetings. Employees were paid \$25 per captive-audience meeting, and \$50 per focus-group meeting. Both Vargas and Hernandez testified that Respondent did not have a practice of paying employees to attend mandatory meetings. Employees, such as Hernandez, were paid by the day, not the hour. Hence, no extra money was required. Paying employees to attend anti-union meetings when there is no previous practice of paying employees for attending meetings is unlawful, and may be used as evidence of animus. *U-Tell Corporation*, 150 NLRB 1534 (1965).

Both Corso and Ramos made unlawful statements of futility. Twice, Corso told employees in his speech in which he announced receipt of the Union's demand for recognition that, "he would not accept a union[.]" In another speech, Corso told employees he would not negotiate with the union if it were to be elected. Ramos made a statement of futility during his interrogation of Sagastume. Ramos told Sagastume, after she admitted that she would support the Union if it came in, "Well, I don't think that's going to happen. John Corso is not going to allow that to happen." These statements constitute violations of Section 8(a)(1) of the Act, and constitute evidence of union animus. *Earthgrains Co.*, 351 NLRB 733 (2007).

Corso and Ramos committed hallmark violations when they each separately threatened plant closure. Corso threatened plant closure in the same speech in which he told employees he would not negotiate with the union. Corso was the highest authority at Respondent. Ramos threatened plant closure during his interrogation of Sagastume. He made this threat just before

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<sup>127</sup> There were no threats of violence or violence during the campaign.

telling Sagastume that she had to talk to her husband and get him to repent for his union activities. These statements constitute violations of Section 8(a)(1) of the Act. *Long-Airdox Co.*, 277 NLRB 1157 (1985). As such, they may be used as evidence of animus.

Evidence of animus may also be found in the multiple interrogations which occurred during the course of Respondent's anti-union campaign. Ramos engaged in an unlawful interrogation of Sagastume the day before she was terminated. Saia and McWhorter also interrogated employees. Saia interrogated Hernandez about the Union and asked if he was "the head of the Union." Saia continued to seek answers after Hernandez denied involvement with the Union. Saia pressured Hernandez to sit down and talk to Corso. Saia committed an unlawful interrogation, using the same five-factor test already set forth in the discussion of Sagastume's interrogation.<sup>128</sup> *Bourne v. NLRB*, 332 F.2d 47 (1964); *Rossmore House*, 269 NLRB 1176 (1984). The ALJ appropriately found that Saia committed a coercive interrogation. (ALJD 50, 55). The evidence also shows that McWhorter interrogated Hernandez and Vargas.<sup>129</sup> All of the interrogations described herein should be used as evidence of animus.

Evidence of animus may also be found in the sabotage of Hernandez's load the day before the election. The evidence shows that the boxes were cut from underneath. It is

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<sup>128</sup> (1) There is a history of employer hostility toward the Union; (2) Saia sought information about what was going on with the Union and if Hernandez was involved. Hernandez was clearly not an open union supporter at the time of the interrogation because he had just denied any involvement with the Union to Corso and Foca; (3) Saia was a supervisor claiming to speak on the behalf of upper management officials; (4) While the interrogation occurred in Saia's home, the meeting was preceded by a phone call in which Saia said he needed to speak to Hernandez, giving the impression that the matter was so urgent that Saia had to call on a Sunday; and (5) throughout the conversation Hernandez continually denied that he was the leader of the organization drive, but despite his denials, Saia pressed him for more information. Thus, all five factors were present, and Saia's conduct constituted an unlawful interrogation.

<sup>129</sup> McWhorter directly asked the men what they thought of the Union. McWhorter sought to know information that the men had gone to great lengths to hide. McWhorter was a member of the executive management team. He was also the owner of L&M, the very company that brought both Vargas and Hernandez to work at Respondent. McWhorter called both men into his office to question them. While both men eventually told McWhorter they supported the Union, this one factor does not outweigh the weight of all of the others. Hence, the weight of the evidence is in favor of finding McWhorter committed two coercive interrogations. *Bourne v. NLRB*, 332 F.2d 47 (1964); *Rossmore House*, 269 NLRB 1176 (1984).

incredible to believe that management was not aware of, if not involved in, the sabotage because loading the boxes would have been extremely difficult. Moreover, Vasquez's email reporting Hernandez's complaint of sabotage clearly shows that management became aware of it the same day Hernandez complained. Respondent presented no evidence of an investigation or discipline resulting from the incident.

Respondent engaged in surveillance during the union organizing drive. The October 30 email, from S. Callas to Moore and Corso, reports in detail an employee conversation regarding their union sentiments; the November 16 email from Moore to Corso states there was "pro-union talk from the night warehouse team"; and the emails exchanged in the early morning hours before the election between Foca and Corso clearly show Respondent's highest ranking officials were highly engaged in the anti-union campaign and went to great lengths to learn of employee union activities.

Finally, evidence of animus may be adduced from Respondent's contracting of an anti-union consultant and passing out of anti-union literature. While these actions do not rise to the level of an 8(a)(1) violation they may be used as evidence of motivation. *Sunshine Piping, Inc.*, 351 NLRB 1371, 1387 (2007); *Gencorp*, 294 NLRB 717 (1989); *see also J.P. Stevens v. NLRB*, 461 F.2d 490 (4<sup>th</sup> Cir. 1972) (finding the Board's reliance on an anti-union speech during an organizing campaign as evidence of improper motive of an unlawful holiday benefit appropriate). *Orchard Corporation of America vs. NLRB*, 408 F.2d 341 (8<sup>th</sup> Cir. 1969) (finding the backdrop of a vigorous anti-union campaign "lends substance to the Board's finding of violations with respect to the company supervisor's actions.")

In light of the above, Respondent's incredulous argument that ALJ erred in finding animus lacks merit. Respondent relies on *Medeco v. NLRB*, 142 F.3d 733 (4<sup>th</sup> Cir. 1998) and

*Louisburg Sportswear Co., v. NLRB*, 462 F.2d 380, 385-86 (4<sup>th</sup> Cir. 1972) for the proposition that employer speech protected by § 8(c) cannot be used as animus. This is contrary to Board law<sup>130</sup> and irrelevant because the instant case contains ample evidence of animus not protected by § 8(c) of the Act. Also, contrary to Respondent's argument, *Permaneer Corp.*, 214 NLRB 367, 369 (1974), does not stand for the proposition that the absence of a charge insulates an employer from a finding of animus. In *Permaneer Corp.*, the Board merely noted that its failure to find animus was consistent with the fact that no charges were filed during two prior union campaigns. *Id.* at 369.

**3. The ALJ properly found a causal connection between Hernandez's union activity and Sagastume's termination.**

Proof of a discriminatory motive may be established by statements and actions showing the employer's general and specific anti-union sentiment; the timing of the employer's adverse action in relationship to the employees' protected activities; inconsistencies between the proffered reasons for the action; disparate treatment of similarly situated employees; and an employer's deviation from past practices. *Embassy Vacation Resorts*, 340 NLRB 846, 849 (2003).

In the instant case, the timing of Sagastume's termination is clear evidence of causal connection between Hernandez' union activities and the adverse employment action taken against his wife. On November 2, Hernandez made a complaint to Corso and human resources regarding "rumors" that he, Vargas and Sagastume were responsible for bringing in the Union. While making his complaint, Hernandez denied any involvement with the Union. That day, at Corso's suggestion, human resources initiated an investigation into his complaint.

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<sup>130</sup> *Sunshine Piping, Inc.*, 351 NLRB 1371, 1387 (2007); *Gencorp*, 294 NLRB 717 (1989); *see also J.P. Stevens v. NLRB*, 461 F.2d 490 (4<sup>th</sup> Cir. 1972); and *Orchard Corporation of America vs. NLRB*, 408 F.2d 341 (8<sup>th</sup> Cir. 1969).

Then, just one week before Sagastume's termination, Saia called Hernandez to his home and interrogated him about his union activities. During the interrogation Saia pleaded with Hernandez to meet with Corso. Luis Hernandez ignored the request.

On November 15, at 11:22 pm, Corso sent an email to Moore asking if they had followed up on the complaints of Nixon, Vargas, Luis Hernandez, and Sagastume. Moore responded early the next morning that she would check with Morgan, who works in human resources. The next day, Ramos interrogated Sagastume about Hernandez's union activities. Ramos tried to convince her to talk to Hernandez and get him to stop his union activities and to talk to Corso. Sagastume responded that she already had spoken with Luis Hernandez, and he had made his decision, and he was not going to back down.

As soon as the conversation was over, Ramos left the work area. In fact, Sagastume did not see him again until around 6:00 pm that evening, as he descended the staircase leading to the offices of upper management. It would appear that Ramos spent the time, between the end of his conversation with Sagastume and coming down the staircase, in upper management's offices. No witness testified to Ramos's whereabouts during this time gap.

That evening, at 8:32 p.m., before leaving work, Foca, an individual heavily involved in Respondent's anti-union campaign, sent an email to Corso, in which Zeleznik, Moore and Respondent's attorney Krupin are copied, announcing that the tomato department would be transferred the next day, some employees would receive pay raises, and Sagastume's position would be eliminated.

#### **4. The ALJ's Finding Respondent's Defense to be Pretextual is Well Supported by the Record**

The ALJ found Respondent's defense to be pretextual, and the transfer of the tomato department to ECFC to be a sham. (ALJD 57-63). The ALJ based his finding on the fact tomato

department employees remained on CSP's payroll, there was no change in the tomato department location or equipment, CSP continued to pay the rent for the tomato department, Sagastume's duties were unrelated to Giant tomato orders, the timing of the transfer, and the incredulous testimony of Respondent's witnesses. *Limestone Apparel Corp.*, 255 NLRB 722 (1981)(the Board held that "a finding of pretext necessarily means that the reasons advanced by the employer did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by General Counsel." Id.); *Delchamps, Inc.*, 330 NLRB 1310 (2000)(finding 14 job eliminations to be pretextual based on timing and the fact that outsourcing the ice that these employees had manufactured did not save that much money). See also *Rood Trucking Co.*, 342 NLRB 895 (2004).

The ALJ found Respondent's purported reasons for the elimination of Sagastume's position to be pretextual. The ALJ discredited Respondent's assertion that Sagastume's position was eliminated for reasons of efficiency. Respondent assertion that an ECFC administrator could field customer service calls while inputting information in the spreadsheet is undercut by the fact that there was no phone in the tomato department at the time of Sagastume's termination. The evidence shows that a phone was never installed. Moreover, the administrative area was incredibly noisy, making it unlikely that Respondent ever had such plans.<sup>131</sup> Respondent also asserted Sagastume's position was eliminated because she was unfamiliar with the ECFC computer programs it planned to use. (GC 30 p. 5). In reality, the same spreadsheet used to perform repack administrative work, at the time of Sagastume's termination, was still used at the time of trial. In fact, Respondent failed to show any substantive change to the duties associated with Sagastume's position.

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<sup>131</sup> Respondent argues that Sagastume was unqualified to field customer service calls because she was not proficient in English. Sagastume's English skills are irrelevant because employees performing repack administrative work after Sagastume never answered such calls.

The ALJ also noted the contradicting testimony between Foca and Zeleznik as to who would perform Sagastume's duties after her termination. Zeleznik said he planned to have Perdomo perform them, which is incredible since Perdomo was on medical leave at the time of Sagastume's termination. Foca said he would have an ECFC administrator do it. In actuality, a ECFC administrator performed the work for only a few weeks, before the tomato department supervisors took over. Zeleznik admitted that administrative work had to be done as the boxes were completed, requiring the individual performing the administrative work to be in the department full-time. Ramos, the department manager and Sagastume's direct supervisor, was never consulted about the transfer or Sagastume's termination. Finally, the fact that five people are now doing the work once done by a single individual shows that the decision to eliminate Sagastume's position was impulsive and unplanned. The ALJ considered all of the above in discrediting Foca and Zeleznik's testimony that ECFC management analyzed Sagastume's duties, found they were duplicative, and used this as the basis for her termination.

Respondent erroneously argues that the ALJ did not consider its argument that Sagastume was terminated because of her high hourly wage. The ALJ found this argument to be pretext, and noted in his decision that the tomato department supervisors were promoted and made salary personnel at the time they took on her duties. (ALJD 62). Moreover, Respondent's argument that cost was a concern is inconsistent with the department raises it issued immediately after Sagastume's termination.

The ALJ considered the timing of Sagastume's position elimination to be evidence of pretext. (ALJD 61). The week of Sagastume's termination was one of the busiest weeks of the year for both Respondent and ECFC due to the Thanksgiving holiday. Terminating Sagastume, who knew how to do the work, and replacing her with someone who has never done the job does

not make sense, especially when Respondent admitted that there was no reason why the elimination could not have waited until after Thanksgiving. The timing is particularly strange when considering that the transfer occurred during the middle of a pay period. Zeleznik admitted that the start of a pay period would have made the most sense for a personnel action.

Respondent's claim that the termination occurred on a Thursday because Foca wanted to be present for the transfer of the department is unsupported. Foca was present on Tuesday, the start of the pay period. Finally, the inconsistent testimony of Respondent's witnesses as to when the decisions to transfer the department to ECFC and terminate Sagastume were made further proves that Respondent's actions constituted a spurious reaction to the confirmation of Hernandez's Union activities and his resolution to continue supporting the Union's campaign.

## **V. CONCLUSION**

Accordingly, for the reasons set forth in this Answering Brief and the ALJ's decision, the Acting General Counsel urges the Board to affirm the ALJ's rulings, findings, and conclusions, and to adopt the recommended Order.

**CERTIFICATE OF SERVICE**

I hereby certify that on May 25, 2012, I electronically filed a copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions, and, on that same day, copies were electronically served on the following individuals by email:

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