UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PORTOLA PACKAGING, INC.

and **Case 28-CA-067274**

MARTA MAGALLON CORONA, an Individual

and **Case 28-CA-067345**

JORGE GARCIA, an Individual

and **Case 28-CA-070621**

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 99

PORTOLA PACKAGING, INC.

Employer

and **Case 28-RC-067973**

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 99

Petitioner

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

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Counsel for the Acting General Counsel (General Counsel), pursuant to Section 102.46(a) of the Board's Rules and Regulations, files the following Brief in Support of Exceptions to the Decision of Administrative Law Judge [JD(SF)-45-12] (ALJD), in this case, issued on September 13, 2012.[1] It is respectfully submitted that in all respects, other

[1]Portola Packaging, Inc. is referred to as Respondent. United Food and Commercial Workers Union, Local No. 99 (UFCW), is referred to as Union. References to the ALJD show the applicable page number. "Tr. ___"

than what is excepted to below, the findings of the Administrative Law Judge (ALJ) are appropriate, proper, and fully supported by the credible record evidence.

The ALJ found that Respondent committed numerous and serious unfair labor practices in violation of Section 8(a)(1) of the Act by: orally promulgating overly-broad and discriminatory rules prohibiting employees from discussing their wages and what occurred at meeting with supervisors with other employees; unlawfully soliciting employee complaints and grievances, and promising employees increased benefits and improved terms and conditions if they did not select the Union as their collective-bargaining representative; unlawfully interrogating employees; creating the impression of surveillance; unlawfully threatening employees with a reduction in benefits and wages; unlawfully demanding that employees vote "no" in the upcoming representation election; and maintaining an overly-broad and discriminatory rule it its Employee Handbook. (ALJD at 11-12, 18, 26-33, 38)

The General Counsel excepts to the ALJ's failure to find that Respondent also violated Section 8(a) (1) by:

1. instituting more onerous working conditions upon employees by not allowing Spanish-speaking employees to use an interpreter when speaking with supervisors when that interpreter was engaging in protected, concerted activities;

2. issuing an October 5, 2011[2] written warning to Charging Party Jorge Garcia (Garcia);

3. soliciting employee complaints and grievances and promising increased benefits and improved terms and conditions of employment if employees rejected the Union as their collective-bargaining representative and determinations concerning witness Evangelina Villegas' testimony;

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refers to pages of the transcript from the hearing held March 20-22; April 26-27, 2012. "GCX ___" refers to exhibits introduced by General Counsel at the hearing. "EX___" refers to exhibits introduced by Respondent/Employer at the hearing. "UX___" refers to exhibits introduced by the Union at the hearing.

[2] All dates are in 2011 unless otherwise noted.

4. threatening employees with unspecified reprisal by telling employees to "think of your family's well-being" if employees selected the Union as their collective-bargaining representative;

5. disparaging the Union, expressing futility and threatening employees with loss of benefits by distributing and posting a flyer that called the Union and those that support them "losers" and implying that a vote for the Union will always result in a loss; and

6. disparaging the Union by implying that the Union was behind violence depicted in a video shown to employees, and threatening employees that the Union could request their termination if they didn't pay union dues in a right to work state.

I. BACKGROUND

A. Respondent's Operations

Respondent is an international manufacturing company that manufactures bottle caps for dairy, juice, and water containers. (Tr. 36; 496) Respondent operates a manufacturing facility in Tolleson, Arizona (the Tolleson facility), where it employs approximately 91 employees. (Tr. 36) The Tolleson facility has been in operation for approximately eight years. (Tr. 38) It is a 24-hour a day facility, operating seven days a week with three separate shifts. (Tr. 83) Respondent's General Manager at the Tolleson facility is Tim Tyler (Tyler). (Tr. 35) Chris McClanahan (McClanahan) is the Human Resources and Safety Manager (Tr. 67, 135), Tim DeCrow (DeCrow) is the Production Manager (Tr. 67; 93), and Ray Buchanan (Buchanan) and Fabian Franco (Franco) are both production supervisors. (Tr. 772; 846)

B. Employee Jorge Garcia

Employee Jorge Garcia (Garcia) has worked for Respondent as a maintenance technician for 24 years. (Tr. 102; 173) Maintenance technicians are in charge of the maintaining the machines in the Tolleson facility. (Tr. 173)

Garcia was asked to become a member of a "GO Team" in August. (Tr. 187) GO Team stands for "get organized," and was a concept instituted by Respondent at the Tolleson

facility in 2011. (Tr. 96) The GO Team is a reliability-centered maintenance team consisting of a process engineer, a maintenance technician, and production staff. (Tr. 96-97) The team works as a unit and is assigned to a certain type of machine that creates specific types of lids. (Tr. 96-97)

Besides being a long-term and experienced employee, Garcia was also one of the few employees that spoke both English and Spanish. (Tr. 102) Accordingly, Garcia was often used by employees to interpret for them when speaking with management officials who did not speak Spanish. (Tr. 102; 280-283)

Additionally, Garcia often engaged in protected, concerted, activities at the workplace. (Tr. 174; 355) Garcia presented, in writing, the mutual concerns of his fellow mechanics to management (Tr. 178-182; GCX 16), and often spoke to Respondent about the workplace concerns of the operators. (Tr. 229) The operators frequently talked to Garcia, complaining about being over-worked, and the maltreatment they received at the hands of Production Supervisor Ray Buchanan (Buchanan). (Tr. 175; 355) Respondent's attitude toward those concerted complaints is best illustrated by Production Manager Tim DeCrow's (DeCrow). When Garcia brought the operators' concerns to his attention, DeCrow mocked the operators, telling Garcia that they were whining, while rubbing his eyes like a child and crying "wah, wah, wah.". (Tr. 177)

C. Union Campaign

On November 1, the Union filed a petition for a representation election. (EX 2) The election was scheduled for December 1.[3] Respondent engaged in several statements that constituted violations of the Act. One of the statements was made by Production Supervisor

[3] The Tally of Ballots resulted in a tie-vote, with three determinative challenges. [GCX 1(o)] As part of these proceedings, the objections filed by the Union and the challenged ballots were consolidated with the unfair labor practice charges. The ALJ sustained a number of the objections and ordered a rerun election. (ALJD at 49)

Fabian Franco (Franco). After the petition was filed, Franco instituted employee meetings everyday at the end of the shift; he told employees that the reason for meetings was for the workers to discuss problems they were having and for Respondent to be able to listen to those problems. (Tr. 365-366) Moreover, DeCrow stood by the time clock the night before the election and announced to employees as they clocked out for the day that they needed to "think about their families" when they voted the next day. (Tr. 302; 383-384; 588)

After the filing of the petition, Respondent hired a Labor Relations Firm, LRI, to assist them in campaigning against unionization. (Tr. 45; 676; GCX 4) Besides sending a labor relations consultant[4] to Respondent's Arizona facility, LRI provided flyers and videos for Respondent to distribute and present to employees. (Tr. 50; 168-170) Flyers were either posted on an employee bulletin board, by the time clock, or handed out to employees. (GCX 5-7; 9-15) In days leading up to the election, the videos played for a continuous 24 hour cycle in the lunch room and the hallway at Respondent's facility. (Tr. 50; 169-170)

II. ANALYSIS

A. The ALJ Erred in Failing to Find that Respondent Created More Onerous Working Conditions by Refusing to Allow Garcia to Engage in Protected, Concerted Activities while Serving as a Spanish Interpreter.

1. Allegation

The Complaint alleges that Respondent instituted more onerous working conditions for employees when it prohibited Spanish and English-speaking employee Garcia to serve as an interpreter for Spanish-only speaking coworkers because he engaged in protected, concerted, activities while interpreting. [GCX 1(t) at para. 5(b)]

[4] The labor relations consultant, Armando Talancon, was found by the ALJ to have committed several unfair labor practices during his conversations with employees, including unlawful threats, the solicitation of grievances and implied promises of increased benefits. (ALJD at 26-27)

The ALJ found that there is no right for employees to have a specific Spanish interpreter when talking to management, that Garcia did not engage in protected, concerted, activities while interpreting, and that Respondent continued to allow employees to have Spanish interpreters while meeting with management, just not Garcia. (ALJD at 10) The ALJ specifically concluded that Garcia was merely acting as an interpreter and was not engaged in protected, concerted, activities at the time he was interpreting in a meeting with Production Supervisor Ray Buchanan (Buchanan) and employee Marta Magallon Corona (Magallon). (ALJD at 9-10) Moreover, the ALJ found that there is no case law supporting the proposition that, when an employee acts as a translator for another employee to speak to management, those employees are engaged in concerted activities. (ALJD at 9) The ALJ erred in finding Garcia was not engaged in protected, concerted, activities while he was interpreting and speaking with Buchanan, and by concluding that Garcia's prohibition from interpreting did not violate Section 8(a)(1) of the Act.

2. The Record Evidence

Garcia was one of the few employees that spoke both Spanish and English. (Tr. 102) One employee Garcia interpreted for on a fairly regular basis was 17 year employee Magallon. (Tr. 280) In the middle of May, Magallon wanted to bring a concern to her supervisor, Buchanan. (ALJD at 7; Tr. 183; 282) Magallon's concern was that, although being trained to be a team lead, the team lead position on weekends amounted to being a relief supervisor, in charge of the entire Tolleson facility, as no other supervisor was present on the weekends. (ALJD at 7; Tr. 183; 282) Magallon felt that this was too much responsibility for her on the weekends, and she did not feel comfortable performing those duties. (ALJD at 7; Tr. 282) Magallon attempted to talk to Buchanan about this issue by herself but Buchanan did

not respond positively. (ALJD at 7; Tr. 282-283) Magallon then asked for the assistance of Garcia to accompany her and speak with Buchanan, as Buchanan did not speak Spanish. (ALJD at 7; Tr. 183; 283) Garcia agreed; On a Thursday evening, before the weekend that Magallon was scheduled to be the relief supervisor, Magallon and Garcia went to Buchanan's office after their shift. (Tr. 184; 284, 322) Magallon, using Garcia as an interpreter, informed Buchanan that she did not feel comfortable being a relief supervisor on the weekends because it was too much responsibility and she was not receiving any additional pay. (ALJD at 7; Tr. 185; 285) Buchanan, with Garcia translating, told Magallon that she had to do it. (ALJD at 7; Tr. 185) Magallon attempted to talk to Buchanan further but Buchanan raised his voice and yelled at Magallon. (ALJD at 7; Tr. 286) Garcia asked Buchanan why he was getting so upset, why was he yelling at Magallon, and why Buchanan was treating Magallon so badly. (Tr. 185; 287; 328) Buchanan made a face, turned his back and ignored them. (Tr. 185; 287) Garcia and Magallon then left the office. (Tr. 185)

The ALJ did not discuss in his decision the testimony of Magallon where she stated that Garcia asked Buchanan "why he treated us like that, why was he so disrespectful to us", and only found that Garcia said "why he was yelling, and why he was treating Magallon badly." (ALJD at 7; Tr. 328) This is an important omission as Magallon's testimony, credited by the ALJ in numerous areas of the ALJD, indicates that Garcia was including both her and Garcia in his statements that Buchanan was treating them both badly.

The next day, Magallon arrived at work and was immediately approached by Buchanan who told her to go to the conference room. (ALJD at 7; Tr. 288-289) In the conference room was Buchanan, Human Resources Manager McClanahan (McClanahan), and DeCrow. (ALJD at 7; Tr. 288) McClanahan told Magallon that Buchanan had reported that

Garcia had disrespected him the night before. (ALJD at 7-9; Tr. 289) McClanahan then stated that, because of Garcia's disrespectful actions of the previous day, Garcia could no longer act as an interpreter for Magallon. (ALJD at 9).

The ALJ determined that McClanahan told Magallon that Garcia could no longer be used to interpret but McClanahan did not issue an overall prohibition against using interpreters, thus discrediting McClanahan's testimony that he had no idea that Garcia had ever been used to interpret for other employees and denied that the conversation even occurred. (ALJD at 8-9) (Tr. 166) Garcia was told by Magallon a few days later that he was no longer allowed to interpret for Magallon. (Tr. 185) Since that day, Garcia has no longer been authorized to interpret for Magallon. (Tr. 186)

3. Legal Analysis

The ALJ appears to have concluded that an employee acting as an interpreter for another employee, when that employee wants to bring a concern to management about wages, hours or working conditions is not, per se, engaging in protected, concerted activities. The ALJ's analysis missed the mark, because that is not what happened in this case. Garcia, while acting as an interpreter for Magallon, clearly engaged in protected, concerted activity when he asked Buchanan why he was yelling at Magallon and why he was treating Magallon so badly. This concern had nothing to do with the "relief supervisor" issue they were originally discussing in the meeting. Instead, Garcia questioned the way Buchanan, a supervisor, was treating his coworker: yelling at her, and treating her badly. It is "well settled that an employee engages in protected activity by speaking up to management about the allegedly unfair treatment employees have received.[5]" *Media General Operations, Inc.*, 341 NLRB

[5] While the Fourth Circuit declined to enforce the Board's order in *Media General Operations*, it did not take issue with the finding of concerted activity, but concluded that the offensive nature of the employee's statements

124, 125 (2004) citing *Churchill's Restaurant*, 276 NLRB 775, 777 fn. 11 (1985). Respondent did not like that Garcia had engaged in protected, concerted activities, questioning Buchanan as to why he was yelling at Magallon and treating her so badly, while he was interpreting, and issued a prohibition on him interpreting in the future – deeming his conduct as "disrespectful." (ALJD at 8, 9) That prohibition stifled Garcia's ability to engage in protected, concerted activities in the future as well as Magallon's ability to do the same with Garcia.

The record evidence shows that prior to this date, Garcia had been able to interpret without issue. What made this meeting different was that Garcia did not merely interpret, but challenged Buchanan's mistreatment of a Magallon, at Magallon's request. Respondent could abide Garcia stepping out of the role of interpreter and also joining in on employees' complaints and issued its edict the next day.

If an employer's actions interfere with employees' Section 7 rights, the employer must demonstrate a legitimate business reason that outweighs the interference:

> Under *Jeannette*, once it is established that an employer's conduct adversely affects employees' protected rights, the burden is on the employer to demonstrate "legitimate and substantial business justification" for its conduct. 532 F.2d at 918. It is the responsibility of the Board to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. Id.

Caesar's Palace, 336 NLRB 271, 272 n. 6 (2001), quoting *Jeannette Corp.*, 532 F.2d 916, 918 (3d Cir. 1976). Respondent has presented no legitimate and substantial business justification to not allow Garcia to be used as an interpreter in future meetings. Respondent's sole stated reason for refusing to allow Garcia to be used as an interpreter was apparently

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statements rendered them unprotected. *Media General Operations, Inc. v. NLRB*, 394 F.3d 207 (4th Cir. 2005). Of course, there was nothing comparable in the content of Garcia's remarks to Buchanan that would take them outside the protection of the Act.

Buchanan's belief that Garcia was disrespectful to him. However, as noted by the ALJ, there was no record evidence of Garcia losing his temper, raising his voice, using profanity or calling Buchanan names. (ALJD at 7) Without any legitimate reason to prohibit Garcia from interpreting, the only conclusion to reach is that it was Garcia's concerted activity during the meeting that prompted the prohibition. Such a prohibition interferes with Garcia and any other employee that wants to use Garcia's ability to engage in concerted activity. The ALJ erred when he found that Respondent's prohibition against the use of Garcia as an interpreter did not violate Section 8(a)(1) and such finding should be overruled

B. The ALJ Erred in Failing to Find that the October 5 Written Warning Issued to Garcia Violated Section 8(a)(1) of the Act.

1. Allegations

The Complaint alleged that an October 5 written warning given to Garcia was a violation of Section 8(a)(1) of the Act. Specifically, it is alleged that due to Garcia's extensive concerted activity on the behalf of fellow mechanics and operators, including his assistance as an interpreter, Respondent issued the October 5 written warning. Respondent's reasoning for the warning was crystal clear when it noted during the discipline meeting that Garcia had engaged in concerted activity, which was a problem for Respondent, and Respondent did not intend to allow that to continue. The ALJ erred in not finding that these words belied the true justification for the warning—to retaliate against Garcia for his protected, concerted activities.

2. The Record Evidence

a. EAM Acknowledgment Form

Garcia's protected concerted activities were extensive and well known to Respondent. Garcia initially put his protected, concerted, activities into writing concerning a new computer

system. (ALJD at 14; GCX 16) In late 2010, Respondent implemented a system used to track all of the maintenance technicians' hours on the computer. (ALJD at 14; Tr. 98) That system was called Enterprise Asset Management (EAM). (ALJD at 14; Tr. 98) In early December 2010, maintenance technicians attended their first training session on the EAM system.[6] (Tr. 662) Despite the training, two-thirds of the maintenance technicians were still either not using the EAM system, or experiencing difficulty using the system. (Tr. 639) Respondent, through Supervisor Paul Rose (Rose), conducted another training session on EAM on May 6. (Tr. 176) At the end of the training session, Rose required each employee in attendance to sign an EAM Training Acknowledgment Form. (GCX 16) Garcia signed this form on May 6. (Tr. 178) Garcia questioned having to sign the form and Rose told him not to worry about it, that everyone was required to sign the form. (Tr. 178) At the bottom of the form, Garcia wrote several concerns that he and other maintenance technicians had with the EAM system. (GCX 16) Garcia wrote "we need a lot more training with the system EAM. A lot of the equipment don't have the location it is hard to find in the system (sic); Also the supervisors need to make the work orders so we can't close after the work is done (sic)." (Tr. 178-179) Despite the ALJ's determination that there was no evidence that Garcia spoke with other employees about the issues, Garcia's testimony was that he and three or four other technicians shared the same concerns and Garcia's statement on the form indicate the shared concerns. (ALJD at 14; Tr. 180) Garcia testified that because he and the other technicians did not grow up with computers, and they needed more training on how to use the computer. (Tr. 179) Garcia testified as to who those technicians were that shared his concerns. (Tr. 80)

[6] Although Garcia attended this training session according to Respondent's records, it was immediately after the sudden death of his wife and Garcia missed work during this same time period. (Tr. 662; EX 16) Therefore, Garcia's memory may have been unclear as to whether he attended that training session the same time that his wife had suddenly died. (Tr. 216) In fact, Garcia stated that he did not remember. (Tr. 217) Garcia was not asked about the February training. (EX 8)

These notations on the EAM form were clearly concerted concerns brought to the attention of Respondent and the ALJ acknowledged that in writing the comments on the form, Garcia was engaged in protected, concerted activity. (ALJD at 14-15)

b. Garcia's Further Presentation of Protected, Concerted Complaints to Respondent

In mid-May, Garcia and his coworkers began discussing with each other the issues they were facing at work. (ALJD at 15; Tr. 174; 355) These included having too many machines to handle, and the fact that their supervisor, Buchanan, would not listen to them about their problems. (ALJD at 14; Tr. 175; 355) Garcia worked the second shift at that time—2:00 p.m. to 10:30 p.m., and spoke to almost every employee on that shift. (Tr. 174-185) Magallon corroborates that employees on the second shift were discussing the issue of their mistreatment by Buchanan and the amount of work they had to do. (Tr. 280)

Garcia brought these complaints to the attention of his supervisor, DeCrow, sometime between August and September. (ALJD at 14; Tr. 229) DeCrow's response was that all the operators do is whine—making a "wah, wah, wah" sound and placing his hand in a crying motion by rubbing his eyes as a child, indicating that the operators were just whining. (ALJD at 14; Tr. 177) The ALJ determined that, despite DeCrow's protestations, this conversation did occur, showing a disdain by Respondent for the protected, concerted, activities of employees. (ALJD at 14) The ALJ further determined that during May 2011, Garcia also engaged in protected, concerted, activities. (ALJD at 15)

c. Garcia's Discipline

On October 5, Garcia was given a second written warning.[7] (ALJD at 16; GCX 18) On the face of the warning, Respondent incorrectly stated that Garcia had received a verbal reminder on June 9, 2011. (Tr. 109; 162; GCX 18) There were four alleged performance incidents recorded in the October 5 written warning. (GCX 18) The ALJ states that as a layman, who is unfamiliar with the technician requirements of the repairing process, he is unable to determine whether Garcia was at fault for all of the incidents. (ALJD at 17) Thereafter, the ALJ only analyses two of the four incidents on the written warning. (ALJD at 17) Despite the uncontroverted evidence presented by Garcia regarding each of the incidents and about the technical aspects of the allegations, the ALJ failed to address them all. Garcia's testimony was cogent and specific and Respondent's failure to present any evidence to contradict Garcia's testimony should have been noted by the ALJ. Garcia's explanation of the incidents should have been credited. As demonstrated below, the incidents were not so complicated that the ALJ could not make a finding as to their accuracy.

The first incident occurred when Garcia was asked to fix a machine, but was unable to do so. (Tr. 195) Garcia was at home after his shift ended and was asked to come in and fix a machine. (Tr. 195) Garcia went to the Tolleson facility and attempted to fix the machine. Earlier a process technician had tried to fix the machine but could not do so, and went home. (Tr. 195) Garcia immediately saw that the machine had lost its memory and tried to reprogram the machine but could not do so; he therefore went home for a few hours, and returned at 5:30 a.m. to speak to his supervisor about the problem. (Tr. 195-96)

[7] Garcia was given a first written warning on October 4. (GCX 17) The ALJ found that that warning did not violate the Act. (ALJD at 15-19) General Counsel has not excepted to that finding.

Upon arriving for his shift, Garcia met with process engineer Lane Addison (Addison) to discuss the problem. (Tr. 196) Addison and Maintenance Lead Carlos Delamonte were more familiar with the machine and discovered that the machine needed a new battery and also needed to be rebooted. (Tr. 197) Garcia does not have access to the new batteries, and also has no access to the CD that is required to reboot the system. (Tr. 197) Instead of noting that Garcia does not have access to new batteries or the programming CD, the written warning merely states that Garcia could not fix the machine and other technicians had to be called. (GCX 18) Respondent leaves out the fact that the "other technicians" were process engineers and maintenance leads with higher technical knowledge than a maintenance technician, and in possession of the actual equipment needed to get the machine up and running again. (Tr. 197-198) DeCrow, issued the discipline, had no idea what specifically was wrong with the machine when he testified. (Tr. 111) Despite his testifying that the machine was shut down over a two day period, it was actually only shut down for a few hours before and after midnight on the same evening. (Tr. 111; GCX 18)

The second incident occurred when there was a leak in a hydraulic valve, which Garcia attempted to fix. (Tr. 198) Garcia admitted that he did not have a lot of knowledge with respect to hydraulic valves, but his process technician insisted that he attempt to fix it. (Tr. 198) In the middle of the repair, Garcia was required to leave and go to a mandatory safety meeting. (Tr. 199-200) Garcia informed another maintenance technician to replace the valve with a spare part from a machine that was no longer in use and routinely used for spare parts. (Tr. 199-200) The machine was fixed and, despite Respondent's attempts to make the incident sound worse than it was, no expenditure on a new valve was required. (Tr. 200) DeCrow, again, had the facts wrong in GCX 18, stating that Respondent had to call in another

maintenance technician and use one of the critical valves. (Tr. 111) Additionally, Respondent failed to rebut Garcia's testimony that he was sent to a meeting and informed the other maintenance technician on shift how to fix the problem and where to get the part that was needed. The ALJ completely failed to discuss this omission by Respondent.

The third incident involved an individual by the name of Ramon who asked Garcia to start up a specific machine. (Tr. 200) Garcia went to start the machine, but noticed that one of the zones was not getting hot. (Tr. 200) Each zone must get hot before the machine can be turned on. (Tr. 201) Garcia worked on the issue and then went to lunch. (Tr. 201) Garcia testified that it takes approximately two hours for the machine to warm up before it can start without being damaged. (Tr. 201) Notwithstanding the potential for damage, Buchanan told Garcia that the machine was ready to be run. (Tr. 201) Garcia informed Buchanan that the machine was not ready. He further told Buchanan that the machine needed time to warm up, that he was going to go to lunch, and when he returned from lunch the machine should be warmed up and ready to start. (Tr. 201) Buchanan, instead of waiting for the machine to warm up, tried to start it too early, and the color for the machine spilled all over the floor. (Tr. 202) Garcia, being responsible for the machine, informed Buchanan that he would take care of it and would clean up the mess Buchanan made. (Tr. 202) Buchanan failed to testify about this incident when called as a witness by Respondent.[8] The ALJ found that Garcia's going to lunch instead of turning on the machine was insubordination (ALJD at 17) yet there is no evidence that Garcia was directed to skip lunch, nor any evidence from Respondent to counter Garcia's testimony that, to start up the machine without the two hours of warning up, would have disastrous results by damaging the machine. (Tr. 201)

[8] DeCrow testified that Garcia was argumentative with Buchanan several times yet there is no corroboration of this from Garcia's personnel file or from Buchanan himself. (Tr. 112)

The final incident listed on GCX 18 concerned Garcia being off work and not hearing his cell phone ring. (Tr. 203) Garcia was off duty and sleeping before his 5:30 a.m. shift. (Tr. 203) During that time, he was called by Respondent, although there is no evidence as to who called him. (Tr. 203) As soon as Garcia woke up in the morning and discovered he had the missed call, Garcia tried to reach a supervisor. (Tr. 203) After not being able to do so, Garcia called Chris Turner, a process technician, who informed him that they had had some problems with the machine, but it was fixed and ran throughout the night. (Tr. 204) Garcia is required by Respondent to be on-call whenever he is not at work, yet Respondent does not provide Garcia a means by which they can contact him. (Tr. 204-205) Again, DeCrow's attempts to exaggerate this incident in GCX 18 by stating it was over two shifts that Respondent tried to reach Garcia, failing to include the mitigating information into GCX 18 or his testimony that the shift change took place in the middle of the night, when Garcia was home resting after working a full shift. (Tr. 112) DeCrow also failed to mention in GCX 18, or in his testimony, that the machine was eventually able to run and there was no down time. (Tr. 204) Additionally, Respondent has never informed employees that they are subject to discipline if they did not hear their personal phone ring, do not come into work when requested, or when they are otherwise scheduled to be off. (Tr. 113) Respondent's disciplining of Garcia because he did not hear his cell phone when he was home resting after working a full day, and getting ready to come into work for another full day, shows that Respondent's reasoning for the disciplines are pretext.

d. Respondent's Animus towards Protected, Concerted, Activity

When Respondent issued Garcia the October 5 warning, Respondent made it clear to Garcia that it did not like, or support, his engaging in protected, concerted, activities. The

timing clearly supports the inference that the warning was given because of Garcia's protected conduct. Upon giving Garcia the warning, DeCrow told Garcia that he was provoking other people to complain, that Garcia was not the kind of person that was good to have around, and that Garcia was not good for business. (Tr. 193) Garcia told DeCrow that he was not trying to provoke other people, but was merely passing on information that he hears, trying to help the operators, and trying to help management. (Tr. 194) DeCrow ignored Garcia's comments and threatened him by stating that, if he received one more warning, he would be fired. (Tr. 194) The ALJ discredited DeCrow and other managers, and specifically credited Garcia's testimony that these statements of animus towards Garcia's protected, concerted, activities were made when Garcia was given the October 5 warning. (ALJD at 18)

3. Legal Standard

It is well established that Section 7 of the Act provides workers "the right to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising her right to engage in protected concerted activity. Id. at 17; *Triangle Electric Co.,* 335 NLRB 1037, 1038 (2001). Here, the evidence adduced at trial demonstrates that, but for the fact that the Garcia spoke up for other employees, not only in writing but by assisting them with speaking to English-only speaking supervisors, and bringing concerted complaints to Respondent's attention, Garcia would not have received any discipline for minor issues that were not fully investigated nor explained. Accordingly, the October 5 written warning given to Garcia was unlawful and should be ordered expunged from his file.

4. The Legal Analysis

The General Counsel has the initial burden of establishing a prima facie case. To establish that an employer has retaliated against an employee for exercising his right to engage in protected concerted activity, the following four elements must be established: (1) the employee engaged in concerted activities; (2) the employer knew of the concerted nature of the activities; (3) the concerted activities were protected by the Act; and (4) the adverse action taken against the employee was motivated by the activities. *Triangle Electric Co.*, supra; *Meyers Industries*, 268 NLRB 493, 497 (1984).

Once a prima facie unlawful motivation is shown, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *NLRB v. Mini-Togs, Inc*., 980 F. 2d 1027, 1032-1033 (5th Cir. 1993). To carry its burden, Respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the employee's protected activity. See *GSX Corp. v. NLRB*, 918 F. 2d 1351, 1357 (8th Cir. 1990) ("[b]y assessing a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.") Moreover, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason. *Aero Metal Forms*, 310 NLRB 397, 399 n. 14 (1993).

5. Respondent is Unable to Establish a Defense forthe Warnings

The ALJ correctly noted that the General Counsel established a prima facie case that Garcia's protected, concerted activities were a motivating factor in Respondent's decision to issue Garcia the written warning. (ALJD at 19) However, the ALJ inexplicitly determined that Respondent established a defense for its actions. (ALJD at 21) The ALJ makes this finding despite credited testimony that, at the time Respondent gave Garcia the warning, it threatened him that further protected, concerted, activity would result in his termination. (ALJD at 18) Respondent's defense for the warnings is full of unusual aspects, exaggerations, embellishments, and a complete lack of evidence to explain its conduct.

The October 5 warning is for relatively minor incidents, yet the statements placed on the warning itself, and as testified to by various managers, were exaggerated and embellished to make the incidents appear to be far worse than they were. The October 5 warning contains four alleged incidents. The first incident occurred when a machine had lost memory and could only be rebooted with batteries and a CD, to which Garcia did not have access. It took a process engineer, Lane Addison, to fix the machine, someone with far greater technical ability that a maintenance technician such as Garcia. That information was left out of the October 5 discipline.

The second incident makes it appear that Respondent had to purchase an expensive part to fix the valve that was damaged. That was not the case, as Garcia was able to use a valve from a machine that is used for spare parts.

The third incident completely leaves out the facts of what actually occurred. Garcia was not able to start up the machine as directed immediately because one of the zones was not heating up and, if he had started the machine, he would have damaged the it. The ALJ finds that Garcia's going to lunch instead of immediately starting the machine was insubordination,

despite failing to address in his decision Garcia's uncontroverted evidence that to start the machine at that time could have led to disastrous results, and the lack of evidence that a supervisor told him to skip lunch.

Finally, the fourth incident concerns one time when Garcia, who was at home resting before he had to start his shift at 5:30 a.m., did not hear his personal cell phone when called by a supervisor. The report, where it states that the machine could not be used, is inaccurate; the employees present stated that they were able to run the machine throughout the night and complete the order.

Respondent provided no rebuttal to any of these specific and detailed statements made by Garcia, and the ALJ failed to address Respondent's lack of rebuttal to Garcia's testimony. Instead, Respondent relied upon exaggerated and inaccurate recitations in the October 5 warning, without calling any witnesses to substantiate what actually occurred. In fact, Buchanan, who was apparently the supervisor that stated that Garcia was argumentative in the third incident, was called as a witness by Respondent yet Respondent failed to ask him any questions about the incident with Garcia.

Combining the unusual aspects listed above with DeCrow's statements to Garcia at the time the October 5 written warning was given, there should be no doubt that Respondent issued the October 5 written warning to Garcia to put him one issue away from termination due to his repeated protected, concerted, activities on behalf of other employees.

Finally, after the General Counsel established a prima facie case, the burden shifts to Respondent to show they would have taken the same actions absent Garcia's protected activity, Respondent failed to present any evidence that it routinely disciplines employees for the same conduct Garcia engaged in. See *Blue Chip Casino, L.L.C.*, 341 NLRB 548 (2004) (finding violation of

Act where employer failed to bring specific evidence demonstrating that it would have taken same action, absent protected concerted activity).

Respondent failed to present specific evidence on the discipline, on comparative discipline, and the ALJ failed to analyze the uncontroverted testimony of Garcia regarding the four incidents. It is urged that the October 5 written warning be found to violate Section 8(a)(1) of the Act, and the ALJ's determination be overruled.

C. The ALJ Erred in Failing to Find that Supervisor Franco's Statements and Meetings Constituted a Solicitation of Grievances in Violation of Section 8(a)(1) of the Act and in his Determinations regarding Villegas' Testimony.

1. Allegations

Production Supervisor Fabian Franco instituted meetings at the end of his shift among employees soon after the November 1 petition was filed by the Union, and after Labor Relations Consultant Talancon informed Respondent that employees wanted more communication from Respondent.[9] During these meetings, it is alleged that Franco solicited employee concerns and grievances and promised increased benefits. The ALJ incorrectly found that these meetings and statements by Franco were not a solicitation of grievances or promises of increased benefits and erroneously determined that Villegas' testimony was confused, vague, somewhat incomprehensible and without substance. (ALJD at 34)

2. The Record Evidence

After the representation petition was filed on November 1, for the first time, Respondent began to have meetings with employees at the end of their shifts. (Tr. 365) Franco informed employees that the purpose of the meetings was that Respondent wanted to

[9] Talencon was found to have unlawfully solicited employee grievances and made promises of more favorable terms and conditions of employment in employee meetings. (ALJD at 26-27) One of the complaints raised by employees was the lack of communication from Respondent to the employees. (ALJD at. 24-25)

hear about employees' problems so employees would get more attention from Respondent. (Tr. 365) Franco also used these meetings as a place to hand out anti-union literature to employees, as well as to ask employees about their grievances, and state Respondent would try to assist the employees. (Tr. 365-366; 595) The ALJ correctly found that these meetings were new, and started in the November timeframe, after the petition was filed by the Union. (ALJD at 34).

3. Legal Analysis

The ALJ determined that, despite the meetings beginning after the petition was filed in November, that employee Evangelina Villegas' statements as to what was said by Franco at the meetings to be confusing, vague, somewhat incomprehensible and without substance. (ALJD at 34) A clear reading of Villegas' testimony does not square with this description. Villegas testified that Franco told employees that the purpose of the meetings were for Respondent to "hear about employees' problems". (Tr. 365) This is neither confusing, vague, incomprehensible or without substance. When you look at Franco's statements, combined with Talencon's statements that he learned from employees one of their complaints was that Respondent did not communicate with them, this makes perfect sense. Respondent solicited employee complaints through Talencon, and instituted these meetings to hear those complaints. (ALJD at 26-27) Villegas went on to testify that Franco told them that after hearing employees' problems, Respondent would try to assist them. Again, there is nothing vague about this statement, and put in the context of the ongoing anti-union campaign, it is completely logical. Respondent had no previous practice of meeting with employees to discuss their concerns, or inform employees that they would try to fix the problems. C*hartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1168 (2004) (employer solicited

grievances and impliedly promised to remedy them by asking employees, for the first time, for input on benefits and their problems at work); *Beverly California Corp*., 326 NLRB 153, 153 n. 2 (1998) (employer unlawfully solicited grievances by inviting employees to contact the employer directly about their work related problems and offering to resolve them).

Respondent learned from Talencon after Talencon spoke with employees, that one of the employees' grievances was the lack of communication the employees received from Respondent. After learning of this grievance, Respondent instituted employee meetings, told employees they wanted to hear about their problems, would do their best to assist those problems, and passed out anti-union literature at those same meetings. This is exactly the factual scenario that establishes an unlawful solicitation of grievances and a promise of increased benefits for failing to select the union as a collective-bargaining representative. The ALJ incorrectly dismissed this allegation and that determination should be overruled.

D. The ALJ Erred in Failing to Find that Supervisor DeCrow's Statements that Employees Needed to "Think About Your Families Well-Being" Constituted a Violation of Section 8(a)(1) of the Act

1. Allegations

The day before the election, it is alleged that DeCrow showed up after one of the newly instituted employee meetings, and told employees that, when they voted, they should think about their families' well-being. The ALJ erred when he found that this was protected speech under Section 8(c) of the Act.

2. The Record Evidence

During one of these after shift meetings, the night before the election, DeCrow was waiting by the time clock to speak to employees when they got out of the meeting. (Tr. 302) As employees were walking out, and punching out at the time clock, DeCrow told them that

the election was going to be the next day, that they would not be allowed to talk about it the next day, and that he could not tell them whether to vote yes or vote no but that the employees should think about the well-being of their families. (Tr. 303; 383-384) DeCrow admitted to bringing up the well-being of employees' families in relation to the union election. (Tr. 588) This statement was then translated into Spanish by Franco. (Tr. 303) All of the employees that heard the statement were concerned about the statement regarding the well-being of their families. (Tr. 303) Magallon testified that employees were scared about losing their jobs and scared about how they would support their families. (Tr. 303)

3. Legal Analysis

"[T]he test in determining whether an employer's conduct constitutes an unlawful threat or implied threat of reprisals or retaliation for employees' engaging in protected activity is whether the remark(s) may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act, and does not turn on the motivation for the remark(s) or rely on the failure or success of the coercion". *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). When applying this standard, the Board considers the totality of the relevant circumstances. *Hialeah Hospital*, 343 NLRB 391, fn 8 (2004); *Sawgrass Auto Mall*, 353 NLRB No. 40 (2008) (A two-member Board decision) The ALJ determined that the statement made by DeCrow is similar to the statement made in *Werthan Packaging, Inc.*, 345 NLRB 343, 344 (2005) where the Board ruled that an employer's statement that it was in employees' and their families' best interest to vote "no" was not threatening. Employer statements that might be permissible considered in isolation can become improper if uttered in the context of other unfair labor practices (or objectionable conduct) that "impart a coercive overtone" to the statements. *Reno Hilton,* 319 NLRB 1154. 1155 (1995). Here, the statements were made after employees had received

letters from Respondent "demanding" that they vote no, after unlawful interrogations, threats, and a creation of an impression that their union activities were under surveillance, all violations found by the ALJ. Therefore, DeCrow's statements that employees needed to think about the "well-being" of their families cannot be taken in isolation as done by the ALJ. Further, these statements were not made to just one employee, as in *Wertham,* but made right after a newly instituted captive audience meeting to every employee on the shift the night before the election. DeCrow made no attempt to persuade employees by a reasoned argument. Instead he made a bare, blunt reference not only to employee's well-being but to the well-being of their families, in the face of Respondent's other, numerous unfair labor practices. Referring to employees' families clearly implied that support for the Union could have personal economic consequences. And given DeCrow's status as high-level manager, not a their immediate low-level supervisor, he was in a position to ensure such consequences. Under all the circumstances, DeCrow's statement would reasonably be understood as a threat of unspecified reprisals in violation of Section 8(a)(1).

E. The ALJ Erred in Failing to Find that an Anti-Union Flyer Constituted a Violation of Section 8(a)(1) of the Act.

1. Allegations

The Complaint alleged, as amended at the hearing, that one of the many anti-union flyers distributed to employees in the time after the petition was filed, but prior to the election, contained objectionable statements in violation of Section 8(a)(1). In particular, the flyer (GCX 11) is alleged to have disparaged the Union and those that support the Union, suggested futility and threatened unspecified reprisal if the Union was selected as the employees'

collective-bargaining representative. The ALJ found that the flyer was proper election campaign propaganda and permissible under Section 8(c) of the Act.

2. The Record Evidence

During the weeks prior to the election, Respondent inundated employees with letters and flyers, all anti-union. (GCX 5-6; 9-15) One of those flyers is GCX 11, which is titled "Don't be a loser! Say NO to the union!" The flyer indicates that benefits are lost by employees who are represented by a union. (GCX 11) At the end of this flyer, is the statement "union representation is a game in which you will always LOSE." (GCX 11) Plant Manager Tim Tyler testified that this flyer was posted at Respondent's workplace for all employees to see. (Tr. 74)

3. Legal Analysis

An employer may speak freely to his employees regarding issues arising in connection with a union organizational campaign, so long as his statements do not contain a threat of reprisal or force or promise of benefit. The Supreme Court, in *Gissel Packing Co., v. NLRB,* 395 U.S. 575, 616-619 (1969), articulated the following rigorous standards an employer must meet to avoid a violation, when predicting the effect unionization will have on employees:

> [T]he question raised here most often arises in the context of a nascent union organizational drive, where employers must be careful in waging their antiunion campaigns.... Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely .... And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.... [W]hat is basically at stake is the establishment of a non-permanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and

> employers as a class freer to talk. ... Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, *the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control* or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. .

In assessing whether Section 8(a)(1) has been violated, the Board's test is whether, in light of all the circumstances, including the context in which the alleged unlawful statement or action occurred, the charged conduct reasonably tends to interfere with the free exercise of the employees' rights under the Act. *American Freightways Co.*, 124 NLRB 146, 147 (1959); *Sunnyside Home Care Project, Inc.*, 308 NLRB 346 fn. 1 (1992). Use of disparaging language by an employer to describe union supporters to other employees is coercive and a violation of Section 8(a)(1) of the Act. *M.K. Morse Co.*, 302 NLRB 924 (1991). While "words of disparagement alone" are insufficient for a finding a violation of Section 8(a)(1), the Board said that disparaging remarks in "their context among other coercive statements," may be sufficient. *Sears, Roebuck, and Co.*, 305 NLRB 193 (1991). *Domsey Trading Corp*, 310 NLRB 777, 793 (1993). (An employer's use of slurs, or derogatory comments to union representatives is considered unlawful.) Here, the statements were made in the context of an on-going union organizing campaign where employees should be able to exercise the freedom to vote in an atmosphere free of this type of disparaging language and coercion.

These statements also inform employees that, no matter what happens, if they select union representation, they will always lose; clearly expressing to employees their efforts to unionize are futile, and by trying to do so they will "always lose," in violation of Section 8(a)(1). Moreover, disparaging remarks that suggest that the employees' protected activities are futile, reasonably convey explicit or implicit threats that would reasonably tend to interfere with employees' Section 7 rights. *Trailmobile Trailer, LLC,* 343 NLRB 95 (2004); *Rogers Electric, Inc.*, 346 NLRB 508 (2006). Disparaging of an employee before his peers because of an employees' support for a union is inherently coercive, indicating to employees that prounion employees are viewed unfavorably because of their support for a union. *Perth Amboy Hospital,* 279 NLRB 52 (1986).

Respondent may argue that it was merely "joking" when it implied that those that support the Union are "losers." "It is well established that the coercive and unlawful effect of a statement is not blunted merely because interrogations of, warnings to, or disparaging statements about union adherents are accompanied by laughter or made in an offhand humorous way." *Ethyl Corporation,* 231 NLRB 431, 434 (1977); "[E]xecutives who threaten in jest run the risk that those subject to their power might take them in earnest and conclude the remarks to be coercive." *A. P. Green Fire Brick Company* v. *N.L.R.B.,* 326 F.2d 910 (8th Cir. 1964).

Respondent's flyer (GCX 11) not only disparaged the Union and those that support the Union but threatened employees with loss of benefits and informed them that any support of the union is futile. Accordingly, the publication of the flyer by Respondent to its employees violated the Act. The ALJ erred by failing to find accordingly and that determination should be overruled.

F. The ALJ Erred in Failing to Find that an Anti-Union Video Constituted a Violation of Section 8(a)(1) of the Act.

1. Allegation

The Complaint, as amended at the hearing, alleged that a video shown by Respondent to employees at Respondent's facility, disparaged the Union and threatened employees that if they selected the Union as their collective-bargaining representative, the Union could request the employees' termination if the employee failed to pay dues even though Respondent's facility was in a "right to work" state—Arizona. The ALJ found that the video was permissible campaign propaganda and dismissed the allegations.

2. The Record Evidence

A labor relations firm, LRI, was hired by Respondent to present an anti-union campaign. Besides sending a labor relations consultant, LRI provided several videos for Respondent to present to employees. (Tr. 168) Instead of showing the videos in a meeting where questions could be asked, Respondent decided to play the videos continuously, over and over for a 24 hour period immediately prior to the election. (Tr. 50; 169-170) Respondent played the videos on monitors that were located in the lunch room and in the hallway leading into the manufacturing floor. (Tr. 50) Respondent began showing these videos on November 14. (Tr. 168) The English video was played in the hallway monitors and the Spanish video was played in the lunch room. (Tr. 169) The videos were titled "Job Security and Strikes" and "Your Job on the Line." (Tr. 168) Employees felt fear after watching the videos and became disheartened. (Tr. 370) Employees were also disturbed because the videos were played extremely loud and constantly. (Tr. 370)

An anti-union video in English was entitled "Your Job on the Line". (UX 8) Based upon the presentation into evidence of the video by the Union, General Counsel moved to

amend the Complaint. (Tr. 472; GCX 26). The Motion to Amend was granted by the ALJ. (Tr. 480)

The video depicts, in part, footage that is in black and white and appears to be from a surveillance camera showing two individuals in dark sweatshirts vandalizing a car by smashing windows and puncturing tires. (Tr. 463-464) Playing over this depiction, the narration states "now months into the strike, daily reports of violence and vandalism have become common throughout the town. King City was a community being torn apart by a union strike" (Tr. 461) The record evidence establishes what was being played during this narration:

> What we see on the screen is a black and white video image. On the lower right-hand corner, there is a date and time stamp that reads October 15th, 1999, and the time begins at approximately 1:13 and 38 seconds a.m.
>
> In the image is a car and on the left-hand side of the car is a person wearing a dark hooded sweatshirt. The image appears to be taken from the perspective of the inside of a building, looking out through a window.
>
> As the video continues, the individual in the dark sweatshirt on the left-hand side does something to the rear passenger side tire of the car. And on the right-hand side we see another individual coming in from the right-hand side, and I'll note also that it appears to be nighttime.
>
> As the video continues, another individual comes in from the right-hand side and begins to smash the windshield of the car repeatedly. And you can hear the smashing sound in the background. As the video continues it appears that the car sinks somewhat as a result perhaps of the air being let out of the tire of the car.

(Tr. 462-463) (This recitation includes clarifications offered by the Union, Respondent and General Counsel during the hearing.)

Respondent provided a witness from LRI, Greg Kittinger (Kittinger), who is responsible for product development including the videos that Respondent showed to its employees. (Tr. 734) Kittinger testified that he believed the footage was from a strike with

one of LRI's former clients, Basic Vegetable, but did not know where this footage came from, whether it was a staged event, whether it was a real event, whether it had anything to do with the union strike spoken about by the narrator. (Tr. 742-744) In fact, the video footage existed prior to Kittinger working for LRI and his knowledge about that portion of the video was non-existent. (Tr. 742-746)

Additionally, the English video states that Union's can request that employers fire employees for non-payment of union dues. (Tr. 423) The video shows a letter from a union to an employer, requesting that the employee be fired in accordance with the union contract. (Tr. 423) The video does not clarify that in a right to work state, such as Arizona, a Union cannot request to have an employee fired nor can a union insist that a security clause be placed in a collective-bargaining agreement. (Tr. 423)

3. Legal Analysis

Two portions of the video that were shown to employees violate Section 7 of the Act. First, the depiction of vandalism with the distinct impression being left with the view that the Union was responsible for the acts of violence not only unlawfully disparaged the Union but constituted a threat that if employees supported the Union and a strike was called that they did not agree with, they too could be victims of violence. Such comments have coercive effects upon the employees' exercise of their Section 7 rights and are violative of Section 8(a)(1). *Kawasaki Motors,* 257 NLRB 502, 511 (1981) (Board affirms ALJ's finding that implying the union was behind a bomb threat which forced a suspension of operations violative); *Wallace Intern. De Puerto Rico, Inc.,* 328 NLRB 29, 41 (1999) (Board affirms without opinion ALJ's finding of disparagement by implying blame upon the union for a fire and other acts of violence.

Second, the video implies that unions have the ability, unrestricted, to ask an employer to fire an employee who does not pay his or her dues. The video makes no distinction between a "right to work" state such as Arizona or a non-right to work state where a union may or may not have that ability. The Board has found that an employer's misstatement of the law in that union campaign, by implying employees would have to pay union fines, assessments, and accede to a dues-check off requirement to keep their jobs, violated Section 8(a)(1) of the Act when the statements were made in the context of the employer's repeated unlawful threats, including threats that a vote for the union would destroy the employees' job security. *Taylor-Dunn Mft. Co.,* 252 NLRB 799, 801 n. 2 (1980) enfd. 679 F. 2d 900 (C.A. 9, 1982).

In the instant case, the ALJ found that Respondent had engaged in numerous Section 8(a)(1) violations during the same time frame by threatening employees, engaging in unlawful interrogations, soliciting employee grievances and making promises of improved benefits and terms and conditions of employment, creating an impression of surveillance, and threats of discharge and unspecified reprisal. Therefore, a misstatement of the law in this context violates Section 8(a)(1) of the Act as opposed to Board rulings where a misstatement of the law that is isolated and contained to a context of no threats, is not coercive within the meaning of the Act. See *Daniel Construction Company*, 257 NLRB 1276, (1981) and *Edward A. Utlaut Foundation, Inc*., 249 NLRB 1153, 1158 (1980). The Board found in *Edward A. Utlaut Foundation, Inc.,* that the misrepresentation as to whether employees would have to join the Union contained only a misstatement that might amount to a loss of some money to employees by paying dues but did not amount to an implicit threat of employee rights and, therefore, no violation of the Act. Id at 1158. However, the Board, in adopting the

Administrative Law Judge's decision, agreed that when a misstatement implicitly threatens employee rights and would encompass an action such as discharge or failure to reinstate employees, such as respondent's misstatements about *Laidlaw*[10] rights (whether the employer would have a duty to rehire employees who were replaced during a strike), such misstatements constituted violations of Section 8(a)(1). Id at 1157-1158. Another case where the Board found misstatements by an employer did not constitute a Section 8(a)(1) violation is distinguishable from this case. In *O'Neil Moving & Storage, Inc.*, 209 NLRB 713, 715 (1974), the Board found that an incorrect statement by the employer did not constitute a Section 8(a)(1) violation because the statement was in a letter sent to employees three weeks prior to the election and the Union had ample opportunity to have called the employees attention to the erroneous statement of the law, and the remoteness of the effect was considerable. Id. at 714-715. Here, the video was played immediately before the election and the Union was unaware of the content of the video until after the election. There was no opportunity for the Union to instruct the employees on the erroneous information contained within the video.

For these reasons, Respondent's misstatement of the law carries with it a threat to the employees' future job security in the event they elect to vote for the Union and that misstatement necessarily tends to interfere with the employees' Section 7 rights in violation of Section 8(a)(1) of the Act. The ALJ's finding otherwise should be overruled.

[10] *Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F. 2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

III. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board find that Respondent violated Section 8(a)(1) of the Act as discussed above, affirm and adopt the ALJ's other findings and conclusions, and issue an order providing a full and appropriate remedy in this matter.

Dated at Phoenix, Arizona, this 11th day of October 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S EXCEPTIONS and ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS in PORTOLA PACKAGING, INC., Cases 28-CA-067274, 28-CA-067345, 28-CA-070621 and 28-RC-067973 were served by E-Gov, E-Filing and by E-mail, on this 11th day of October 2012, on the following:

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