

**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 REPLY BRIEF**

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**I. INTRODUCTION**

On October 9, 2012, Counsel for the Acting General Counsel (General Counsel) filed Exceptions, and a Brief in Support, to the decision [JD(SF)-45-12] (ALJD), issued by Administrative Law Judge Gregory Z. Meyerson (ALJ), issued on September 13, 2012, in the

above captioned case.<sup>1</sup> On October 25, 2012, Respondent filed a Brief in Opposition to the Acting General Counsel's Exceptions (Opposition Brief). Pursuant to Section 102.46(h) of the Board's Rules and Regulations, the General Counsel files this Reply Brief to Respondent's Opposition Brief.

In its Opposition Brief, Respondent argues that: it did not prohibit employees from using coworkers to translate for them in meetings with Respondent; any statement to employees that they could not use employee Jose Garcia (Garcia) to translate did not impose more onerous working conditions; Garcia's written warning was not in retaliation for his protected activities; its managers did not solicit grievances, promise benefits, threaten employees, disparage the Union, or tell employees that it would be futile to unionize. Finally, Respondent asserts that its anti-union videos did not violate Section 8(a) (1) of the Act. As set forth more fully below, Respondent's assertions are baseless, not supported by the record evidence and should be rejected by the Board.

## **II. THE GENERAL COUNSEL EXCEPTIONS AND RESPONDENT'S ARGUMENTS**

### **A. Exceptions Regarding Onerous Working Conditions.**

The General Counsel argued in its exceptions that the ALJ erred by failing to find that Respondent creating more onerous working conditions by not allowing Garcia to engage in protected, concerted activities while serving as a Spanish language interpreter for his coworkers.<sup>2</sup> Respondent has offered nothing new in its Opposition Brief.

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<sup>1</sup> Portola Packaging, Inc. is referred to as Respondent. United Food and Commercial Workers Union, Local No. 99 (UFCW), is referred to as the Union. References to the ALJD show the applicable page number. "Tr. \_\_\_" refers to pages of the underlying hearing transcript. "GCX \_\_\_" refers to exhibits introduced by the 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.

<sup>2</sup> The General Counsel also objected to the ALJ's failure to make certain related factual findings.

Respondent argues that Garcia was only acting as a translator when he accompanied fellow employee Maria Magallon (Magallon) to speak to her supervisor, Ray Buchanan (Buchanan), about her terms and conditions of employment, and did not independently engage in concerted activities. However, during Buchanan's questioning of Magallon, Garcia stopped translating, and came to the aid and protection of his coworker when he directly asked Buchanan why he was getting so upset, why he was yelling at Magallon and why Buchanan was treating Magallon so badly. (ALJD at 7; Tr. 185; 287; 328) The General Counsel excepted to the ALJ's failure to discuss these facts, and questioned why they were disregarded when he determined that Garcia was merely a translator. Respondent's Opposition Brief does not address the ALJ's error. Instead, Respondent question's Magallon's veracity, an issue Respondent previously raised in its own exceptions to the ALJD. Respondent misses the point entirely. The issue here is that Garcia was barred from acting as a translator for employees because he engaged in protected, concerted activities when he confronting Buchanan about the fact that Buchanan was yelling at, and mistreating, Magallon, Garcia's coworker. *Media General Operations, Inc.*, 341 NLRB 124, 125 (2004) ("it is well settled that an employee engages in protected activity by speaking up to management about the allegedly unfair treatment employees have received.") enf. denied 394 F.3d 207 (4th Cir. 2005).<sup>3</sup> Respondent's argument does not address this aspect of the General Counsel's exceptions.

Accordingly, as set forth above, the ALJ erred by failing to find that Respondent's prohibition against Garcia acting as a translator after he came to the aid and protection of a colleague while he was translating was the implementation of onerous working conditions on

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<sup>3</sup> Unlike the employee in *Media General Operations*, Garcia did not use any swear words, or make "outrageous comments" or accusations, when he came to the aid and protection of his coworker Magallon. Compare, *Media General Operations, Inc. v. NLRB*, 394 F.3d 207, 211 (4<sup>th</sup> Cir. 2005)

employees in violation of Section 8(a)(1) of the Act. Respondent's Opposition Brief is devoid of any meaningful argument to this exception.

B. Exceptions Regarding Garcia's Discipline of October 5, 2011.

The General Counsel filed Exceptions to the ALJ's finding that Respondent did not violate Section 8(a) (1) of the Act by issuing Garcia a written warning on October 5, 2011. While being issued a written warning, Garcia was threatened about his protected, concerted activities by the supervisor presenting him with the warning. (ALJD at 18; Tr. 193-194). Respondent argues that Garcia's written warning was issued for just cause and fails to address the basis of the General Counsel's Exceptions. Respondent's arguments are without merit.

On October 5, 2011, Garcia was issued a written warning for four alleged performance incidents. (ALJD at 16; GCX 18) Despite having sufficient credible evidence to analyze all four incidents, and Garcia's testimony regarding those incidents, the ALJ analyzed only two of the four incidents. (ALJD at 17) Moreover, Respondent failed to present any evidence contradicting Garcia's testimony and, therefore, the ALJ should have credited Garcia's explanation as to the incidents, an explanation that would have shown the warning was given without just cause, but instead was motivated by Garcia's protected conduct. Instead of addressing this exception, Respondent merely repeats its version of the events, a version that wasn't found by the ALJ.

Respondent also fails to address the statements of animus towards Garcia's protected, concerted, activities that were made simultaneously with the issuance of the written warning by Production Manager Tim DeCrow (DeCrow). (ALJD at 18; 193-194) Respondent's entire argument is that the ALJ was incorrect in finding that those statements were made.<sup>4</sup>

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<sup>4</sup> An argument made in Respondent's Exceptions filed on October 9, 2012.

Respondent fails to address any of the actual bases for General Counsel's exceptions in its Opposition Brief and, therefore, its arguments should be disregarded.

C. Exceptions Regarding Supervisor Fabian Franco's Statements

The General Counsel argued in its Exceptions that the ALJ erred by failing to find that Production Supervisor Fabian Franco's (Franco) solicited grievances and promised employees benefits they rejected Union representation. Respondent has offered nothing new in its Opposition Brief.

Soon after the representation petition was filed on November 1, 2011, employees were subjected to meetings conducted by Labor Relations Consultant Armando Talencon (Talencon);<sup>5</sup> Franco instituted meetings with employees, after their shifts had ended, to discuss problems based upon the grievances solicited by Talencon. (ALJD at 24-25) At one of the first meetings, employee Evangelina Villegas (Villegas) testified that Franco told employees Respondent wanted to hear about their problems so employees would get more attention from Respondent. (ALJD at 34; Tr. 365) The General Counsel's Exceptions show that the ALJ failed to analyze these statements within the context of the newly instituted meetings with employees, asking them at these meetings their problems, and then promising them more attention. (ALJD at 34) The ALJ merely stated that this testimony from Villegas was confusing, vague, incomprehensible and without substance. (ALJD at 34) Respondent merely repeats this holding of the ALJ and does not address the substance of the Exceptions.

D. Exception Regarding Supervisor DeCrow's Statements

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<sup>5</sup> Talencon was found by the ALJ to have unlawfully solicited grievances and made promises of increased terms and conditions of employment if employees rejected the Union at the upcoming election. (ALJD at 26-27) One of the grievances that employees raised at these meetings was that Respondent's supervisors did not communicate with employees and address their problems. (ALJD at 24; Tr. 298) Talencon promised employees he would share those grievances with Respondent and things would get better. (ALJD at 25; Tr. 364-365)

The General Counsel argued in its Exceptions that the ALJ erred by not finding that Respondent violated Section 8(a)(1) of the Act when Production Supervisor DeCrow told workers, as they departed from work the day prior to the December 1 representation election, that employees “needed to think about your families well-being” when they voted. Again, Respondent presented nothing new in its Opposition Brief and failed to address the analysis in the General Counsel’s Exceptions.

Specifically, the General Counsel argued that the ALJ’s reliance on *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, was misplaced as the facts of *Werthan* are distinguishable from the facts at hand. The General Counsel argued that the statement by DeCrow could not be taken in isolation, as was done by the ALJ, where a statement might be permissible if not uttered in the context of other unfair labor practices (or objectionable conduct). *Reno Hilton*, 319 NLRB 1154, 1155 (1995). DeCrow’s 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. Respondent failed to address this argument in its Opposition brief.

E. Exception Regarding an Anti-Union Flyer and Video

The General Counsel argued in its Exceptions that the ALJ erred when it failed to find that an anti-union flyer distributed to employees at a time after the petition was filed, but prior to the election, and a video shown to employees during the same time period, contained objectionable statements in violation of Section 8(a)(1) of the Act. Respondent has simply argued that it has a First Amendment right under Section 8(c) of the Act to express its

opinions about labor relations to employees and those opinions did not contain any threats, force or promises of benefits. Respondent's arguments have no merit.

A flyer was distributed to employees prior to the election that 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 and ends with the statement "union representation is a game in which you will always LOSE." (GCX 11) The ALJ found that the flyer was proper election campaign propaganda and permissible under Section 8(c) of the Act. Respondent's sole argument in its Opposition brief is the "free speech" argument and it fails to address General Counsel's Exception.

General Counsel argued that the use of disparaging language by an employer to describe union supporters to other employees is coercive<sup>6</sup> and a violation of Section 8(a) (1) of the Act when made in "their context among other coercive statements." *Sears, Roebuck, and Co.*, 305 NLRB 193 (1991). *Domsey Trading Corp.*, 310, NLRB 777, 793 (1993) The statements in the flyer 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. Telling employees that they are "losers" if they support the Union and if they do support the union, they will **always** lose, is coercive and is clearly expressing to employees that their efforts to unionize are futile. *Trailmobile Trailer, LLD* 343 NLRB 95 (2004); *Rogers Electric, Inc.*, 346 NLRB 508 (2006)

Respondent also showed employees a video that 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. (UX 8) The General

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<sup>6</sup> *M.K. Morse Co.*, 302 NLRB 924 (1991)

Counsel filed Exceptions to the ALJ's determination that portions of the video did not violate Section 8(a) (1) of the Act.

One of the two videos shown to employees was in English and entitled "Your Job ON the Line." (ALJD at 40-41; UX 8) 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. (ALJD at 41; 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." (ALJD at 41; 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 15<sup>th</sup>, 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) By blaming the Union for acts of violence, or otherwise implying that the Union would engage in violence, or unionization brings about violence, Respondent violated Section 8(a)(1). ). *Kawasaki Motors*, 257 NLRB 502, 511 (1981) (Board affirms ALJ's finding of a violation where employer implied the union was behind a bomb threat which forced a suspension of operations); *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).

Additionally, the English video states that Union's can request that employer's fire employees for non-payment of union dues. (ALJD at 41; 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. (ALJD at 41; 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)

Respondent's Opposition brief fails to mention that this flyer and the video were shown in the context of other violations of the Act—threats, solicitation of grievances and promises of increased benefits, unlawful interrogations, and the creation of the impression of surveillance. These statements were not isolated and the video with the misstatement of the law was shown immediately before the election with insufficient time for the Union to have

called the employees attention to the erroneous statement. See *O'Neil Moving & Storage, Inc.*, 209 NLRB 713, 715 (1974). Respondent's failure to address the specific basis for the Exception indicates it has no answer.

### **III. CONCLUSION**

It is respectfully requested that the Board accept the General Counsel's cross-exceptions and find the additional violations of the Act, as alleged, and provide the appropriate remedy.

Dated at Phoenix, Arizona, this 8<sup>th</sup> day of November 2012.

/s/ Sandra L. Lyons

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF in PORTOLA PACKAGING, INC., Cases 28-CA-067274, 28-CA-067345, 28-CA-070621 and 28-RC-067973 was served by E-Gov, E-Filing and by E-mail, on this 8<sup>th</sup> day of November 2012, on the following:

***Via E-Gov, E-Filing***

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