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**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 28**

<p>In Re the Matter of:</p> <p>MARIELA SOTO, an individual, AND ANAHI FIGUEROA, an individual,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>DON CHAVAS, LLC d/b/a TORTILLAS DON CHAVAS, an Arizona limited liability company,</p> <p style="text-align: center;">Defendant.</p>	<p><b>Case No.: 28-CA-063550</b></p> <p style="text-align: center;"><b>28-CA-067394</b></p> <p style="text-align: center;"><b>BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE</b></p>
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Defendant DON CHAVAS, LLC d/b/a TORTILLAS DON CHAVAS (“Don Chavas”) hereby submits its Brief in Support of Exceptions to the Decision of the Administrative Law Judge.

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## STATEMENT OF THE CASE

This case involves Respondent Don Chavas, LLC, the employer, an Arizona limited liability company doing business exclusively within the state of Arizona, and the charging parties, former employees Mariela Soto (“Soto”), Alan Pineda (“Pineda”), and Anahi Figueroa (“Figueroa”) (together the “charging parties”). Respondent is a small tortilla factory located in south Tucson and operates out of one location, small warehouse. It is owned and operated by Jesus Olguin. Respondent produces and sells tortillas and sells tortilla-related products locally to small markets located in Tucson, Arizona, who themselves are not directly engaged in interstate commerce.<sup>1</sup> Respondent has no more than eight employees at any given time, four to work the morning shift and four for the afternoon shift. Respondent purchases supplies locally as well and in a calendar year only purchases approximately \$51,000.00 worth of supplies. Respondent, therefore, is an extremely small business. Additionally, Respondent’s business cannot be said to be one of great significance to the American economy.

The Administrative Law Judge (“ALJ”) found that Don Chavas violated Sections 8(a)(1) of the National Labor Relations Act (the “NLRA”) by transferring Soto from the morning shift to the afternoon shift, constructively discharging Soto by transferring her to the afternoon shift, and by illegally threatening Pineda and Figueroa with termination and ultimately terminating them for having engaged in a strike. The ALJ also found that these alleged acts had led to or tended to lead to a labor dispute burdening or obstructing commerce or its free flow. Additionally, the ALJ found that Respondent met the indirect inflow jurisdictional theory.

In connection with those findings, the ALJ recommended an order requiring Don Chavas to offer the charging parties reinstatement to their former positions and to make them whole by paying each back pay from the time of their discharge until the Board’s order.

The record compiled during a six-day hearing from August 22, 2012 to August 24, 2012 and from

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<sup>1</sup> General Counsel presented no evidence establishing any economic information on the markets Respondent sold to.

October 1, 2012 to October 3, 2012 demonstrates that none of these findings or conclusions of law have merit.

*First*, it is clear that the ALJ erred in finding statutory jurisdiction. The ALJ found that jurisdiction was proper despite General Counsel's failure to establish a relationship between Respondent and the charging parties to interstate commerce such that Respondent's alleged unfair labor practices exerted or even tended to exert a substantial economic effect on interstate commerce. The evidence on the record clearly established that the alleged unfair labor practices had no effect whatsoever on interstate commerce. As mentioned above, Respondent is an extremely small business with limited inflow and outflow. Simply put, if Respondent's operations ground to a halt, it would not have a substantial economic effect on interstate commerce. In fact, the evidence adducted at the hearing established that the alleged unfair labor practices had no effect whatsoever on interstate commerce. Since Respondent sells only locally to business who only sell locally, any decrease in Respondent's output would have no effect on interstate commerce. The evidence also establishes that in July 2011 and September 2011, the months which correspond with the alleged unfair labor practices, Respondent's purchase of supplies did not change in any material way nor did FSI's interstate purchases.

*Second*. The ALJ found that Respondent's purchases from FSI satisfied the indirect inflow theory of jurisdiction. Respondent purchased its supplies from Food Source International, LLC ("FSI), located in Phoenix, Arizona. FSI in turn purchases some of its goods from out of state. At the hearing, the ALJ prevented Respondent from questioning FSI on the cost of those goods when FSI purchased them from out of state and the corresponding markup that was added when the goods were sold by FSI in Phoenix to Respondent in south Tucson. It is clear, however, that the value of goods that crossed state lines does not meet the Board's \$50,000.00 discretionary jurisdiction amount. The evidence establishes that Respondent purchased approximately \$51,000.00 worth of supplies from FSI in a 12-month period. It goes without saying that FSI purchased those goods in interstate commerce for far less than they were

sold for. The amount and value that crossed state lines, therefore, cannot not meet the Board's discretionary dollar amount.

*Third*, \$50,000.00, the alleged discretionary amount, in the modern economy cannot be said to be more than de minimis. The United States economy produces fourteen trillion dollars each year. \$50,000.00 in relation to the total gross domestic product is insignificant. Millions of dollars cross state lines each day, a business's purchase of \$51,000.00 worth of goods in one calendar year is de minimis. Given the rate of inflation and the increasingly globalized economy, Respondent's purchases are de minimis as a matter of law. Therefore, even if \$50,000.00 worth of goods did cross state lines, this amount is de minimis and insufficient to justify the Board's jurisdiction.

*Fourth*. The ALJ's finding that Respondent changed Soto's shift in retaliation for her engaging in concerted activity is predicated upon discrediting large portions of material and uncontradicted testimony. The record establishes that Jesus Olguin changed Soto's shift because when coupled with Anahi Figueroa, Soto was inefficient and produced less tortillas than were required. The evidence establishes that Olguin became aware of this fact around May 2011. His procedure for determining whether production was efficient involved counting the tortillas twice a day, once at 7 am and again at 8 pm. Based on his counting each shift's production, he determined that the morning shift was producing approximately 120 less tortillas per shift. Olguin determined that Soto and Figueroa were responsible for this drop in production after being notified by another employee that they would socialize excessively. The veracity of these statements was confirmed by Olguin's own observations. Each morning at 7 am, he would arrive to count the production and to pick up tortillas for the day's deliveries. Each day during the period in question, he would observe Soto and Figueroa socializing excessively. After observing this for approximately a month, he determined that Soto and Figueroa needed to be separated. The evidence, therefore, establishes that Respondent would have changed Soto's shift even in the absence of any concerted activity. Soto's conduct was hurting the business and could not be allowed to continue. None

of this evidence was refuted or contradictory, yet the ALJ summarily dismissed it after discrediting Olguin's testimony and by mischaracterizing portions of his testimony and drawing inferences directly contrary to it. Finally, the ALJ disregarded the corroborating testimony of Jesus Arvizu based on inadmissible evidence.

*Fifth.* The ALJ's finding that Respondent constructively discharged Soto likewise is predicated upon the complete disregard of material and uncontradicted testimony. The evidence establishes that transferred Soto to the afternoon shift for legitimate business reasons and prior to transferring her, offered to allow her to alternate shifts with Figueroa to accommodate her childcare situation. He could not allow production to continue declining, so he offered Soto and Figueroa the option of alternating on the afternoon shift. He made a crucial accommodation that would allow him to normalize production numbers by separating Soto and Figueroa, and reduce the economic burden of hiring a baby sitter for Soto by only requiring her to work the morning shift every other week. Respondent, therefore, did not constructively discharge Soto.

*Sixth.* The ALJ's finding that Pineda and Figueroa were threatened with termination and ultimately terminated in retaliation for engaging in concerted activity also requires ignoring sworn and uncontroverted testimony. Both Pineda and Figueroa testified that they walked off the job because a fourth worker had not arrived. The evidence, however, establishes that shortly after they left, Jesus Arvizu arrived as the fourth worker. Olguin was informed by his son Adrian that the fourth worker had arrived. Olguin thereafter informed both Pineda and Figueroa that a fourth worker had indeed arrived, and informed them that they needed to return to work. Despite being notified that the fourth worker had arrived, the two persisted in their walkout. In finding that Pineda and Soto were fired wrongfully, the ALJ simply discredited all testimony corroborating Olguin's testimony that a fourth worker had arrived.<sup>2</sup>

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<sup>2</sup> As noted above, the ALJ in large part discredited Arvizu's testimony after permitting general counsel to question Arvizu on his visa status, something the ALJ had earlier denied to Respondent. Apart from the improper visa evidence, the ALJ based her credibility finding solely on his demeanor despite there being no inherent contradictions in his testimony or with the

The evidence clearly establishes that a fourth worker had arrived and that Pineda and Soto were informed that the reason for their walkout had ceased. Both refused to return and voluntarily quit.

*Seventh*, the ALJ's credibility determinations were unobjective based on her mischaracterization of Respondents' witnesses' testimony, basing credibility determinations on inadmissible evidence, repeatedly and systematically favoring General Counsel by prohibiting Respondent from introducing hearsay evidence while permitting General Counsel to admit as much hearsay evidence as it sought to introduce, by repeatedly making incorrect evidentiary rulings favoring General Counsel, by aiding General Counsel in responding to Respondent's objections, by sustaining objections before General Counsel had stated the basis for its objection, and by materially prejudicing Respondents central defenses by way of incorrect evidentiary rulings.

### **QUESTIONS PRESENTED**

1. Whether the decision of the Administrative Law Judge is invalid because she was appointed by the Board while it lacked the quorum required under section 3(b) of the National Labor Relations Act. *See* Exception 1.
2. Whether the Board, lacking a quorum, has the power to hear or decide this matter. *See* Exception 1.
3. Whether the ALJ erred in determining that there was statutory jurisdiction under Section 10(a) of the Act. *See* Exceptions 2,3, 5.
4. Whether the ALJ erred in determining that the Board's discretionary jurisdiction standard had been met under the indirect inflow theory. *See* Exceptions 3,4.
5. Whether the "discretionary standard" analyzed by the ALJ was based upon a de minimis standard or test, and was valid. *See* Exceptions 1-5.
6. Whether the ALJ erred in determining that Respondent violated Section 8(a)(1) of the Act by

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testimony he was corroborating.

- allegedly transferring Soto to a different shift. *See* Exceptions 5-17, 23.
7. Whether the ALJ erred in determining that Respondent violated Section 8(a)(1) of the Act by allegedly constructively discharging when Respondent transferred Soto to a different shift. *See* Exceptions 5-17, 23.
  8. Whether the ALJ erred in determining that Respondent violated Section 8(a)(1) of the Act by allegedly discharging Pineda and Soto for engaging in concerted protected activity. *See* Exceptions 17-23.
  9. Whether the ALJ erred in determining that Respondent constructively discharged Soto where constructive discharge was not a charge in the complaint. *See* Exceptions 5-17.
  10. Whether the ALJ's credibility determinations were objective where the ALJ displayed clear bias against Respondent, where the ALJ made numerous incorrect evidentiary rulings in favor of General Counsel, where the ALJ sustained objections of the General Counsel before General Counsel had even indicated an intention to voice an objection, where the ALJ aided General Counsel in responding to Respondent's objections. *See* Exception 23.

## **I. FACTS**

The alleged acts of Respondent that are the subject of this Unfair Labor Practice hearing occurred in the summer of 2011 and were brought on behalf of former employees Mariela Soto ("Soto"), Anahi Figueroa ("Figueroa"), and Alan Pineda ("Pineda") (together referred to as the "charging parties). In the consolidated complaint, Respondent was charged with having violated section 8(a)(1) of the complaint when (1) on or about July 7, 2011, Respondent allegedly transferred Soto to a different shift thereby causing her termination, (2) on or about September 4, 2011, Respondent allegedly threatened its employees with discharge because they engaged in a strike; (3) on or about September 4, 2011, Respondent allegedly discharged Pineda and Figueroa for having engaged in a strike, and (4) on or about mid-September, Respondent allegedly transferred Figueroa to a different shift thereby causing her

termination.

**A. DON CHAVAS, LLC**

As noted above, Don Chavas, LLC, is a small eight-man tortilla shop which sells tortilla products exclusively from a single location exclusively within the state of Arizona to small markets which do not sell any goods in interstate commerce. Don Chavas purchases products from two main suppliers, Food Source International, LLC (“FSI”), and A&P Paper and Plastic (“A&P”), both located in Arizona. FSI and A&P both purchase a number of products from out of state.<sup>3</sup> Respondent, having a single workshop and only four employees working at any given time does not have significant output, nor does Respondent purchase a significant amount of supplies in a given year.<sup>4</sup> Respondent, therefore, does not have any meaningful impact on commerce outside of the state of Arizona. Despite Respondent’s small size and limited sales and purchases, Respondent is being subjected to paramount federal regulation based on the complaints of three employees.

**B. SOTO’S SHIFT CHANGE.**

On July 7, 2011, Jesus Olguin, owner and manager of Respondent Don Chavas, LLC, transferred Mariela Soto from the morning shift to the afternoon shift. Olguin changed Soto’s shift after confirming her inability to work efficiently with her friend and cousin Anahi Figueroa. TR 810:12-20. In May of 2011, Olguin began noticing a marked drop in production. TR 809:1-17; 810:12-20. The morning shift was producing approximately 120 packages less than the afternoon shift. *Id.* at 810:12-20. The drop in production, Olguin determined, was the result of Soto and Figueroa socializing excessively while working their respective post on the production line. TR 817:4-6. Olguin, as was his daily custom, would arrive every morning at approximately 7:00 am to collect tortillas for delivery and to count the tortillas produced by the evening shift and by the morning shift. Every morning he would observe Soto and

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<sup>3</sup> The ALJ did not include A&P’s sales within the discretionary jurisdiction amount, finding that FSI’s sales alone would be sufficient to satisfy the Board’s discretionary dollar amount, therefore, A&P’s sales are not at issue and in any event fall within a 12-month period that does not correspond with FSI’s sales. They cannot, therefore, be used to calculate the discretionary dollar amount. ALJD 4:16-28.

<sup>4</sup> Respondent purchased approximately \$51,000.00 worth of supplies from FSI between August 2011 and July 2012.

Figuroa socializing excessively about matters unrelated to work. TR 302:7-25; 303:1-2. Normally this would not be cause for concern, however, another employee working the morning shift in approximately May of 2011, informed him that Soto and Figuroa were slowing production. TR 813:3-8. From the foregoing, Olguin determined that Soto and Figuroa were the cause for the drop in production. TR 817:4-6. Olguin resolved to change their shifts in an attempt to normalize production. *Id.*

Soto, who had customarily worked the morning shift, but had occasionally worked in the evenings, was informed of the shift change by her aunt that Olguin had changed her to the afternoon shift beginning at 2pm. Soto telephoned Olguin and protested the shift change and complained that she could not work the afternoon shift because she had small children. Olguin acknowledged that both had children and endeavored to compromise with them. TR 818:5-7. It was clear that they could not work well together. The only solution was to separate them, thus one would have to work the evening shift. Olguin, therefore, informed them that they could alternate in the evening shift. After the shift change, Soto did not return to work. *Id.*

### C. FIGUEROA'S AND PINEDA'S WALKOUT.

On September 4, 2011, Pineda and Figuroa reported for work on the morning shift. The fourth worker never appeared. At approximately 6:00 am, Pineda called Adrian Olguin to ask that he find a fourth worker. While Adrian attempted to find a fourth worker, Pineda and Figuroa continued working. Approximately an hour later at 7:00 am, Pineda again called Adrian because the fourth worker had not arrived. Adrian arrived shortly after and the two engaged in a heated exchange. At approximately 7:30 am<sup>5</sup>, Pineda and Soto walked off the job and refused to continue working. Adrian informed Jesus Olguin

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<sup>5</sup> What exact time they left is not clear, Pineda and Figuroa's testimony conflicts as to what time. Pineda testified that he and Figuroa left approximately fifteen minutes after Adrian arrived at the factory on September 4, 2011. TR 440:10-25. Specifically, Pineda testified that Adrian arrived at approximately 7:00 am. *Id.* at lns 10-11. He then testified that they "argued for 10 to 15 minutes and then after that is when I left." *Id.* Pineda, therefore, according to Pineda's testimony, he left after approximately 7:15 am. As to when exactly they left, Pineda testified that he left "in order not to get into any problems with him physically" and that he left "after he [Adrian] told a couple of words . . ." *Id.* at 373:17-19, 23-24. From this, it can be inferred that Pineda left shortly after the 10-15 minute discussion, which would have occurred at 7:15 am. Therefore, according to Pineda's testimony, he would have left around approximately 7:30 am. Based on his statements that he wanted to

that a fourth worker was missing. Between 7:00 and 8:00, Jesus Arvizu arrived as the fourth worker. TR 763:1-2. Adrian informed Olguin at approximately 8:20 that Arvizu had arrived. TR 821:17. Olguin, thereafter, informed Pineda by phone that a fourth worker had arrived and that he should return to work.<sup>6</sup> Despite this notification, Pineda responded that he had just arrived home and would not be returning to work. TR 826:8-9. Figueroa as well refused to return.<sup>7</sup> Figueroa was later returned to work for Respondent but was terminated after failing to show up for work.<sup>8</sup>

## II. ARGUMENT

Respondent maintains that the ALJ's decision is invalid in its entirety due to the illegality of her appointment. Additionally, Respondent maintains that the Board is currently operating without the required quorum of three members and thus lacks the authority to hear or decide this matter. In addition, Respondent excepts to numerous findings of the ALJ in her decision, specifically, Respondent excepts to the ALJ's finding that statutory jurisdiction and discretionary jurisdiction are proper. Additionally, Respondent excepts to the ALJ's finding that Respondent transferred Soto's shift in retaliation for her allegedly concerted activity and constructively discharged her. Finally, Respondent excepts to the ALJ's finding that Pineda and Soto were discharged in retaliation for engaging in concerted activity.

### A. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE CHRISTINE

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avoid a physical confrontation, he would not have stayed much longer. Pineda then testified that Olguin called him approximately an hour later. *Id.* at 375:5-6. Olguin testified that he spoke with Pineda at approximately 8:30. *Id.* at 820:19-20; 824:18-10. Pineda's and Olguin's testimony is consistent on the timing of the phone call and thus it is highly likely that Pineda and Figueroa did in fact leave the factory around 7:30. Figueroa's testimony, on the other hand, conflicts with both Pineda's and Olguin's testimony. Figueroa testified that Adrian arrived at 8:00 am, not 7:00am. TR 494:11-12. Figueroa's testimony contradicts both Olguin's testimony and Pineda's and the ALJ should not have relied on it for this specific point.

<sup>6</sup> This fact is not specifically in evidence owing wholly to the ALJ's continuous and improper sustaining of foundational objections from General Counsel. When questioned about what he said to Pineda, Olguin was not permitted to respond despite testifying as to the date and time the call took place, who he was speaking to, where he was when he made the call, and who else was with him when he made the call. A witness need only have personal knowledge to be competent to testify. Rule 602 *Federal Rules of Evidence*. Based on his testimony, Olguin clearly had personal knowledge of the phone call. Had he been permitted to testify on this point, his testimony would have indicated that Pineda was informed that a fourth worker had arrived.

<sup>7</sup> Figueroa drove Pineda home, therefore, she as well would have heard this conversation and would have also known that the fourth worker had arrived.

<sup>8</sup> The ALJ found that Figueroa's subsequent termination was not motivated by any concerted activity by Figueroa and thus that finding is not in dispute.

## **DIBBLE IS INVALID.**

It is undisputed that the National Labor Relations Board must have a quorum of three in order to take action. *Noel Canning v. NLRB*, 194 L.R.R.M. 3089, \*22 (D.C. Cir. 2013). The Taft-Hartley Act increased the size of the National Labor Relations Board (the “Board”) from three members to five. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2638 (2010); 29 U.S.C. §153(a). Concurrent with that change, the Taft-Hartley Act amended section 153(b) of the National Labor Relations Act (“NLRA”) to increase the quorum requirement for the Board from two members to three, and to allow the Board to delegate its authority to groups of at least three members. *Id.* Following a delegation of the Board’s powers to a three-member group, two members may not continue to exercise that delegated authority once the Board’s membership falls to two. *Id.*

Section 201 of the National Labor Relations Board Organization and Functions Manual (the “Organization Manual”) states: “The Board appoints administrative law judges and, subject to the provisions of the Administrative Procedure Act and section 4(a) of the National Labor Relations Act, exercises authority over the Division of Judges.”<sup>9</sup> Judge Christine Dibble was appointed by the Board on July 30, 2012. It is undisputed that at the time of her appointment, the Board lacked the required three-member quorum. *See Noel Canning*, 194 L.R.R.M. at \*68. Accordingly, the appointment of Judge Dibble is invalid. As a consequence, any decision rendered by Judge Dibble is likewise invalid and her Decision in its entirety should be vacated.

### **B. THE BOARD LACKS A QUORUM AND THEREFORE HAS NO AUTHORITY TO HEAR OR DECIDE THIS MATTER.**

As described above, the National Labor Relations Board must have a quorum of three in order to take action. *Noel Canning v. NLRB*, 194 L.R.R.M. 3089, \*22 (D.C. Cir. 2013). It is clear that as of January 1, 2012, the Board has lacked the required quorum due to the invalidity of President Obama’s

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<sup>9</sup> Section 4(a) of the NLRA states: “The Board shall appoint . . . examiners . . . and such other employees as it may from time to time find necessary for the proper performance of its duties.” 29 U.S.C. 154(a).

recess appointments to the Board. *Id.* at \*68. Accordingly, the Board is without power to act, and, therefore, lacks the authority to hear or decide this matter.

### **C. THE ALJ ERRED IN FINDING THAT STATUTORY JURISDICTION WAS PROPER**

In addition to lacking the authority to render a decision in this case due to her invalid appointment, the ALJ's statutory jurisdiction finding is incorrect. Specifically, the ALJ found that "[c]hanging the terms and conditions of employment in retaliation for engaging in concerted activity would tend to lead to a labor dispute that would 'burden or obstruct commerce' or the 'free flow' of commerce. . . . Stoppage or disruption of work in Tucson involves interruptions in the steady stream into and out of Arizona, of credit, cash, and supplies."

In so finding, the ALJ relied on the aggregation principle for testing the Board's interstate commerce jurisdiction. *See NLRB v. Denver Bldg. & Constr. Trades Council*, 186 F.2d 326, 330 (D.C. Cir. 1950) rev'd on other grounds, 341 U.S. 675, 683-84 (1951); *Reliance Fuel Corp. v. NLRB*, 371 U.S. 224, 226 (1963). However, the aggregation principle has no sound Constitutional basis and is limitless in its application, effectively obliterating any distinction between national and local. The aggregation principle should not have been applied to find statutory jurisdiction.

Furthermore, even if the aggregation principle is proper in testing the Board's statutory jurisdiction, the nature and size of the business are equally important. The ALJ erred in analyzing Respondent's overall effect on interstate commerce because no finding was made establishing the existence of a relationship of Respondent and the charging parties to interstate commerce such that the alleged unfair labor practices substantially led or substantially tended to lead to a labor dispute

substantially affecting interstate commerce.<sup>10</sup> Specifically, in making its ruling, the ALJ failed to analyze the size and nature of the business, as well as the volume of interstate commerce affected by Respondent.

**1. The aggregation principle should not have been applied to find statutory jurisdiction**

Section 10(a) of the NLRA grants the NLRB the authority to proscribe practices which adversely affect commerce when judged by the full reach of the constitutional power of Congress. *NLRB v. Fainblatt*, 371, U.S. 224, 226 (1939). The Board's authority is thus coextensive with that of Congress. *NLRB v. Benevento*, 297 F.2d 873 (1st Cir. 1961). Congress's power to regulate intrastate activity under the commerce clause is limited to regulating those intrastate activities which exert a substantial economic impact on interstate commerce. *US v. Lopez*, 514 U.S. 549 (1996). This same standard, therefore, applies to the NLRB and must be read into Section 10(a) of the NLRA.

The test of the Board's statutory jurisdiction is not the volume of the interstate commerce which may be affected, but the existence of a relationship of the employer and his employee to interstate commerce such that, in the light of constitutional limitations, the alleged unfair labor practices have led or tended to lead to a labor dispute burdening or obstructing commerce. *NLRB v. Fainblatt*, 306 U.S. 601, 608 (1939). Implicit within this test is the requirement that if the Board is seeking to regulate intrastate activity, it must exert a substantial economic effect on interstate commerce. *See Wickard v. Filburn*, 317 U.S. 11, 127-28 (1942); *Lopez*, 514 U.S. at 557. Whether a practice substantially affects interstate commerce is not to be judged solely with reference to the quantitative effects of the business immediately before the Board, but also the fact that the situation is representative of others in the nation which in the aggregate have a substantial impact on interstate commerce. *See Polish National Alliance v. NLRB*, 322 U.S. 643, 648 (1944), *Reliance Fuel Corp*, 371 U.S. at 226, *US v. Lopez*, 514 U.S. at 557.

Whether or not particular action in the conduct of intrastate enterprises does affect interstate commerce in

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<sup>10</sup> Any findings made by the ALJ in this regard are not supported by any evidence on the record. There is no evidence establishing Respondent purchased less materials as a result of the alleged unfair labor practices.

such a close and intimate fashion as to be subject to federal control is left to be determined as individual cases arise. *See NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 32 (1937), *Consolidated Edison, Co. v. NLRB*, 305 U.S. 197, 223-24 (1938), *NLRB v. Benevento*, 297 F.2d 873 (1st Cir. 1961). The impact, if any, of a purely intrastate activity upon interstate commerce must be determined by the Board as a matter of fact in each case as it arises. *Consolidated Edison*, 305 U.S. at 222 *see also* Mr. Justice Black's concurring opinion in *Polish Alliance*, 322 U.S. at 652. In analyzing the Board's exercise of jurisdiction over intrastate activities, courts have required clear findings before subjecting local business to paramount federal regulation. *Benevento, supra*, at 875 citing Black's concurring opinion in *Polish Alliance*.

The ALJ, citing *Polish National* and *Reliance*, stated that "Congress has explicitly regulated transactions and goods in interstate commerce and also activities which in isolation might be found to be "merely local but in the interlacings of business across state lines adversely affect such commerce." ALJD, p. 3. In the instant case, the only way the ALJ could have found that Respondent's activities substantially affect interstate commerce would be through the aggregation principle. As will be shown in section b(ii), Respondent's alleged unfair labor practices had no effect whatsoever on interstate commerce. Thus, the aggregation principle alone would support the ALJ's findings.

The aggregation principle, however, should not be used by the Board to judge the effect of the particular activity immediately before it because it is only appropriate for justifying Congressional regulation of an entire class of activities, not a single entity. Moreover, it suffers from two fatal flaws: it has no sound Constitutional basis and diverges from 150 years of precedent, and results in only one finding, that the business before it affects commerce within the meaning of Section 10(a).

The aggregation principle has been routinely employed to justify Congress's assertion of jurisdiction over entire classes of activity, the so-called "class of activities" statutes, and has come up

within the context of a constitutional challenge to federal legislation. *See Maryland v. Wirtz*, 392 U.S. 192 (1968). In applying the effects test, the question is not whether any specific activity within the class has such effects when considered in isolation, but whether the class of activities as a whole substantially affects interstate commerce. The cases reviewing the Board's exercise of jurisdiction, however, reveal that the particular conduct of the employer over which jurisdiction is exercised is important as well, so much so that the Supreme Court has routinely upheld the Board's jurisdiction based on the nature and effect the particular employer had on interstate commerce. As will be shown below, the seminal Supreme Court cases analyzing the Board's exercise of statutory jurisdiction all involve an analysis of whether the specific activity before the Board substantially affects interstate commerce. The Board, unlike Congress, is not exercising authority over an entire class in any given case, but over a single specific entity. *See Consolidated Edison*, 305 U.S. at 222.

In determining whether that particular intrastate activity should be subjected to paramount federal regulation, it is not proper for the Board to aggregate the effects that a particular business has because that inquiry is far too broad to justify exercise of jurisdiction over a single entity. Congress does not deal with particular instances; it created the NLRB for that purpose, and the NLRB must make a factual determination having regard for all of the existing circumstances to determine whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a substantial way. *See Consolidated Edison*, 305 U.S. at 222. Application of the aggregation principle wholly undermines this factual determination, because, as will be discussed in the next paragraph, the aggregation principle is limitless in its application.

Application of the aggregation principle in assertion of jurisdiction over a wholly intrastate activity will always result in a finding that such a business exerts a substantial effect on interstate commerce, no matter how trivial or indirect the effect is, even going so far as attributing a substantial

effect on interstate commerce to wholly intrastate activities which by themselves have no effect on interstate commerce. An employer, for example, that purchases one single ink pen from an office parts supplier which purchases that pen in interstate commerce, under the aggregation principle, will invariably be found to affect interstate commerce if that purchase is magnified and multiplied a thousand times over. The result being that Congress and therefore the Board's exercise of jurisdiction over intrastate activities is limitless. Application of this principal in the Board's determination of jurisdiction over a single enterprise does exactly what the Supreme Court has cautioned against since our nation's founding, namely that the distinction between national and local not be wholly obliterated. *See Laughlin Steel*, 301 U.S. at 37 (Scope of Congress's commerce power may not be extended so as to obliterate distinction between national and local), *Polish Alliance*, 322 U.S. at 650 ("Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity.").

The aggregation principle even goes so far as to support a finding of substantial economic effect over intrastate activity which bears no relationship to interstate commerce. *See NLRB v. Marsden*, 701 F.2d 238, 241 (1st Cir. 1984) (Operations purely local in character may nevertheless affect interstate commerce where the aggregate impact on commerce of like enterprises in like situations is significant). The aggregation principle in those circumstances wholly undermines the purpose of the jurisdictional test, namely to assess the propriety of asserting jurisdiction over the particular employer, by attributing to a specific intrastate employer adverse effects which it does not by itself produce. Suppose an employer changes a workers shift and that shift change is found to be an unfair labor practice, but that shift change had no effect whatsoever on the employer's sales or purchases from a supplier who purchased those goods in interstate commerce. In such a case, that particular employer's activities would clearly not even have an indirect effect on interstate commerce because its supplier, who is engaged in interstate commerce, would not be affected in any way. Under the aggregation principle, the very fact that the shift

change is classified as an unfair labor practice permits the conclusion that if other employers in like situations changed an employee's shift which was then found to be an unfair labor practice, there would be a cumulative adverse economic effect on interstate commerce. Such a result is wholly incompatible with our dual system of government. In such a situation, Congress may regulate and the Board may assert jurisdiction over wholly intrastate activity which of itself has no effect on interstate commerce for the sole reason that the employer's conduct, while not itself affecting interstate commerce, if projected to other imaginary businesses, could conceivably work an adverse effect on interstate commerce. There is, thus, no limit to the application of the aggregation principle. Common sense, and indeed the Constitution, dictates that an exercise of jurisdiction in such a situation is wholly improper because there is no actual effect on interstate commerce, that doing so crosses a clear boundary between national and local.

Finally, the aggregation principle is not grounded in the Constitution, and indeed constitutes a dramatic departure from almost 150 years of precedent. The Commerce Clause states "[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." Article I, Section 8, Clause 3. No mention is made of "aggregation" or of regulating intrastate activity. Indeed, prior to the 20<sup>th</sup> century, it was widely understood that the Commerce Clause did not permit Congress to regulate the wholly internal business of the States. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (Congress could not regulate mine labor because the relation of employer and employee is a local relation); *see also A.L.A. Schechter Poultry Corp. v. US*, 295 U.S. 495, 543-550 (1935) (Congress may not regulate intrastate sales of sick chickens or the labor of employees involved in intrastate poultry sales); *Trade-Mark Cases*, 100 U.S. 82 (1879) (Congress cannot regulate internal commerce and thus may not establish national trademark registration); *US v. Dewitt*, 76 U.S. 4, 441 (1870) (Commerce Clause has always been understood as limited by its terms; and as a virtual denial of

any power to interfere with the internal trade and business of the Separate States); *License Tax Cases*, 72 U.S. 462 (1867) (Congress cannot interfere with the internal commerce and business of a State).

The aggregation principle, therefore, in addition to lacking Constitutional authority and being contrary to 150 years of precedent, is not the appropriate test for the Board to determine whether to exercise jurisdiction over a single entity based on its effect on interstate commerce. Through aggregation, Congress can regulate and the Board can exercise jurisdiction over any intrastate activity whether it affects interstate commerce or not.

**2. *The ALJ erred in her analysis of Respondent's effect on interstate commerce.***

The ALJ erred in finding that Respondent “affects commerce” within the meaning of the Act. She made no finding establishing the existence of a relationship of Respondent and the charging parties to interstate commerce such that the alleged unfair labor practices substantially led or substantially tended to led to a labor dispute exerting a substantial economic effect on interstate commerce. *See Fainblatt*, 306 U.S. at 608. Specifically, the ALJ failed to consider the nature and size of the business as well as the economic effects Respondent actually has on interstate commerce. Had she done that, it would have been evident that Respondent’s alleged unfair labor practices have no effect whatsoever on interstate commerce and therefore, the required relationship between employer and employee and interstate commerce does not exist.

As noted above, the test of the Board’s statutory jurisdiction over an enterprise is not engaged directly in interstate or foreign commerce must be based on the substantial economic impact, if any, of purely intrastate activity upon interstate commerce. *See NLRB v. Benevento*, 297 F.2d 873 (1961).

Because the Board’s power to regulate commerce mirrors that of Congress, the same constraints and authority limiting congress apply with equal force to the NLRB. *See Fainblatt*, 306 U.S. at 607. The scope of the interstate commerce power must be considered in the light of the dual system of government

and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *US v. Lopez*, 514 U.S. 549, 557 (1996) citing *Jones & Laughlin Steel. supra*, at 37.

The ALJ relied on *Polish Alliance* and *Reliance Fuel Corp* in assessing jurisdiction and appeared to rely on the aggregate effects of Respondent's activities, however, the ALJ cannot ignore the Court's earlier precedent which establishes the test for the Board's jurisdiction. In deciding NLRB statutory jurisdiction cases, the Supreme Court has held that a finding by the Board that the enterprise before it affects interstate commerce is not to be made exclusively by analyzing the activities of the business, the Court also considers the aggregate effects of such activities, however, the Court always based its decision in significant part on the potential effect the business would have, which necessarily entailed an analysis of the nature and size of the business. The Court, thus, always required the business itself to actually affect or threaten to affect interstate commerce based on its size and nature. A survey of the Supreme Court's most important decisions analyzing the Board's exercise of statutory jurisdiction reveals the weight that should be given to the actual effect the business has on interstate commerce.

Early in NLRB jurisprudence, the Supreme Court found section 10(a) of the NLRA to be constitutional and upheld the Board's exercise of jurisdiction based exclusively on the effect the employer had on interstate commerce. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34 (1937), the Court found that jurisdiction over the particular employer was proper because of the immediate and catastrophic effect that might result to interstate commerce from a labor-related interruption of production by the nation's fourth largest steel and iron manufacturer. The court reasoned that the stoppage of Respondent's far flung activities would have a most serious effect upon interstate commerce because of the size of Respondent's business and the importance the steel and iron industry plays in the

US economy. *Id.* at 41. The Court held that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. *Id.* Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute [Section 10(a)] to be determined as individual cases arise.” *Id.* at 34 (emphasis added). The Court, thus, based its decision exclusively on the potential effect that the employer itself would have on interstate commerce without reference to any imaginary cumulative effect but rather on the nature and size of the business involved as well as its direct relation to interstate commerce.<sup>11</sup>

One year later, the Court again had occasion again to review the Board’s exercise of jurisdiction. The Court again upheld the Board’s statutory jurisdiction based on the actual effects the employer had on interstate commerce. In *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938), the Court upheld the Board’s exercise of statutory jurisdiction because interstate and foreign commerce were largely dependent on the employer’s activities.<sup>12</sup> The Court held that whether or not a particular intrastate activity affects interstate commerce is to be judged by the facts of the case. *Id.* at 222. The Court analyzed the nature and size of the employer’s business and concluded that though the employer’s activities were intrastate, “[i]n their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power.” *Id.* at 221. The effect of an interruption in the employer’s business would halt interstate railroads, communication by telegraph or telephone, lights would go out, essentially all electricity-based commerce would halt. *Id.* In short, interstate and foreign commerce was dependent on the continuity of service of the employer. *Id.* The Court reasoned that,

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<sup>12</sup> The employer in question supplied 97.5% of the total electric energy sold to the City of New York and 100% of the energy sold to Westchester County. *Consolidated Edison*, 305 U.S. at 220.

where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers' intrastate activities, the question *whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a substantial manner is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances* . . . . The justification for the exercise of federal power should clearly appear. *Id.* at 222 (emphasis added).

The propriety of the Board's exercise of jurisdiction, the Court held, is a fact intensive inquiry, which includes all of the relevant circumstances presently before the Board. *Id.* This inquiry is particularly important where the Board seeks to exercise jurisdiction over a wholly intrastate activity. *Id.*

One year later, the Board's exercise of jurisdiction was again reviewed by the Court. This time, the Court held that the Board's jurisdiction over an enterprise engaged *directly* in interstate commerce was not dependent on any particular volume of commerce. In *NLRB v. Fainblatt*, 306 U.S. 601 (1939), the Court held that an enterprise's effect on interstate commerce was not to be determined or fixed by the Board "exclusively by reference to the volume of interstate commerce involved." *Id.* at 608. The Board ultimately resolved that jurisdiction was proper because of the immediate consequences which were certain to flow from the employer's unfair labor practices. Despite the small nature of the employer's business, the volume of commerce involved was substantial. *Id.* The Court, therefore, upheld the Board's exercise of jurisdiction because the employer regularly shipped a substantial amount of products in interstate commerce. *Id.* 608. The Court found that the only effect the Board had to find was that the enterprise led to or tended to lead to a labor dispute burdening or obstructing commerce or its free flow. *Id.* That finding in this case was clearly demonstrated by the employer engaging directly in interstate commerce. Because the employer was engaged directly in interstate commerce, the Court found that whether the interstate commerce involved was great or small was immaterial. *Id.*

Five years later the Court again upheld the exercise of jurisdiction over an employer based exclusively on the actual effect that company had on interstate commerce, although the Court, continuing the trend established in *Fainblatt*, held that the Board's jurisdictional test was not dependent solely on the

activities of the enterprise before it, but also on the aggregate effect of those activities. As in *Fainblatt*, however, the court ultimately upheld jurisdiction because of the employer's direct and substantial effect on interstate commerce. In *Polish Alliance v. NLRB*, 322 U.S. 643 (1944), the Court upheld the Board's assertion of jurisdiction over the employer because of its engaging in multi-million dollar credit directly in interstate commerce. The Court held that,

Congress . . . left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce. *Id.* citing *NLRB v. Fainblatt, supra*, at 607-08.

The Court, however, found that the employer substantially affected interstate commerce based on its issuance of insurance benefit certificates with a face value of \$160,000,000.00 to persons outside of its home state, and purchases of \$11,000,000.00 and sales of \$7,500,000.00 worth of securities, which the Court also led the Board to find that the employer's practices had a substantial relation to interstate commerce that burdened or tended to burden commerce or its free flow. *Id.* at 646. The Court, therefore, based its determination on the employer's substantial and far flung economic activities, and though it expanded the test to include consideration of the business's aggregate effect, aggregation had little effect, if any, on the Court's decision.

In the most recent Supreme Court case upon which the ALJ relied, the Court again reviewed the Board's assertion of jurisdiction, upholding it based on the employer's substantial purchases of materials from an instate supplier who purchased the goods in interstate commerce. In *Reliance Fuel Corp. v. NLRB*, 371 U.S. 224 (1963), the Court found the Board's jurisdictional test was met where the employer purchased in excess of \$650,000.00 of raw materials from an instate supplier engaged directly in interstate commerce. The Court recited its earlier holdings in *Fainblatt* and *Polish Alliance* that the test

for jurisdiction is not confined to the quantitative effect of the activities immediately before the Board. *Id.* at 227. The Court provided very little discussion, and ultimately found that the jurisdictional test was met “by virtue of Reliance’s purchases from Gulf.” *Id.* The Court, therefore, found that the Board could exercise jurisdiction over an enterprise engaged wholly in intrastate commerce, but which exerted a substantial economic effect on interstate commerce by way of its substantial purchase of materials from its supplier which were purchased in interstate commerce. Thus, the *Reliance* Court too, largely based its decision on the activities of the Respondent and its effect on interstate commerce. The employer in *Reliance*, like in *Laughlin* and *Consolidated Edison*, was involved in an industry of nation-wide importance, the petroleum industry.

From the foregoing, it is clear that while the Board’s jurisdiction is not to be based exclusively on the volume of interstate commerce involved or on the nature and size of the business, including whether such business was directly or indirectly engaged in interstate commerce, the Court has routinely based its findings almost exclusively on just such information, including whether the enterprise was directly or indirectly engaged in interstate commerce, the relative size and geographic distribution of the employer, and the nature of the business, paying particular attention to whether the industry was of nation-wide importance such as steel production or public utilities. In the cases cited above, the Court described the aggregation principle but never once relied on it. In *Laughlin*, the court found that the effect on interstate commerce would be catastrophic after considering the employer’s nature as a steel manufacturer and its size as a large and far flung enterprise occupying the whole of the Midwest. *Laughlin, supra*, at 41. In *Consolidated Edison*, the Court found that the Board had jurisdiction over the employer in question because its effect on interstate commerce, based on the nature and size of the business, would effectively halt interstate commerce. *Consolidated Edison*, 305 U.S. at 222. In *Fainblatt*, the Court found that a textile manufacturer, while relatively small, affected interstate commerce by virtue of it selling substantial amounts of product directly in interstate commerce. *Fainblatt, supra*, at 608. Likewise, in

*Polish Alliance*, the Court found that the Polish Alliance substantially effected commerce by way of its multi-million dollar purchase and sales of securities. *Polish Alliance, supra*, at 646. Finally, in *Reliance*, the Court considered the effect that Reliance had on interstate commerce where it purchased substantial quantities of raw materials from a supplier directly engaged in interstate commerce, and that despite the intrastate nature of Reliance, its purchases in excess of \$650,000.00 had a substantial impact on interstate commerce. *Reliance*, 371 U.S. at 227. It is clear, therefore, that in determining an employer's effect on interstate commerce, the nature and size of the business are of paramount importance, particularly in situations where the business is wholly intrastate.

In Respondent's case, the ALJ found simply that,

[c]hanging the terms and conditions of employment in retaliation for engaging in concerted activity would tend to lead to a labor dispute that would 'burden or obstruct commerce' or the 'free flow' of commerce . . . . presumably reducing the amount of goods sold intrastate and the amount of supplies needed to purchase from interstate suppliers, thus burdening the "free flow" of commerce. Stoppage or disruption of work in Tucson involves interruptions in the steady stream into and out of Arizona, of credit, cash, and supplies." ALJD 3:22-29.

The ALJ made these findings without reference to the size and nature of Respondent's business, a finding that under the case law announced above is part of the statutory jurisdiction test, and improperly presumed that the alleged unfair labor practices would burden or tend to burden interstate commerce or its free flow without any evidence to support such a finding. *See Benevento*, 297 F.2d at 875-76 (Board's exercise of jurisdiction over wholly intrastate activity must be based on legally sufficient evidence); *Consolidated Edison*, 305 U.S. at 222; *Laughlin Steel*, 307 U.S. at 32.

Specifically, the ALJ failed to consider that Respondent's business is a small eight-man tortilla shop in south Tucson. Respondent has one location and sells all of its products to other small businesses located within the state of Arizona.<sup>13</sup> Respondent's sales, therefore, have no effect on interstate

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<sup>13</sup> No evidence was introduced establishing that any of the businesses Respondent sold to have any effect on interstate commerce, therefore, there is no evidence sufficient to base statutory jurisdiction on Respondent's sales.

commerce, thus, any disruption in Respondent's production would have no effect whatsoever on interstate commerce and cannot serve as a basis for establishing statutory jurisdiction. Moreover, Respondent's business is the production and sale of tortillas and tortilla-related products. This industry can hardly be said to be of national importance in the same way that oil refining, public utilities, or steel manufacturing are.

The ALJ, nevertheless, concluded that disruption in Respondent's production would presumably reduce the amount of supplies Respondent needed to purchase from intrastate suppliers themselves engaged in interstate commerce as well as interrupting the steady stream into and out of Arizona of credit, cash, and supplies. ALJD 3. The ALJ made no findings to support these statements and no evidence exists from which these inferences can be drawn. General Counsel presented a plethora of economic evidence from Respondent's suppliers, yet no showing was ever made nor can it be presumed from the evidence that by changing Soto's (July 7, 2011) shift or by Pineda and Figueroa ceasing to work (September 4, 2011), that Respondent's purchase of supplies would be affected in any meaningful way. Indeed, since General Counsel sought to establish jurisdiction through the indirect inflow theory, it is only through purchases from FSI that any effect on interstate commerce could be traced.

Based on the evidence provided by General Counsel, it is clear that Respondent's purchases were not affected by the alleged unfair labor practices. General Counsel's Exhibit 13 purports to establish FSI's total sales to Don Chavas for the months January 2011 to July 2012. The evidence shows that Respondent averaged monthly purchases of \$10,124.00.<sup>14</sup> See General Counsel's Exhibit 13. During the months during which the alleged unfair labor practices occurred, July and September, Respondent purchased approximately \$8,427.15 and \$8,471.00 worth of supplies from FSI respectively. *Id.* From the evidence, it can be deduced that the alleged unfair labor practices had no negative effect on

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<sup>14</sup> This number was based on total monthly sales divided by the number of months. The lowest monthly purchase was \$5,715.25 in May 2011 and the highest was \$19,881.00 in May of 2012.

Respondent's purchases from FSI. Most notable is the fact that Respondent's purchases during July and September of 2011 are greater than other months in which no unfair labor practices were alleged.<sup>15</sup> If Respondent's alleged unfair labor practices exerted a substantial economic effect on interstate commerce, presumably the evidence of Respondent's purchases from FSI would show Respondent's purchases suffering, yet the evidence reveals nothing significant about Respondent's purchases; they were neither the lowest, nor the highest. To support the ALJ's finding, the evidence would have to demonstrate that Respondent's purchases were significantly lower than months during which no labor dispute was alleged to have occurred. No such effect is discernible from the economic data. Likewise, the evidence would also demonstrate a decline in FSI's sales, yet this is not the case. FSI's sales remained constant for the months in question. *See* GC 10, pp. 1, 12, 21, 25, 30, 36, 41, 42, 47, 49, 61.<sup>16</sup> Respondent purchased approximately the same amount of supplies during months in which no labor dispute existed and during the months in which the alleged unfair labor practices occurred. *See* GC 13.

The evidence, therefore, establishes that the ALJ is wholly incorrect in her presumption that Respondent's alleged unfair labor practices substantially led to or substantially tended to lead to a labor dispute which would exert a substantial economic effect on interstate commerce. The evidence shows that Respondent's alleged activities during the periods in question (July 2011 and September 2011) had absolutely no effect whatsoever on interstate commerce, much less a substantial economic effect.<sup>17</sup>

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<sup>15</sup> In March, 2011, Respondent purchased approximately \$8,411.40 worth of goods from FSI. In April, 2011, Respondent purchased \$8,282.25 worth of supplies. In June 2011, Respondent purchased \$5,5715,25. In October, 2011, Respondent purchased \$8,067.50. In December, 2011, Respondent purchased \$7,549.00 worth of supplies. All months in which no unfair labor practices were alleged. *See* General Counsel's Exhibit 13.

<sup>16</sup> During the 2011 calendar year, FSI's purchases of sweet unsalted butter remained constant at 48 cases a month. GC 10, p1. During July 2011, FSI's purchases of milk powder was 45 cases, the same as 9 other months that year. *Id.* at 12. In July 2011, FSI purchased approximately 60 cases of baking powder, its largest purchase in 2011. *Id.* at 21. In July of 2011 FSI purchased approximately 90 cases of calcium proportionate crystals and 180 in September corresponding with its average amount of purchases for that year. *Id.* at 25. In September, 2011, FSI purchased approximately 50 cases of plastic bags, the same as four other months were no unfair labor practices were alleged to have occurred. *Id.* at 30. In July, 2011, FSI purchased 32 cases of baking powder eagle and 25 in September, approximately the same as 11 other months that calendar year. *Id.* at 41.

<sup>17</sup> It is significant that General Counsel did not present any testimony from FSI indicating that their activities in interstate

Moreover, from the foregoing, it is difficult to imagine any interference with the flow of cash, credit, or supplies where the alleged unfair labor practices had no discernible effect on FSI's sales to Respondent, or even on FSI's interstate purchases. Simply put, the ALJ presumed such effects despite having no evidence to support a presumption and despite the fact that the economic evidence put on by General Counsel demonstrated the exact opposite.

Admittedly, the Board's determination that an enterprise substantially effects interstate commerce is not to be made exclusively by reference to the volume of interstate commerce involved or the activities of the business immediately before the Board, the aggregation principle is also employed to magnify the effects the employer has on interstate commerce. The cases, however, are clear, analysis of the nature, size, and volume of interstate commerce affected does form part of the inquiry, and indeed is even accorded great weight by the Court in *Laughlin* (disruption of production for fourth largest steel manufacturer), *Consolidated Edison* (disruption of employer's public electricity service would halt interstate and foreign commerce), *Fainblatt* (textile manufacturer received shipments of garments from interstate commerce and shipped finished product out of state), *Polish Alliance* (employer's issuance of millions of dollars' worth of insurance certificates and multi-million dollar purchases and sales of securities), and *Reliance* (oil refinery purchases substantial sums of raw materials from supplier engaged in interstate commerce), all of which found that the respective employer's activities affected interstate commerce after an analysis of the nature and size of the business.

The Court never relied on the aggregation principle but always based its decision on the employer having a demonstrated effect on interstate commerce. Nor is it appropriate for the Board to base its jurisdictional findings on aggregation of the intrastate activity before it. The aggregation principle's most common use is to justify Congress's regulation of an entire class of activities. *See Wirtz, supra.*

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commerce were burdened in any way. As discussed in note 14 above, FSI's interstate purchases were not affected during the months when the alleged unfair labor practices occurred.

Congress did not attempt to deal with particular instances; it created the NLRB for that purpose. *Consolidated Edison*, 305 U.S. at 222. While having authority coextensive with Congress, the Board cannot make such generalized and aggregated findings as Congress. Instead, to justify its assertion of jurisdiction over a particular enterprise, especially an intrastate one, the Board must analyze the effect that particular enterprise has on interstate commerce based in large part on the nature and size of the enterprise before it, not on the aggregate effect of an entire class of employers. *See id.* The Board is assessing its jurisdiction over a single enterprise, not the entire class. Such a finding must be based on clear and legally sufficient evidence before the Board subjects a local business to paramount federal authority. *Benevento*, 297 F.2d at 876.

Here, the test for statutory jurisdiction is not met. There is no relationship between Respondent and the charging parties to interstate commerce such that it can be said that the alleged unfair labor practices substantially led or substantially tended to lead to a labor dispute which would exert a substantial economic effect on interstate commerce. According due weight to the size and nature of Respondent's business, and the economic information adduced at trial, here there is no effect whatsoever on interstate commerce, let alone a substantial economic effect.

**D. THE ALJ ERRED IN FINDING THAT THE BOARD'S DISCRETIONARY JURISDICTION STANDARD HAD BEEN MET.**

The ALJ erred in finding that the Board's discretionary jurisdiction standard had been met. Specifically, the ALJ improperly analyzed the discretionary standard under the indirect inflow theory by finding the standard had been met despite no evidence that goods valued in excess of \$50,000.00 crossed stateliness. Additionally, the Board measured the discretionary dollar amount against an outdated standard which does not reflect modern economic reality. The test, therefore, is invalid because the Board's discretionary jurisdiction is based on a de minimis amount of interstate commerce.

***1. The ALJ improperly analyzed the discretionary jurisdictional standard under the***

### *indirect inflow theory*

It is axiomatic that where the Board lacks statutory jurisdiction, it cannot exercise its discretionary jurisdiction. *See Mich. Cmty. Servs. v. NLRB*, 309 F.3d 348, 360 (6th Cir. 2002). Even if the Board were found to have statutory jurisdiction, which it does not, the ALJ improperly analyzed jurisdiction over Respondent under the indirect inflow theory finding that Respondent's purchases of \$51,000.00 worth of supplies from FSI satisfied the standard.<sup>18</sup> Specifically, the ALJ was required to find that \$50,000.00 worth of goods had crossed state lines, yet in assessing the amount that crossed state lines, the ALJ included in the \$50,000.00 discretionary non-retail dollar amount amounts which never crossed state lines, and measured those amounts against an outdated dollar standard which has not been adjusted to reflect modern economic reality since 1958.

In *Siemons Mailing Service*, 122 N.L.R.B. 81 (1958), the Board set forth its current discretionary jurisdictional standards, and concluded that “[i]t will best effectuate the policies of the Act if jurisdiction is asserted over all nonretail enterprises which have an outflow or inflow across State lines of at least \$50,000.00, whether such outflow or inflow be regarded as direct or indirect.” (emphasis added) The Board further added,

*direct outflow* refers to goods shipped or services furnished by the employer outside the State. *Indirect outflow* refers to sales of goods or services to users meeting any of the Board's jurisdictional standards except the indirect outflow or indirect inflow standard. *Direct inflow* refers to goods or services furnished directly to the employer from outside the State in which the employer is located. *Indirect inflow* refers to the purchase of goods or services which originated outside the employer's State but which he purchased from a seller within the State who received such goods or services from outside the State. *Id.*

Critical for purposes of this discussion is the language “across state lines.” Thus, it is the “value” that crosses interstate lines that is at issue. Therefore, the actual “value” that crossed state lines alone can

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<sup>18</sup> Within that amount, the ALJ included amounts that corresponded with purchases of salt from Spalding Salt Company, an Arizona company. TR 192:18-25. This amount cannot be included in the jurisdictional dollar amount because it constitutes an intrastate purchase. Without the Spalding Salt sales, Respondent's purchases from FSI of interstate products is approximately \$50,553.00.

be used to meet the \$50,000.00. The value that actually crosses state lines in this case, is the wholesale price FSI purchased the goods for. To hold otherwise would be to include in the \$50,000.00 amounts which did not flow “across state lines,” contrary to the Board’s ruling in *Siemons*. Moreover, as will be discussed below, to satisfy the direct inflow or outflow and indirect outflow standards, the Board must always find that \$50,000.00 crossed state lines. Why would the indirect inflow theory require a different result?

The ALJ found that Respondent had purchased approximately \$51,000.00 worth of supplies from FSI, which purchased those supplies in interstate commerce. ALJD 3:45.<sup>19</sup> FSI, being a commercial enterprise no doubt purchases the items it sales at a lower price and then adds a markup on those items to turn a profit. Respondent attempted to question the FSI representative on the amount by which the price of the supplies was marked up but was prevented from doing so by the ALJ.<sup>20</sup> TR 197:17-25; 199:7-18.

In direct inflow or direct outflow cases, the “value” used to calculate the dollar amount is always the amount that crosses state lines and always requires that value to be in excess of \$50,000.00. See *Liner v. Jafco.*, 375 U.S. 301, 304, n.2 (1964) (direct inflow standard met where company purchased materials costing approximately \$147,099.67 directly across state lines); *Hobart Crane Rental*, 337 N.L.R.B. 77 (1999) (jurisdictional standard not met where employer purchased goods directly over state lines valued at \$241.29); *Farkas v. United Steelworkers of America*, 1973 U.S. Dist. LEXIS 12696 (S.D.OH. 1973) (Corporation’s sale of goods valued in excess of \$50,000.00 directly across state lines satisfies Board’s direct outflow standard); *YMCA of Pikes Peak Region, Inc. v. NLRB*, 914 F.2d 1442

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<sup>19</sup> The ALJ also noted that additional goods purchased from A&P Paper and Plastic Supplies as well as insurance payments, these amounts, however, are from a variety of different time periods which do not correspond with the 12 month period for the FSI evidence, therefore, according to Board policy, these amounts cannot be included to calculate the discretionary jurisdiction dollar amount. *Valentine Painting & Wallcovering*, 331 N.L.R.B. 19 (2000). The ALJ rejected this argument finding that the FSI amounts in and of themselves were sufficient. The ALJ, therefore, agreed that the A&P and insurance amounts are not to be considered in determining discretionary jurisdiction. ALJD 4:18-23.

<sup>20</sup> This constituted an abuse of discretion as the evidence was clearly relevant towards assessing the Board’s statutory jurisdiction.

(10th Cir. 1990) (Employer satisfied direct inflow standard where it purchased \$56,700.00 in supplies from directly out of state). Likewise, where jurisdiction is based on an employer's indirect outflow it requires that the entity to which the employer sells either purchases or sells goods valued in excess of \$50,000.00 directly across state lines. See *NLRB v. Marsden*, 701 F.2d 238, 241 (2d Cir. 1984) (Indirect outflow refers to sales of goods or services to users meeting any of the Board's jurisdictional standards except indirect outflow and indirect inflow); *NLRB v. Ferraro's Bakery, Inc.*, 353 F.2d 366 (6th Cir. 1965) (Employer satisfied indirect outflow by selling to four customers each of whom had a direct inflow of more than \$50,000.00 annually). Thus, under the direct inflow or outflow theories and the indirect outflow theory, there must always be goods valued in excess of \$50,000.00 crossing directly over state lines. This requirement is wholly consistent with the language in *Siemons* requiring "outflow or inflow across state lines of at least \$50,000.00." *Siemons*, 122 N.L.R.B. at 86.

From the foregoing, it is clear that to satisfy the *Siemons* standard under the direct outflow and inflow, and indirect outflow theories, \$50,000.00 must cross state lines. For those standards, that is the value that controls. Here, that value is represented by the wholesale purchase price paid by FSI in purchasing those goods in interstate commerce. If the "value" of the goods embraced wholly intrastate amounts, i.e. whatever additional value was added to the goods when sold intrastate, the actual effect on interstate commerce would be so indirect and remote as to obliterate any distinction between national and local. See *Laughlin Steel*, 301, U.S. at 38 (Board may not exercise its jurisdiction to such an extent as to embrace effects upon interstate commerce so indirect and remote as to obliterate distinction between national and local).

If Respondent had engaged directly in interstate commerce, the Board would base its discretionary jurisdictional amount on the value of goods that Respondent purchased directly across state lines. See *Hobart Crane Rental*, 337 N.L.R.B. 77 (1999) (jurisdictional standard not met where employer

purchased goods directly over state lines valued at \$241.29). Likewise, the Board would require such a finding under the direct outflow and indirect outflow standards as well. Why should the inquiry be any different when based on indirect inflow? The only difference is the source of the goods. Including in the \$50,000.00 amount intrastate transactions which did not cross state lines is directly contrary to the *Siemons* standards. It is clear that \$50,000.00 must cross state lines. In the instant case, it cannot be said that FSI's wholesale purchase price rose to that level. It was error for the ALJ to preclude Respondent from questioning FSI on this evidence and it was equally erroneous to include the mark up amounts as part of the \$50,000.00 amount which must cross state lines pursuant to the *Siemons* standard.

Finally, the ALJ measured the discretionary dollar amount against a standard which does not reflect the economic reality of today's economy. The *Siemons* standards were announced in 1957, over sixty years ago. No doubt, in 1957, \$50,000.00 constituted a significant sum of money, however, adjusted for inflation and taking into account the increasingly globalized economy, \$50,000.00 in 2013 terms is approximately \$409,750.80. It is clear that the *Siemons* standard no longer reflects economic reality and contributes to the Board's over-assertion of jurisdiction. The original impetus for defining the current standards, was to increase the Board's assertion of jurisdiction to cover an increasing "no-man's land of regulation," *Siemons Mailing Service*, 122 N.L.R.B. at 86. The current dollar amounts have broadened the Board's jurisdiction to such an extent that it now encompasses businesses which have a miniscule effect on interstate commerce, an effect which in today's economy, cannot be said to be more than de minimis.

The Board was receptive in the past to adjusting its discretionary dollar amounts. In *Jonesboro Gran Drying Cooperative*, 110 N.L.R.B. 67 (1954), the Board changed its jurisdictional standards by increasing the required amount of direct outflow of interstate business from \$25,000.00 to \$50,000.00 a year, and increased the required amount of indirect inflow of interstate goods from \$50,000.00 to

\$100,000.00 a year. The Board did so to “reappraise the 1950 jurisdictional standards in the light of the Board’s experience, since their adoption and also in the light of changing economic conditions.” The Board concluded that the standards needed revision in order to better attain the Board’s long-standing policy of limiting its exercise of jurisdiction to “enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce.” *Id.* at 483. Here, it is clear that such a reappraisal is needed.

**2. Respondent’s effect on interstate commerce is *de minimis*.**

A business “affects commerce” within the meaning of the Act if the effect of its operations on commerce is more than *de minimis*. *Marty Levitt*, 171 N.L.R.B. 739 (1968). Here, the evidence clearly establishes that the alleged unfair labor practices exert no effect whatsoever on interstate commerce. Moreover, it is also clear that Respondent’s purchases from FSI are likewise *de minimis*. In addition to not meeting the \$50,000.00 amount required to cross state lines, whatever amount crossing state lines is indirectly attributed to Respondent cannot be said to be more than *de minimis*.

In *Marty Levitt*, the Board held that \$1,500.00 derived directly from interstate commerce was more than *de minimis*, however, in 1968, \$1,500.00 had significantly more value than it does now. Using an outdated monetary standard to measure conduct in today’s market is unjustifiable. It is notable, that all of the cases holding that such an amount is not *de minimis* are of an older vintage. *See NLRB v. Aurora City Lines, Inc.* 299 F.2d 229, 231 (7th Cir. 1962) (\$2,000.00 more than *de minimis*), *Lamar Hotel*, 127 N.L.R.B. 885, 886 (1960) (\$4,900.00 more than *de minimis*); *Somerset Manor, Inc.* 170 N.L.R.B. 1647 (1962) (\$1,800.00 more than *de minimis*). In today’s market, Respondent’s indirect effect on interstate commerce is *de minimis*.

**E. THE ALJ ERRED IN DETERMINING THAT RESPONDENT VIOLATED SECTION 8(A)(1) BY TRANSFERRING SOTO TO ANOTHER SHIFT.**

The ALJ found that General Counsel had met its initial burden of showing a discriminatory

motive for Soto's transfer and found that Respondent had failed to meet its burden of establishing that the transfer would have taken place even in the absence of the protected conduct. ALJD 17:17-18. The ALJ reached this decision by discrediting clear, material, and uncontroverted testimony from Jesus Olguin establishing the reasons for Soto's shift transfer on the grounds that Olguin failed to produce documents as evidence of those reasons and failed to produce corroborating testimony. *Id.* The ALJ also drew inferences that were contrary to Olguin's testimony in addition to mischaracterizing it by finding that Olguin was not at the factory frequently enough to observe Soto socializing with Figueroa despite Olguin's testimony that he observed them every day in the morning. Accordingly, the Board should not adopt the ALJ's findings in this regard because Respondent established legitimate business reasons for having transferred Soto so that would have occurred in the absence of any allegedly protected activity.

The Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. *Standard Dry Wall Products*, 91 N.L.R.B. 544 (1950) enf'd 188 F.2d 362. Additionally, the Board is not authorized to ignore material uncontradicted facts. *NLRB v. Cleveland Trust Co.*, 214 F.2d 95, 98 (6th Cir. 1954). It is required under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(c), to impose no sanction or rule or order or issue any order "except upon consideration of the whole record . . . as supported by and in accordance with the reliable, probative, and substantial evidence." *Id.* An examiner may give credence and weight to the testimony of general counsel's witnesses in preference to that of the employer . . . [b]ut, a complete disregard for sworn testimony coupled with a tongue-in-cheek-characterization of those utterances . . . depreciates the examiner's findings and obliges . . . close examination. *Medline Industries, Inc. v. NLRB*, 593 F.2d 788, 795 (7th Cir. 1979). Likewise, inferences contrary to direct testimony are not ordinarily sufficient to support a finding by an ALJ. *Id.* Where material uncontradicted evidence has been ignored or where the evidence has been disregarded or eliminated by the casual expedient of discrediting an employer's witnesses, a trial examiner's credibility

findings are not accorded the presumption of correctness usually attributed to a tier of fact. *Id.*

Jesus Olguin testified that Soto's shift was changed because when coupled with Figueroa, a relative and close friend, the two would socialize about non-work related issues to the point where production decreased by approximately 120 packages.<sup>21</sup> TR 810:12-20. Olguin testified that he became aware of Soto and Figueroa's excessive socializing through his standard-procedure review of production numbers for the morning shift, indicating approximately 120 packages less for that shift. *Id.* He concluded that the drop in production was the result of Soto and Figueroa's excessive socializing through his own routine observations of them at work and through comments made to him by other employees. TR 302:7-25; 303:1-2. All of this testimony was material and uncontradicted. Yet the ALJ chose to discredit, ignore, or mischaracterize all of this evidence.

Specifically, Olguin testified at length about the procedure he used to check each shift's production to ensure production was orderly and efficient. Olguin testified that the afternoon shift was required to leave a note detailing how many tortillas were produced from 8:00 pm until 4:00 am when the shift ended. TR 804:22-24.; 806:12-23. Olguin would leave the factory each day at 8:00 pm and would count what had been produced up to that point. TR, p. 804, lns 21-22. Olguin would count again at 7:00 am the following morning to determine how many packages were produced by the morning shift from 4:00 am until 7:00 am. TR 805:1-2, 21-25. Using this procedure each day, Olguin was able to determine that each shift was to produce 840 packages of tortillas a day assuming no irregularities with machinery or other problems. TR 808:1-6. Olguin testified that he noticed morning production numbers began slipping in May of 2011. TR 809:1-17; 810:12-20. He began counting production of around 720 packages per shift for the morning shift worked by Soto and Figueroa, 120 less than what a normal shift was required to package. TR 810:12-20.

Olguin determined that this drop in production was the result of Soto and Figueroa's excessive

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<sup>21</sup> A normal shift would produce approximately 840 packages.

socializing based on his own routine observations of Soto and Figueroa socializing and through comments made to him by other employees, notably Jesus Arvizu. Olguin testified that he routinely observed Soto and Figueroa socializing about non-work related matters when he would arrive to work every day at 7 am to pick up the tortillas for delivery. TR 302:7-25; 303:1-2. He testified that he observed them and overheard them daily because the factory itself is small and employees can easily be overheard. *Id.* Olguin also testified that he did not hear other employees talking about non-work related matters. TR 303:8- 24; 304:1-25.<sup>22</sup>

Additionally, Olguin testified that he asked Jesus Arvizu, another employee working the morning shift at the time, why production was short to which Arvizu responded that Soto and Figueroa would get together at the wheel station of the production line and socialize excessively. TR 813:3-8. This testimony was corroborated by Jesus Arvizu, who despite not being able to recall the exact date, testified that he had on more than one occasion become concerned with Soto and Figueroa's inefficiency on the production line. TR 729:15-23; 720:15-19.<sup>23</sup>

The ALJ conveniently discredited all of this material and uncontroverted testimony. The ALJ discredited Olguin's testimony regarding his determination that production numbers had decreased during Soto's and Figueroa's shift because "Olguin was unable to produce documentation showing a decrease in productivity for each period at issue . . . or corroborating testimony to support his defense on

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<sup>22</sup> The ALJ chose not to credit this portion of testimony based on her mischaracterization and discrediting of later testimony. Specifically, the ALJ stated: "When questioned about employees complaining to him about broken equipment, he claimed he was in the factory infrequently but changed his testimony to note that daily her overhead conversation between Soto and Figueroa because he was often in the factory. This type of contradictory testimony weighs negatively on the overall credibility of his testimony." ALJD 11:48-50.

The ALJ's tongue-in-cheek characterization of Olguin's testimony is not supported by any citations to the record, nor does the record support this characterization. Olguin never stated he was often in the factory. He stated that he was there only in the morning and the late afternoon, the rest of the day he was usually delivering tortillas. The ALJ, however, took this testimony and distorted it by choosing to phrase it in a way that, through semantic manipulation, presents Olguin's testimony as contradictory on this point. A full review of all of the relevant testimony on this issue reveals that the ALJ is incorrect.

<sup>23</sup> When Respondent's counsel attempted to elicit testimony concerning whether Arvizu informed Olguin that Soto's and Figueroa's socializing was affecting production, the ALJ inexplicably and improperly sustained a series of objections from General Counsel. Most notably, the ALJ sustained General Counsel's hearsay objection [TR 813:14-17] despite overruling a previous hearsay objection asked only moments earlier by Respondent. TR 813:3-8. Olguin's testimony on this point was corroborated by Jesus Arvizu, yet the ALJ chose to discredit all of Arvizu's testimony, noting that it was "worthless." ALJD 13:28.

this point.”<sup>24</sup> ALJD 11:37-38. There is no requirement; however, that testimony must be corroborated to be credible. *Marchese Metal Industries*, 302 N.L.R.B. 565, 570 (1991). Lacking any other indicia of unreliability, the ALJ improperly ignored material and uncontradicted sworn testimony. Olguin was under oath and described with exceeding clarity and detail how he determined that the numbers were low. No evidence was adduced by General Counsel to contradict this testimony nor was any of Olguin’s testimony on this issue inherently unreliable or contradictory. His testimony was completely consistent with earlier statements that he had separated the two because of his belief that they were affecting production numbers. Moreover, the detail and clarity of his testimony presents no reasonable basis for the ALJ to conclude that this testimony was inherently unreliable, nor is it proper to discredit this testimony for lack of corroboration. Olguin is the owner and manager of Don Chavas, LLC. His testimony indicated that he alone counts the production from the line and never indicated that anyone other than hi would have this knowledge. Discrediting this testimony on the basis that no other witness corroborated it (other than Arvizu) and on the lack of documentary evidence to support it is a casual and unobjective way of discrediting uncontradicted material testimony.

The ALJ also drew inferences directly contrary to Olguin’s testimony that he routinely observed the charging parties socializing in addition to mischaracterizing Olguin’s testimony concerning his presence at the factory. ALJD 11:39-40. The ALJ specifically found that

Olguin testified that he spent most of his time away from the factory delivering tortillas to customers . . . [t]herefore, his opportunity to overhear the workers’ conversations was, by his own admission, extremely limited. If he indeed observed Soto and Figueroa talking together, those occasions would have been infrequent. The infrequency of his observation of charging parties’ engaging in non-work related conversation would not be sufficient to justify his excuse that he transferred Soto because she was the sole reason for a decrease in production numbers. ALJD 11:40-47.

The ALJ’s inference that Olguin infrequently observed the charging parties’ socializing is directly contrary to Olguin’s sworn testimony that he was in the factory at 7am every morning during the period

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<sup>24</sup> Olguin testified that he did not keep records of the production numbers, that he would destroy the sheet of paper. TR 845:8-9.

in question and that during these stops at the factory he frequently observed Soto and Figueroa socializing. TR 302:7-25; 303:1-2. Nothing in Olguin's testimony or in the record as a whole supports a finding that he infrequently observed the two socializing, rather, the record shows that during the period in question, he observed them every single day around 7 am. TR 302:7-25. This testimony does not strain credulity, contain any inherent contradictions, or present an impossible or unbelievable scenario. Soto and Figueroa worked the morning shift in May 2011. Therefore, when Olguin arrived every morning to pick up the tortillas, they were at work. Because the factory is small, Olguin would have had ample time and opportunity to observe them working.<sup>25</sup>

Additionally, in so finding, the ALJ ignored other major portions of Olguin's testimony. The ALJ apparently believed that Olguin's entire defense was predicated on his observations of the charging parties socializing. ALJD 11:40-47. The ALJ ignored Olguin's testimony that the shift change was occasioned, in addition to his observation of them socializing, by his own review of the production numbers for their shift and comments made to him by other employees. *Id.* Taken together, these three sources confirmed to Olguin that Soto and Figueroa needed to be separated because their excessive socializing was affecting production. Therefore, the ALJ also mischaracterized Respondent's defense by limiting it to being supported only by his observations.

The ALJ further discredited Olguin's testimony by completely mischaracterizing portions of Olguin's testimony concerning his presence at the factory. The ALJ discredited Olguin's statements that he never overheard other workers engaging in the type of excessive socializing that Soto and Figueroa engaged in because Olguin "claimed he was in the factory infrequently but then changed his testimony to note that daily he overheard conversation between Soto and Figueroa because he was often in the factory." ALJD 11:40-47. This is the type of tongue-in-cheek characterization of Olguin's testimony that casts serious doubts on the ALJ's credibility determinations. The ALJ conveniently left out a citation to the

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<sup>25</sup> This fact is corroborated by Figueroa who says she saw him at 8:00 am every morning when she worked the morning shift. TR 452:15-16.

record and the transcript does not reveal testimony from Olguin indicating this type of inconsistent testimony. What Olguin did say is that he spends most of the day making deliveries and, therefore, apart from going to the factory at 7am in the morning to count and pick up tortillas for delivery and 8 pm when he counts again, he is not in the factory. Every day, however, he arrives at the same time to collect the tortillas and count them, and it is during this period that he is in the factory that he observed Soto and Figueroa socializing excessively.<sup>26</sup> There is nothing inherently contradictory in Olguin testifying that he is rarely at the factory because he is making deliveries, but that when he is there, specifically in the morning, that he frequently observes Soto and Figueroa socializing. The ALJ's semantic manipulation of Olguin's testimony mischaracterizes it with the end result being that the ALJ casually disregarded material and uncontradicted testimony from Olguin establishing a defense under the Wright Line test and drew inferences directly to the contrary.

The ALJ also completely ignored testimony from Jesus Arvizu corroborating Olguin's statements, namely that Jesus Arvizu informed him that Soto and Figueroa would get together on the "wheel" and socialize excessively.<sup>27</sup> TR 730:15-22; 749:4-6; 813:7-9. The ALJ chose to discredit this testimony based on wholly irrelevant and impermissible character evidence, namely evidence of arrests and

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<sup>26</sup> The questioning that produced this testimony occurs at TR 272:10-22 and is as follows:

10 Q: And you were inside the factory -- inside the tortilla

11 factory, weren't you?

12 A: I am never there. I am always working by delivering.

13 Q: Okay, but you do come back to the factory after you make  
14 the deliveries, right?

15 A: I leave the containers, the boxes, and then I retire.

16 Q: And you talk to your employees in the process of leaving  
17 these containers, don't you?

18 A: When they talk to me, I answer them.

19 Q: And during one of your returns to the factory is when one  
20 of the workers told you that they were having problems -- that  
21 there was a problem with the extractor, right?

22 A: Yes.

<sup>27</sup> Despite Respondent's repeated attempts to elicit testimony from Arvizu elaborating on his concerns regarding Soto and Figueroa's excessive socializing and lowering of production, Respondent was not permitted to do so over excessive and unwarranted foundational objections sustained by the ALJ. Similar questioning was permitted of General Counsel's witnesses was permitted over Respondent's objections.

evidence of misdemeanor convictions. ALJD 12:27-53.<sup>28</sup> Even in the absence of Arvizu's corroborating testimony, the preponderance of the relevant evidence establishes that Olguin's testimony was detailed and uncontradictory. Moreover, it was not refuted by the charging parties.

From the foregoing, it is clear that the ALJ completely disregarded Olguin's sworn and uncontradicted testimony that Soto's shift was changed because she was contributing to a drop in production. In discrediting Olguin's testimony, the ALJ improperly required Olguin to corroborate his testimony concerning his production counts, drew inferences contrary to his testimony regarding his presence at the factory and routinely mischaracterizes it in her decision. For these reasons the Board should not adopt her credibility findings and should find that Respondent carried its burden by establishing that Soto's shift change would have occurred even in the absence of any alleged protected activity. The ALJ's credibility determinations on Respondent's defense are not supported by a preponderance of the relevant evidence.

**F. THE ALJ ERRED IN DETERMINING THAT RESPONDENT HAD CONSTRUCTIVELY DISCHARGED SOTO.**

In addition to incorrectly finding that Respondent had a discriminatory motive for transferring Soto to a different shift, the ALJ also erroneously found that Respondent constructively discharged Soto because he knew or should have known that its transfer of Soto to the evening shift would result in an untenable situation for Soto. ALJD 17:48-50. The ALJ, however, erred in discrediting Olguin's testimony regarding the reasons for Soto's shift change. The ALJ also erred in finding that Olguin knew or should have known that changing Soto's shift would force her to resign because the ALJ ignored material and uncontradicted testimony that Olguin made a crucial accommodation to Soto that would enable him to achieve his goal of normalizing production while at the same time making it easier for her to obtain child care.

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<sup>28</sup> Federal Rule of Evidence 609 allows introduction of criminal convictions involving elements of fraud or dishonesty or felonies, i.e. crimes punishable by more than 1 year's imprisonment.

For the same reasons as above, the ALJ erred in finding that Respondent constructively discharged Soto, namely, that material and uncontradicted testimony was ignored wholesale and is conspicuously absent from her decision. One element required for a finding of constructive discharge is that the unbearable working conditions were imposed because of the employee's protected activity. *Engineering Contractors, Inc.* 357 N.L.R.B. 127 (2011). Because the ALJ ignored, mischaracterized, and drew unsubstantiated and contradictory inferences from clear, material, and uncontradicted testimony regarding Respondent's reason for transferring Soto to a different shift, the ALJ's credibility determinations should not be adopted and the Board should find that there is no nexus between the shift change and Soto's allegedly protected activity. *See infra* Section E.

Additionally, the ALJ erred in finding that Respondent knew or should have known that the shift change would present Soto with a "Hobson's choice." Olguin testified that he was aware that both Soto and Figueroa had children and that working the evening shift would present difficulties for them because Soto in particular had informed him that she could not afford a baby sitter. TR 818:5-8. For that reason, he proposed a solution that they would alternate in the evening shift with the result being that one week Soto would work the evening shift and another week Figueroa would work the evening shift. *Id.* If Respondent intended to retaliate against Soto for her allegedly protected activity, why would Olguin have made this critical accommodation? In fact, both Soto and Figueroa had worked the evening shift in the past, therefore, given his proposal that they alternate shifts, there is nothing on the record to support a finding that he knew or should have known that the shift change would be a "Hobson's Choice." Rather, the evidence establishes that Olguin was aware of the difficulties of changing the shift, but because their excessive socializing was affecting production, it could no longer be tolerated. He resolved to change their shifts and to have them alternate working the evening shift as a means of accommodating their home situation. This is exactly the proper balance that an employer should strike.

General Counsel presented no evidence to refute Olguin's testimony concerning the alternating

evening shift proposal, in fact, both Soto and Figueroa conveniently failed to mention it. Moreover, General Counsel also had the opportunity to recall both Figueroa and Soto to refute this testimony but elected not to do so.

The ALJ's reliability determinations regarding Olguin's reason for transferring Soto's shift is not supported by a preponderance of the relevant evidence and the ALJ's finding that Olguin knew or should have known the shift change would force Soto to resign completely ignored crucial bit of testimony, making no mention of it in her decision. Accordingly, the Board should not adopt the ALJ's findings in this regard and should find that Respondent did not constructively discharge Soto because the shift change was not motivated by any desire to retaliate against Soto for any allegedly protected activity.

**G. THE ALJ ERRED IN FINDING THAT RESPONDENT ILLEGALLY THREATENED PINEDA AND FIGUEROA WITH DISCHARGE AND THAT RESPONDENT ULTIMATELY DISCHARGED THEM IN RETALIATION FOR THEIR CONCERTED ACTIVITIES.**

The ALJ incorrectly found that Respondent threatened Pineda and Figueroa with termination in retaliation for engaging in a protected work stoppage and that both were ultimately discharged for engaging in concerted activity. ALJD 19:38-40; 20:10-13. In so finding, the ALJ committed reversible error by discrediting Olguin's and Arvizu's testimony. Specifically, the ALJ ignored Olguin's testimony that he did not threaten Pineda and Figueroa with discharge. The ALJ also did not credit Olguin's testimony that a fourth worker had arrived because she found Arvizu's corroborating testimony unreliable based on inadmissible evidence. In so doing, the ALJ committed reversible error because the inadmissible evidence cast doubt on Respondent's central defense, that Pineda and Figueroa were fired for refusing to return to work after being notified that the fourth worker had arrived.

The ALJ discredited Olguin's testimony that a fourth worker had arrived because he did not observe the worker first hand. ALJD 12:28-31. Olguin, however, testified that his son Adrian had informed him that Jesus Arvizu had arrived as the fourth worker. TR 823:16-23. Jesus Arvizu corroborated this account, but his testimony was discredited by the ALJ based on inadmissible evidence

of misdemeanor convictions and arrests. TR 715:1-25; ALJD 17:30-55.<sup>29</sup>

The ALJ discredited Arvizu's testimony based on inadmissible evidence, namely evidence of misdemeanor convictions and of arrests not supported by a conviction.<sup>30</sup> The NLRA states that the NLRB is required to conduct its proceedings, so far as practicable, in accord with the Federal Rules of Evidence and the Federal Rules of Civil Procedure. 29 U.S.C. § 160(b). Federal Rule of Evidence 609 directs that evidence of felony convictions can be admitted for the purpose of attacking the credibility of a witness. Misdemeanor convictions are only admissible if an element of the crime required proof of fraud or dishonesty. The NLRB may not exclude or admit evidence which it would be error to exclude or admit in a court trial. *See NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357 (5th Cir. 1978) (Board erred in excluding evidence of a felony conviction for purposes of impeachment). The Board has previously held that an ALJ's evidentiary rulings are bound by FRE 609. *See Quazite*, 315 N.L.R.B. 132 (1993); *Double D Construction*, 342 N.L.R.B. 89 (2004).

While Arvizu was testifying, General Counsel presented evidence of a misdemeanor conviction and evidence of incarceration not even supported by a conviction. TR 763:20-23; 767:3-9. General Counsel insisted that it was offering the evidence for no other reason "than this witness's veracity [sic]"<sup>31</sup> and described the misdemeanor conviction as showing "the date of the arrest," nothing more. TR 764:8-10; 765:15-17.<sup>32</sup> Respondent's objection cited Federal Rule of Evidence 609's prohibition of evidence of a conviction that is not a felony or one involving fraud or dishonesty. *Id.* at 767:9-25, 768:10-25. The

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<sup>29</sup> Arvizu's corroboration, however, is not necessary as corroboration is not necessary to find evidence credible. *See Marchese Metal Industries*, 302 N.L.R.B. 565, 570 (1991) (there is no requirement that testimony be corroborated to be credible).

<sup>30</sup> The ALJ also found that the majority of Arvizu's testimony was "accompanied by smirks, sarcasm, and evasion." ALJD 12:33-35. This, however, is patently false. Arvizu's testimony may not have been the most eloquent, but he was respectful, never sarcastic, and never answered with smirks or evasion. The ALJ's finding in this regard is wholly false. The behavior she describes is more properly attributable to the charging parties, in particular Mariela Soto who frequently responded to Respondent's questions with sarcasm, and spiteful facial gestures.

<sup>31</sup> General Counsel, however, was adamant that it was not offering the evidence under Federal Rule of Evidence 609, however, General Counsel was mistaken, the only evidentiary rule that would permit the admission of the type of evidence she was offering was in fact FRE 609.

<sup>32</sup> General Counsel never described whether the conviction was a misdemeanor nor a felony even after Respondent objected to it on those grounds.

ALJ, however, overruled the objection and permitted the introduction of both the misdemeanor evidence and evidence of a subsequent arrest, finding that it was proper to test a witness's credibility. *Id.* The ALJ, however, was patently incorrect. Rule 609 allows introduction of felony convictions, i.e. those punishable by one year or more in prison. Moreover, the Federal Rules of Evidence prohibit introduction of evidence of incarceration absent a felony conviction. *See Jackson v Crews*, 873 F.2d 1105 (8th Cir. 1989) (District Court properly refused to permit impeachment of witness with evidence of prior arrests); *US v. Hodnet*, 537 F.2d 828 (5th Cir. 1976) (impeachment of witness through evidence of arrest is not permissible); *Martell Mills Corp.*, 118 N.L.R.B. 75 (1957) ("Testimony with respect to arrests as distinguished from convictions is inadmissible to impeach a witness."); *Board of Publication of the Methodist Church*, 129 N.L.R.B. 176 (1961) (evidence of an arrest is inadmissible to impeach a witness). While introducing evidence of Arvizu's second arrest, General Counsel did not introduce any evidence of a conviction, nor did the ALJ require such evidence or prohibit its introduction on that basis. The ALJ simply overruled Respondent's objections and allowed introduction of the inadmissible evidence.<sup>33</sup>

The ALJ, therefore, discredited Olguin's testimony that a fourth worker had arrived because when the fourth worker, Arvizu, testified that he was in fact the fourth worker that arrived, she discredited his testimony on the basis of inadmissible evidence. Because this evidence cast doubt on one of Respondent's central defenses, i.e. that Pineda was informed of the fourth worker's arrival, it was reversible error on the part of the ALJ. *See US v. Melendez-Rivas*, 566 F.3d 41, 51 (1st Cir. 2009) (Judge's admittance of inadmissible evidence that was not stricken nor given a curative instruction, contradicted one of defendant's central defenses and constituted reversible error.). Accordingly, the Board should not adopt the ALJ's findings in this regard.

Apart from this lengthy discussion concerning Arvizu's credibility, the ALJ gave no other reason for discrediting Olguin's testimony other than his lack of first-hand observation. Lacking any other

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<sup>33</sup> It is notable that earlier in the proceeding, the ALJ prevented Respondent from introducing the same type of evidence, namely evidence of Pineda's immigration status to impeach his credibility. TR 392:7-9.

indicia of reliability, the ALJ is not authorized to ignore material and uncontradicted testimony nor can the ALJ ignore corroborated hearsay. *See NLRB v. Cleveland Trust Co.*, 214 F.2d 95, 98 (6th Cir. 1954) (Board not authorized to ignore material and uncontradicted testimony); *see also Delmas Conley d/b/a Conley Trucking*, 349 N.L.R.B. 30 (2007) (“hearsay evidence is admissible if ‘rationally probative in force and if corroborated”). Likewise, an ALJ may not casually discredit a witnesses sworn and uncontradicted testimony, yet this is precisely what the ALJ did. *See Cleveland Trust Co.*, 214 F.2d at 98. Olguin’s testimony that his son informed him that a fourth worker had arrived was never refuted by either Pineda or Soto. The ALJ, therefore, could not find this statement false for the reasons asserted, namely that it was not based on a first hand observation and that it was not corroborated.

Additionally, Respondent attempted to introduce evidence that Olguin did not threaten Pineda with termination and that at the time he made the phone call he believed that a fourth worker had arrived, but was prevented from doing so by numerous and incorrect foundational objections. TR 824:2-25; 825: 1-25; 825: 1-25; 826:4-9.<sup>34</sup> Respondent testified that he did not threaten to terminate Pineda, he in fact told him that he should return and that he would still be paid for the time that he missed, but Pineda refused stating that he had almost arrived at home. TR 826:4-9. Respondent was also precluded from testifying as to whether he believed a fourth worker had indeed arrived at the time he spoke with Pineda. *Id.* Had he been allowed to do so, his testimony would have further supported the argument that he did not threaten Pineda but told him to return to work because he believed a fourth worker had arrived.

The ALJ’s evidentiary ruling, therefore, prejudiced Respondent by severely handicapping the presentation of its central defense, that Pineda and Figueroa were not threatened with termination, that their concerted activity was no longer protected once Pineda<sup>35</sup> was informed that the reasons for his

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<sup>34</sup> The ALJ mischaracterized this testimony, believing instead that Respondent’s argument was that Adrian had been directed to contact Pineda. ALJD 12:15. The ALJ also improperly sustained the foundational objections despite Olguin establishing the time, date, and place from which Olguin placed the call, in addition to who was in the room with him when he made it, and to whom the call was directed. TR 824:2-25; 825: 1-25; 825: 1-25.

<sup>35</sup> Figueroa drove Pineda home and thus would have been privy to all the information directed at Pineda, namely that he was not threatened with termination, that a fourth worker had arrived, and that he would still be paid.

walkout had ceased and that Pineda and Figueroa were not fired but simply quit.

Based on the foregoing, it is clear that the ALJ committed reversible error in discrediting Olguin's testimony by finding Arvizu's corroborating testimony unreliable based on inadmissible evidence, and by incorrectly sustaining foundational objections which prevented Respondent from establishing his burden of proof under the Wright Line test. Accordingly, the Board should not adopt the ALJ's findings and should rule that Respondent did not discharge Pineda in retaliation for his engaging in concerted activity.<sup>36</sup>

**H. THE ALJ'S CREDIBILITY DETERMINATIONS SHOULD NOT BE ADOPTED BY THE BOARD BECAUSE THEY ARE NOT OBJECTIVE.**

The Board's policy with regard to an ALJ's credibility determinations is that they will not be overturned unless a preponderance of all the relevant evidence shows the Board that they are incorrect. *Jay Metals, Inc.*, 308 N.L.R.B. 40 (1992). Additionally, a reviewing court in proper cases may decline to follow the action of an examiner in crediting and discrediting testimony, even though the Board has adopted the examiner's findings. *Medline Industries, Inc. v. NLRB*, 593 F.2d 788 (7th Cir. 1979). This is particularly appropriate in cases where the bias or hostility of the ALJ towards the respondent affects the objectivity of those credibility determinations.<sup>37</sup>

In the present case, the ALJ's objectivity is in question. Based on the aforementioned instances in section E where the ALJ ignored material and uncontradicted testimony, drew inferences contrary to that evidence, and based credibility determinations on inadmissible evidence, the ALJ was also clearly hostile and biased towards the employer as evidenced by the numerous improper evidentiary rulings, advocating on behalf of the General Counsel, assisting General Counsel in responding to Respondent's arguments, and allowing General Counsel to introduce evidence of a witnesses immigration status but preventing

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<sup>36</sup> Pineda testified that he spoke to Olguin as he was arriving at his home. Figueroa drove Pineda thus she too would have learned that a fourth worker had arrived. TR 496:6-7.

<sup>37</sup> *Medline* is instructive for our purposes. In *Medline*, the Court refused to follow the ALJ's credibility determinations where the ALJ ignored clear and uncontradicted evidence, drew inferences contrary to the evidence, and the court perceived some hostility by the ALJ towards the employer, which may have affected the objectivity of his credibility determinations. *Medline*, 593 F.2d at 795.

Respondent from doing so. Based on the totality of these occurrences, the ALJ's credibility determinations were clearly not objective and should not be adopted by the Board.

First, as noted above, the ALJ allowed General Counsel to introduce inadmissible character evidence to impeach Jesus Arvizu's testimony. The ALJ discredited Arvizu's testimony on the basis of this inadmissible evidence and in doing so severely prejudiced Respondent's central defense against the charge that Respondent terminated Pineda and Figueroa for engaging in a concerted walkout. This constituted reversible error on the ALJ's part because it prejudiced Respondent's central defense on this issue, namely that a fourth worker had arrived and that Pineda was informed of his arrival.<sup>38</sup>

Second, the ALJ improperly overruled numerous hearsay objections from Respondent yet sustained General Counsel's hearsay objections under the same or similar circumstances. Hearsay, under the Federal Rules is a statement made by someone other than the declarant and is offered to prove the truth of the matter asserted. FED. R. EVID. 801. The Board has a two-part test concerning the admissibility of hearsay. The testimony must be rationally probative in force, and corroborated by more than the slightest amount of other evidence. *Dauman Pallet, Inc.*, 314 N.L.R.B. 105, 106 (1994).

During Pineda's testimony, General Counsel questioned Pineda on hearsay statements made to Pineda by Adrian Olguin. TR 360:25; 361:1-2. Respondent objected on hearsay grounds but was overruled. *Id.* In the instant case, Pineda's testimony would be inadmissible under the Federal Rules and the Board's two-part test. First, the statement was no doubt hearsay. Pineda was testifying about statements made to him by Adrian Olguin and the evidence was offered to prove that Adrian had refused to raise his pay. Second, the evidence was not corroborated by any other witness, including the charging parties. The ALJ, however, failed in assessing its admissibility under the Federal Rules and the Board's two-part test, namely that it was never corroborated. Accordingly, the ALJ erred in admitting this testimony and including it in the record.

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<sup>38</sup> Additionally, in allowing such evidence, the ALJ permitted General Counsel to admit evidence of Arvizu's immigration status, a line of questioning which the ALJ prohibited Respondent from asking Pineda. TR 764:8-20.

Later during Pineda's testimony, the ALJ again overruled Respondent's hearsay objection to Alan Pineda testifying about hearsay statements made to him. This time, Pineda was questioned about comments made to him by other coworkers. TR 364:2-13. Respondent again objected but was overruled. Specifically, General Counsel questioned Pineda about whether co-workers complained to him about smoke in the factory. *Id.* at 364:2-3. Pineda was allowed to testify over objection about the statements the unnamed co-workers made to him. These statements constitute additional hearsay which would be inadmissible under the Federal Rules of Evidence and also fail the Board's two-part test because they were uncorroborated. The ALJ, however, incorrectly overruled Respondent's objection and failed to strike the testimony from the record.<sup>39</sup>

When General Counsel objected to hearsay statements the ALJ sustained them, and in doing so, favored General Counsel over Respondent by not according Respondent the same treatment. During Jesus Olguin's testimony, Respondent questioned Jesus Olguin concerning statements made to him by his son Adrian Olguin. TR 819:8-15. General Counsel's hearsay evidence mirrored that which Respondent attempted to introduce, namely statements made to the witness by someone else. Yet the ALJ prevented Respondent from introducing such evidence but permitted General Counsel to do so.<sup>40</sup>

Perhaps the most notable instance of the ALJ favoring General Counsel occurred when Respondent attempted to question Yolanda Gonzalez about statements made to her by one of the charging parties. TR 664:4-12, 667:7-23. General Counsel objected, but incredibly, the ALJ sustained the objection before General Counsel could describe its objection. *Id.* Ins 7-12.<sup>41</sup> On this occasion, the

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<sup>39</sup> The ALJ also overruled another hearsay objection from Respondent, allowing General Counsel to introduce more hearsay evidence which there was no possibility of corroborating; mainly Pineda was allowed to testify again as to the statements made to him by a mass of unnamed co-workers. *Id.* Ins 15-25. The record is riddles with instances such as this, and for our purposes, it is not necessary to recite each individual occurrence, suffice to say that the ALJ did not once sustain a hearsay objection from Respondent.

<sup>40</sup> Olguin attempted to question Olguin about statements made to him by Adrian but was again prevented from doing so by the ALJ after sustaining another hearsay objection from General Counsel. TR 872:6-7. Respondent was also prevented from questioning Olguin as to statements Pineda made to him by phone after the alleged walk out. TR 827:1-8. General Counsel objected on hearsay grounds and the ALJ sustained that objection as well.

<sup>41</sup> Respondent attempted to question Gonzalez again about statements made to her by Figueroa, but was prevented from doing

ALJ was patently wrong. As Respondent argued, questioning Gonzalez about a statement made to her by one of the charging parties is not hearsay under the Federal Rules of Evidence and is admissible against that party to prove the truth of the matter asserted if, the party made the statement either in his individual or representative capacity. *Federal Rules of Evidence* 801(d)(2); see *US v. Taylor*, 656 F.2d 1326 (9th Cir. 1981) (statements made by a party which are offered against individual declarant not hearsay if statement is offered against party who made statement in either his individual or representative capacity). It is nonhearsay. *Id.*; see *US v. Phelps*, 572 F. Supp. 262 (E.D. Ky. 1983) (statement of party may be introduced as admission only when offered against that party).<sup>42</sup> General Counsel erroneously argued that Federal Rule 801(d) was inapplicable because it was not “established that there was an admission by the party opponent.” *Id.* at 667:18-21. Incredibly, the ALJ agreed and sustained the objection. There is no requirement that the statement be an “admission,” rather, it only need be a statement made by a party in their individual capacity and be offered against them. That is precisely what this testimony was.<sup>43</sup> This repeated pattern of abuse by the ALJ is emblematic of the hearing as a whole. The ALJ sustained nearly every one of General Counsel’s hearsay objections and overruled all of Respondent’s. Simply put, General Counsel was allowed to introduce hearsay but Respondent was not.

Fourth, in addition to allowing General Counsel to present numerous instances of uncorroborated hearsay, the ALJ also aided General Counsel in responding to a number of Respondent’s objections. During General Counsel’s questioning of Pineda, Respondent objected that General Counsel’s question was compound. The ALJ suggested that General Counsel break her question up into two. TR 377:3-9. Respondent also objected on grounds of vagueness and ambiguity. The ALJ advised General Counsel that she need only “add two words.” TR, p. 378, 8-9.

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so after the ALJ sustained General Counsel’s hearsay objection. *Id.* at 664:20-25; 665:1-9.

<sup>42</sup> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(2) An Opposing Party’s Statement. The statement is offered against an opposing party and:

(a) was made by the party in an individual or representative capacity;

(b) is one the party manifested that it adopted or believed to be true;

<sup>43</sup> The ALJ again sustained this erroneous objection later in Gonzalez’s testimony. TR 672:1-2.

The most egregious example of the ALJ's hostility towards Respondent occurs during Respondent's questioning of Jesus Olguin. Incredibly, the ALJ did not permit Olguin to testify about his own statements, sustaining General Counsel's foundational objection. TR 815:6-8. The ALJ continued to sustain General Counsel's foundational objections despite Respondent establishing the date, time, and place in which the conversation took place. *Id.* at 815:5-22; 816:1-5. Despite having earlier aided General Counsel in responding to Respondent's objections, the ALJ chastised counsel for Respondent stating "I cannot give you instructions, law school instructions on how to establish foundation to a question. . . . You need to figure it out yourself." TR 816:18-24.

This is the clearest indication of the ALJ's hostility. First, improperly sustaining a foundational objection where no foundation issue arose, chastising counsel, and continuing with her insistence that foundation had not been laid while clearly ignoring the foundational requirements. Under the Federal Rules of Evidence, a witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. FED. R. EVID. 602.<sup>44</sup> It goes without saying, that where a witness is able to testify about the date, time, place, substance of the conversation, person whom he was speaking to, and is able to recall such information with great clarity while presently on the stand, there is no foundational issue whatsoever. The ALJ, however, improperly sustained General Counsel's foundational objection and then chastised Respondent for taking exception to such a clearly incorrect ruling. What makes the conduct of the ALJ so egregious in this particular instance is not just her improper ruling, or her hostility towards Respondent, but the fact that this line of questioning was crucial to one of Respondent's central defenses. The ALJ's actions thus prejudiced Respondent's defense.

In isolation, many of these examples are not in and of themselves material, though some are

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<sup>44</sup> Rule 602 does not require that the witness' knowledge be positive or rise to level of absolute certainty. *M.B.A.F.B. Federal Credit Union, v. Cumis Ins. Soc.*, 681 F.2d 930 (4th Cir. 1982); *see also US v. Munoz Franco*, 487 F.3d 25 (1st Cir. 2007) (Bank's chief lending officer had personal knowledge to testify about Bank's improper loans based on office's first-hand knowledge of Bank's lending practices acquired while working there); *US v. Santa Cruz*, 352 F.3d 499 (1st Cir. 2003) (no foundational issue where officer testified about presence of drug point surveillance areas based on officer's knowledge of the area's history).

clearly prejudicial to Respondent's defenses, however, taken together, they are evidence of the ALJ's hostility, bias, and lack of objectivity. The entire proceeding was tainted with this hostility and bias as evidenced by the numerous incorrect evidentiary rulings and her allowance of General Counsel's hearsay evidence but complete prohibition of the like for Respondent, her allowance of immigration status evidence to impeach Respondent's witness but not General Counsel's. This hostility and bias no doubt affected her objectivity and resulted in her mischaracterization of witness testimony, drawing of inferences contrary to uncontradicted testimony, and her complete neglect of material uncontradicted testimony. Accordingly, the Board should not adopt her credibility determinations. Additionally, this violated Respondent's due process right to a fair proceeding. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).<sup>45</sup>

### **III. CONCLUSION**

For the reasons stated, the ALJ's appointment is invalid, the Board lacks the authority to hear and decide this matter, and the ALJ erred in its findings against Respondent. The Complaint should be dismissed in its entirety.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of March, 2013.

MUNGER CHADWICK, P.L.C.

/s/ John F. Munger

John F. Munger

David Ruiz

*Attorneys for Defendant*

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<sup>45</sup> Respondent's due process was also violated by General Counsel issuing and prosecuting a complaint without establishing jurisdiction, in violation of C.F.R sections 101.8 and 102.15. requiring that the facts in the complaint upon which jurisdiction is based be supported by sufficient factual and record evidence. Specifically because the economic data upon which jurisdiction was predicated was only received by General Counsel the day before the hearing, it is, therefore, impossible for them to have established jurisdiction at the time the complaint issued.

**CERTIFICATE OF SERVICE**

RE: MARIELA SOTO, an individual, AND, ANAHI FIGUEROA, an individual,  
*Plaintiffs*  
vs.  
DON CHAVAS, LLC d/b/a TORTILLAS DON CHAVAS, an Arizona limited  
liability company, *Defendant*  
CASE NO.: 28-CA-063550 / 28-CA-067394

I hereby certify that a copy of **DEFENDANT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the above referenced case was served VIA EMAIL or REGULAR MAIL on this 15th day of March, 2013, on the following:

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