UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES-SAN FRANCISCO

SFTC, LLC d/b/a SANTA FE TORTILLA COMPANY

and **Case 28-CA-087842**

YOLANDA GALAVIZ, an Individual

and **Case 28-CA-095332**

COMITÉ DE TRABAJADORES DE SANTA FE TORTILLA

ACTING GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

In the Summer of 2012, when seven employees of SFTC, LLC d/b/a Santa Fe Tortilla Company (Respondent) formed their own labor organization, El Comité De Trabajadores de Santa Fe Tortilla (the Committee or Union), and raised certain concerns about their working conditions, Respondent reacted swiftly, targeting the ringleaders and subjecting other Committee members to actions of coercion.[1] This reaction included terminating two Committee members, suspending one member, transferring two others – while reducing their work hours, and issuing disciplinary write-ups to another, all while creating an unlawful and coercive work environment that included interrogating employees, soliciting employee complaints and grievances, promising increased benefits such as increased pay and promising to help employees if they refrained from

[1] Citations to the transcripts will be denoted by "Tr." with the appropriate page number. Citations to the Exhibits of the Acting General Counsel (General Counsel), and Respondent's Exhibits will be denoted by "GC." and "R." respectively. All dates in are in 2012 unless otherwise noted.

engaging in Committee activities, threatening employees with discharge, unspecified reprisals and lawsuits because they engaged in Committee activities, informing employees that it would be futile for them to select the Committee as their bargaining representative, promulgating an overly-broad and discriminatory work rule prohibiting its employees from assisting other employees who engaged in Committee and other concerted activities, and creating an impression among its employees that their Committee and other concerted activities were under surveillance.

Respondent's actions culminated with the discharge of two key Committee employee members, Yolanda Galaviz (Galaviz) and Delfina Bruno (Bruno) because of their Committee activities, all to send a message to other employees that they would suffer a similar fate if they dared to express an interest in engaging in Committee activities and other concerted activities.

II. ISSUES PRESENTED

A. Whether the Comité de Trabajadores de Santa Fe Tortilla" [the Committee of the Workers of Santa Fe Tortilla] is a labor organization within the meaning of Section 2(5) of the Act.

B. Whether Respondent committed multiple 8(a)(1) violations in reaction to the attempts of its employees to organize.

C. Whether Respondent violated Section 8(a)(1) and (3) by transferring Lilian Lopez and Yolanda Rivera to the corn-tortilla line.

D. Whether Respondent violated Section 8(a)(1) and (3) by reducing the work hours of Lilian Lopez and Yolanda Rivera.

E. Whether Respondent violated Section 8(a)(1) and (3) by discharging Yolanda Galaviz and Delfina Bruno.

F. Whether Respondent violated Section 8(a)(1) and (3) by issuing a written warning to Yolanda Rivera.

G. Whether Respondent violated Section 8(a)(1) and (3) by suspending Jose Saldana in August and December 2012.

H. Whether Respondent violated Section 8(a)(1) and (3) by suspending Jose Saldana in October 2012.

III. BACKGROUND

A. Respondent's Operations

SFTC, LLC d/b/a Santa Fe Tortilla Company operates a tortilla factory in Santa Fe, Mexico. Respondent's President is Kenny Kalfin (Kalfin). Overseeing the day-to-day operations of the factory is Plant Manager Gustavo Terrones (Terrones), who is assisted by Assistant Plant Manager Alfredo Jasso (Jasso). Helping Terrones and Jasso with the supervision of the plant are Supervisors Mariela Campos (Campos) and Arlette de la Mora (Mora). Respondent operates its tortilla factory twenty four hours a day, generally Monday through Friday. (Tr. 212 - 213)

B. The Comite de Trabajadores de Santa Fe Tortilla [the Committee] and its efforts to organize the workplace

In early August, tortilla workers, Juan Lopez and Jesus Saldana (Saldana), and Gustavo Abel Lopez visited their co-worker Delfina Bruno (Bruno), telling her she had the right to organize, asked if she wanted to be part of a workers' committee, and invited her to meet with other workers of the factory at a local community center, Somos Un Pueblo Unido (worker's center). (Tr. 424, 570 – 571, 604 - 605) Saldana and Juan Lopez invited other workers to meet at the workers center to discuss the problems they were experiencing in the factory, with the intent of organizing all the workers of the factory. (Tr. 313, 472, 569 -570, 604) On August 6, Yolanda Galaviz, Delfina Bruno, Lilian Lopez, Juan Lopez, Yolanda Rivera, Saldana and Gustavo Abel Lopez met at the worker's center, and discussed several issues they were experiencing at work, including the velocity machinery that operated on the production lines and the physical injuries they suffered at work. (Tr. 314 – 316, 425, 525, 571, 604, 605 - 606) They

also complained about the hostility they were experiencing at the hands of Supervisors Mora and Campos. and asking the company for a pay raise. (Tr. 472, 314 -315). The workers wanted a collective voice in the workplace to defend the rights of the tortilla workers; Yolanda Galaviz and Delfina Bruno believed in strength in numbers, so if they had a large group of workers they would have a more powerful voice at work. (Tr. 321, 427) The employees decided to form a "workers' committee" which they named "Comité de Trabajadores de Santa Fe Tortilla" [the Committee of the Workers of Santa Fe Tortilla] (the Committee) for the purpose of trying to improve their working conditions with Respondent. (Tr. 470, 472, 473, 315 – 316, 427, 525, 605 - 606)

On August 7, the Committee met at the worker's center and outlined what the Committee would address in writing a letter to the company and the goals of the Committee, which Yolanda Rivera documented on a sheet of paper. (Tr. 473 – 476;GC 16) Rivera wrote down that the Committee would address with the company that they wanted better treatment, that they were not satisfied with the supervisors, that they would discuss the speed of the machines, ask for more staffing at the production line, and the preferential treatment in the workplace, which they believe to be unfair. (Tr. 477; GC 16) The members shared with each other the complaints they while working in the factory, voted on the complaints they would include in a letter they drafted to Kalfin. (Tr. 427 – 429, 473 – 476, 317 – 319, 526 – 527, 606 - 607) The letter was created in Spanish and reviewed by the members before translating it to English to deliver to the company. (Tr. 317 – 318, GC 14) The members signed the August 7 letter, revealing to the company that they were activists and leaders of the Committee, noting that the "workers of Santa Fe Tortilla have decided to form a workers committee" and through the letter were "informing [Kalfin] of

some of the concerns [the Committee members] were having with [their] working conditions." (GC 2)

After delivery the first letter to President Kalfin, Galaviz was determined to increase the size to the Committee and began to soliciting her co-workers for signatures on a Committee membership petition she created. (Tr. 322, 320 – 324, 328 - 331; GC 11) Galaviz showed her co-workers the Committee membership petition and explained to her co-workers that the Committee would have a stronger voice if it were larger. (Tr. 321; GC 11) Galaviz's organizing efforts caught Terrones attention, and at hearing, acknowledged he knew that Galaviz was involving other workers to ask for a pay raise. (Tr. 193, 339 - 340) After Terrones fired Galaviz and Bruno, the Committee continued to meet, and represent the grievances of its members to the company in the letters drafted during its meetings. (Tr. 496 – 497, 434 -437, 621 - 622; GC 5, 6, 7) Juan Lopez, Saldana, and Rivera continued to invite their co-workers to the Committee meetings, in an effort to increase the size of the Committee. (Tr. 497, 580; GC 7)

C. The Committee represents the grievance of its members in letters to Kalfin and requests meeting with him to deal with the concerns of the Committee

On August 8, Galaviz and Juan Lopez personally hand-delivered the Committee's August 7 letter to Kalfin. In the letter, the employees announced their decision "to form a workers committee. . . . known as Comite De Trabajadores de Santa Fe Tortilla (CTSFT)." (Tr. 320, 573; GC. 2) The Committee highlighted in the letter that "[b]y way of this letter we would like to inform you of some concerns we have with our working conditions" and requested a meeting with Kalfin to discuss those concerns. Specifically, the Committee voiced their concerns about the unsafe equipment at the factory, noting that they "never received training in how to handle the [tortilla] machines, yet [were] pressured to use them, exposing [themselves] to accidents", and asked Kalfin to repair the machines to prevent future accidents that Bruno and Rivera had

previously experienced while operating the machinery. In addition to describing their various workplace complaints and concerns, the Committee asked that employees be given a raise. (GC. 2)

President Kalfin and Plant Manager Terrones testified they did not believe in meeting with groups of employees. (Tr. 65 – 66, 152 - 153) Consistent with their philosophy against , they divided up the Committee as a means to diminish it. Immediately after receiving the initial letter, Respondent started calling the Committee members into individual meetings to interrogate them about the Committee, and the accusations that were set forth in the letter. Even though they were being subjected to these interrogations, the Committee continued to meet and send letters to Respondent that expressed concerns about their working conditions, insisting to meet with President Kalfin, rather than Plant Manager Terrones. (GC 4, 5, 6, 7, 14)

On August 15, the members of the Committee signed another letter addressed to Kalfin, which Rivera and Bruno hand-delivered to Kalfin's office the next day. (Tr. 436;GC 4) The Committee stated in this letter that "once again the members of the [Committee] want to manifest [their] concerns about the treatment [they] receive at work." (GC. 4) The Committee members also asserted in the letter they felt intimidated when Terrones called them into his office one by one and further protested the work hour assignments they had been receiving.

The Committee wrote other letters to Respondent on August 21, October 8, and December 3, respectively, asking for a meeting with Kalfin, and setting forth their workplace complaints. (Tr. 349 – 350, 441 – 443; 579 -580, 613, 621 - 622; GC 5, 6, 7, 14) Despite multiple requests, Kalfin never met with the Committee members as requested, which resonated with his belief that his employees are "not hired as a group, and when they have concerns, we address them individually." (Tr. 66) Instead of a meeting with Kalfin to discuss their working

conditions, the nascent Committee and its members were met with threats, interrogation, suspensions, and discharges.

The day after Galaviz handed Terrones the August 15 letter, and Bruno handed the August 15 letter to Kalfin, Respondent fired them, claiming that both were guilty of misconduct while soliciting employees to join the Committee and asking their co-workers to sign the Committee's activities. (Tr. 342, 436, 437, 439; GC 4) Soon after, Respondent transferred two other Committee members, Yolanda Rivera and Lilian Lopez, to another department, and reduced their work hours. Respondent also suspended Committee member, Jesus Saldana, when it required him to bring a doctor's note documenting his medical issues before allowing him to return to work, notwithstanding the fact Respondent know about his medical issues months earlier.

IV. ANALYSIS

A. Respondent's Noel Canning Argument Should be Dismissed

Citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), SFTC incorrectly asserts that the President's current two recess appointments to the Board (Members Block and Griffin) are invalid, and therefore that the Regional Director—a Board "agent[ ] or delegate"—lacks the authority to issue this complaint. (Aff. Defense # 1) As an initial matter, the authority to issue complaint lies with the General Counsel—an independent officer appointed by the President and confirmed by the Senate to whom staffs engaged in prosecution and enforcement are directly accountable. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987) ("*UFCW*"); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010). Thus, Regional Directors, who are members of the General Counsel's staffs engaged in prosecution or enforcement, derive their authority to issue complaints from the authority of the General

Counsel. *See United Elec. Contractors Ass'n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965) ("[t]he General Counsel has delegated authority to the Regional Directors for issuing [ ] complaints.").

Moreover, the authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any "power delegated" by the Board, but rather directly from the text of the NLRA. Section 3(d) of the NLRA states, among other things, that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d) (2011). In enacting this provision, "Congress intended to create an officer independent of the Board to handle prosecutions, not merely the filing of complaints." *UFCW*, 484 U.S. at 127. It does not detract from the General Counsel's independence that Congress included in Section 3(d) language "on behalf of the Board" to make it clear that the General Counsel acts within the agency. As the Supreme Court has found, the legislative history of the NLRA shows that the acts of the General Counsel were not to be considered acts of the Board. *UFCW*, 484 U.S. at 128-129.

In addition, to the extent SFTC "reserves the right at all stages of the proceeding to challenge the authority of the Board, its agents, or delegates to act in the absence of a lawfully constituted quorum," the Board has publicly stated that it disagrees with the D.C. Circuit's *Noel Canning* decision, and on March 12, 2013, the Board announced that it, in consultation with the Department of Justice, intends to file a petition for certiorari with the United States Supreme Court seeking review of the D.C. Circuit's decision. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential

appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until such time as it is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act."

B. The Committee is a Labor Organization Within the Meaning of Section 2(5) of the National Labor Relations Act.

Participation in a "labor organization" is normally thought to involve unions, but it encompasses broader rights than simply participating in an already established labor union. Section 2(5) of the Act defines labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5). Accordingly, a labor organization as defined by Section 2(5) encompasses worker "action committees" which are free to act independently of employers and represent employee interests. *Electromation, Inc.*, 309 NLRB 990, 994, 997 (1992), enf'd 35 F.3d 1148 (7th Cir. 1994) (finding an action committee was a labor organization where it was formed in response to employee disaffection to the employer's changes in employment conditions, for the purpose of meeting with the employer to address those conditions); *National Packing Co. v. NLRB*, 377 F.2d 800, 803 (10th Cir. 1967) (employee committees were Section 2(5) labor organizations although lacking "the organic structure of a typical labor union," where they "were a group which acted in unison to obtain mutual objectives by combined efforts"); *Sahara Datsun, Inc. v.*

NLRB, 811 F.2d 1317, 1320 (9th Cir. 1987) (fledgling independent organization was a Section 2(5) labor organization, despite its "lack of organization, history and financial support"). It is illegal to discriminate against employees for their participation in a workers' committee. See *Polynesian Cultural Center*, 222 NLRB 1192, 1193, 1198 (1976) (employer violated Section 8(a)(3) for discharging employees because of their participation in the Polynesian Cultural Center Workers Association and its predecessors including the Fijian Workers Negotiating Committee, all of which were found to be labor organizations under Section 2(5) of the Act) enf'd. in pertinent part 582 F.2d 467 (9th Cir. 1978).

A prospective labor organization meets the Board's statutory requirements if: (1) employees participate; (2) the organization exits, at least in part, for the purpose of 'dealing with' employers, and (3) these dealings concern 'conditions of work' or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment." *Electromation, Inc.*, 309 NLRB at 994. If the organization has a purpose of representing employees and meets each of the statutory criteria, then it qualifies as a labor organization "even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues." Id.

Here, the evidence shows that the Committee is a labor organization within the meaning of Section 2(5) the Act. The Committee was formed by employees for the specific purpose of improving their working conditions in Respondent's factory. Even Respondent, during its opening statement at the hearing, admitted that the Committee "was formed to address the concerns of certain employees in the workplace." (Tr. 13) Since its inception on August 7, the Committee has dealt with Respondent regarding work hour assignments, factory equipment safety issues, employee wages, and the firing of Bruno and Galaviz, by submitting the

Committee letters to Respondent and asking for meetings with Respondent's president. (GC. 2-7) The Committee also dealt with Respondent when its various members discussed their workplace concerns with Terrones, and Terrones responded by telling them he was present to deal with the problems they presented in the various Committee letters.

Despite the Committee lacking the experience of a formal labor union, there is overwhelming evidence to establish the employees formed the Committee to ask for higher wages, a change to their work hours, and improvement to the machinery they operated in the tortilla factory. See e.g., *National Packing Co. v. NLRB*, 377 F2d 800, 803 (10th Cir. 1967) (employee committees were Section 2(5) labor organizations although lacking "the organic structure of a typical labor union," where they "were a group which acted in unison to obtain mutual objectives by combined efforts"); *Sahara Datsun, Inc., v. NLRB*, 811 F.2d 1317, 1320 (9th Cir. 1987) (fledging independent organization was a Section 2(5) labor organization, despite its "lack of organization, history and financial support). Based on the foregoing evidence, the General Counsel submits that the Committee is a labor organization as defined by Section 2(5) of the Act.

C. Respondent Committed Multiple Violations of Section 8(a)(1) in Reaction to the Attempts of its Employees to Organize

Section 7 of the Act enshrines the rights of employees to self-organize, form, joint, or assist a labor organization, bargain collectively, and to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. The term "concerted activity," while not defined in the Act, "embraces the activities of employees who have joined together in order to achieve common goals." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830-31 (1984). It also embraces the actions of the "lone employee" who intends to induce group action, or who acts as a representative of at least one other employee. Id.

at 831. By enacting Section 7 of the Act, "Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." Id. at 1513. As such, pursuant to Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. § 158.

"The test for violations of section 8(a)(1) is not whether an attempt at coercion has succeeded or failed, but 'whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of their section 7 rights.'" *Presbyterian/St. Luke's Medical Center v. NLRB,* 723 F.2d 1468, 1472 (10th Cir. 1983) quoting *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 689 (7th Cir.1982). An employer's good faith, or lack of unlawful motive, is not a defense to a Section 8(a)(1) violation. *National Cash Register Co., v. NLRB,* 466 F.2d 945, 963 (6th Cir. 1972); *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (under objective test, employer's motivation for the statement or the act is irrelevant, as is whether or not a particular employee was actually coerced or considered himself to be coerced).

Types of statements or conduct by an employer that independently violate Section 8(a)(1) include the: interrogation of employees engaged in protected activities; the surveillance of protected employee concerted; directing employees to spy on their coworkers' protected conduct; granting benefits to discourage protected activities; soliciting employee grievances and implying they will be remedied, and promulgating and/or maintaining rules restricting protected

activity.[2] The Board considers the totality of the circumstances when determining whether these types of statements or conduct violate the Act.[3]

1. Facts Surrounding the Individual Allegations

a. Kalfin instructs Terrones and Jasso to meet with the Committee members.

On August 8, after President Kalfin received the Committee's initial letter, he distributed a copy of it to his management team. (Tr. 217) He then instructed Plant Manager Terrones and Assistant Plant Manager Jasso to meet with every employee that signed the August 7 Committee letter so Respondent could understand what concerns the employees had so Respondent could remedy them. (Tr. 37-41) Although the Committee had asked to meet with Kalfin as a group, Kalfin instructed Terrones to meet with each Committee member individually because he did not "believe in" group meetings and because he wanted to separate the Committee members, and have Terrones find out each employee's personal concern. (Tr. 65) Kalfin believed that since each Committee member was hired individually, and not as a group, Respondent should "talk to them individually and address their individual concerns." (Tr. 66)

Terrones complied with Kalfin's directive, and immediately set up individual meetings with the employees who signed the August 7 letter. (Tr. 115-16, 119) These meetings took place in Terrones' office, which is located on the second floor of the tortilla factory. (Tr. 120) When the employees arrived for their individual meetings, Terrones and Jasso were present to

[2] *See, e g ,Republic Aviation v. NLRB*, 324 U.S. 793, 803 (1945) (finding overly-broad rules to be "an unreasonable impediment to self-organization"); *NLRB v. Randall P. Kane, Inc.*, 581 F.2d 215, 218 (9th Cir. 1978) ("[t]hreats, intimidation, interrogation, and surveillance of union sympathizers demonstrate the clearest form of conduct in violation of [Section] 8(a)(1)"); *Center Service System Division*, 345 NLRB 729, 730 (2005), enfd. in relevant part, 482 F.3d 425 (6th Cir. 2007) (solicitation of grievances influences employee choice during an organizational campaign because it raises inferences that the employer is promising to remedy those grievances); *Lundy Packing Co.*, 223 NLRB 139, 147 (1976), enforced in relevant part, 549 F.2d 300 (4th Cir. 1977) (surveillance or the impression of surveillance inhibits employees' lawful participation in activities by highlighting "that the employer is anxious to find out about union activity which the employees wish to conceal from him to avoid retaliation").

[3] *See Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991).

meet with them. (Tr. 120, 146, 149, 156, 189, 200, 334) Terrones made sure the door was closed for each meeting because he didn't want other employees, particularly the secretaries outside his office, to hear what the Committee members were complaining about. (Tr. 200-01) During all of these meetings Terrones was either holding the August 7 Committee letter in his hands, or had it on the top of the desk. (Tr. 162)

b. Meeting with Jesus Saldana [Complaint ¶ 5(b) and (c)].

On about August 8, employee Jesus Saldana was working the production line, when Supervisor Campos told him the company needed to speak with him in the office. (Tr. 608?) Saldana stopped working and went to Terrones' office; in the office were Terrones and Jasso, and Terrones was holding a Committee letter in his hand. (Tr. 608) Terrones then asked Saldana if he had signed the letter, and Saldana admitted that he had done so. (Tr. 608) Terrones told Saldana that he wanted to speak with him about the letter, but Saldana said "no," that he wanted the entire Committee present. (Tr. 608-09) Terrones said "okay," but then said that they could talk about work, and asked Saldana why he had signed the letter. (Tr. 609) Saldana replied that he had his reasons, and Terrones asked him what he wanted. (Tr. 609) Saldana said that he didn't want any changes for himself personally, but wanted changes for everyone in the plant. (Tr. 609) Terrones responded by saying there were going to be changes. (Tr. 609)

During the meeting, Terrones also told Saldana that what had been written in the letter were lies, and that Saldana was going to find himself in trouble for creating a letter that wasn't true. (Tr. 609) Discussion then ensued about Saldana's medical condition, with Terrones telling Saldana that he could get fired because he didn't have a doctor's note. (Tr. 610) Saldana told Terrones that he could fire him then, but Terrones backed off of his comment, saying that he

wasn't going to fire him, and that he still had his job. (Tr. 610, 661) Terrones then told Saldana that, of anybody at the plant, he never expected that Saldana would "do that," saying that Saldana had betrayed his trust. (Tr. 610) During the meeting Jasso told Saldana that he, too, was seeing things in the plant he didn't like, and that there were things he also wanted changed. (Tr. 610) The meeting ended with Terrones and Jasso both telling Saldana they were going to make changes. (Tr. 611) Then, for the first time, Terrones asked Saldana to provide him with a doctor's note that set forth his work restrictions. (Tr. 663)

c. Meeting with Juan Lopez [Complaint ¶ 5(d) (e)].

Juan Lopez was summoned into his meeting with Terrones by Supervisor Mora. When Juan arrived at the office, Terrones and Jasso were waiting, and Terrones was holding the August 7 Committee letter in his hand. (Tr. 574) Terrones started the meeting by asking Juan why he had signed the Committee letter. (Tr. 574-75) Terrones told Juan that everything in the letter was a lie, including the statements about Saldana. (Tr. 575-76) Juan replied that everything in the letter was true, as each person had written their testimony according to what experience they had lived. (Tr. 575) Terrones asked Juan if he had ever been mistreated by a supervisor, and Juan complained about Supervisor Campos; Terrones said that he would look into those concerns. (Tr. 585) At some point, Juan said that if they wanted to continue talking to him he wanted the Committee and Kalfin to be present. (Tr. 586-87) Terrones told Juan that his request was never going to be possible – and that was the reason he (Terrones) was there. (Tr. 587) Terrones told Juan to stop sending letters, and then Jasso told him that his participation in the Committee would create a hostile work environment. (Tr. 587-88) Towards the end of the meeting Jasso told Saldana that what he was saying was a lie, that Juan couldn't say anything

unless he was absolutely sure it was true, and that if it wasn't true, he (Jasso) could take Juan to court. (576, 586)

d. Meeting with Delfina Bruno [Complaint ¶ 5(f)]

On about August 9, Delfina Bruno was working at her station when Supervisor Mora approached and told her that Terrones wanted to meet with her. (Tr. 431) Terrones and Jasso were present in the office when Bruno arrived, and Terrones had the August 7 Committee letter with him. At the start of the meeting, Terrones told Bruno that the purpose of the meeting was to discuss the complaints and concerns she had about the working conditions at the plant. (Tr. 435) This was the first time that Bruno had ever been called into a meeting with Terrones to discuss her working conditions or problems at work. (Tr. 435, 466)

During the meeting, Terrones asked Bruno if she believed what was written in the Committee letter was true, and Bruno said "yes." (Tr. 432) Terrones then asked her if she believed what the letter said about Saldana was true, and Bruno again answered "yes."[4] (Tr. 432) Terrones then asked Bruno if she knew whether Saldana had anything in writing confirming that he was ill; Bruno answered "no," but said she believed it was true. (Tr. 432, 456) Bruno told Terrones that Respondent showed favoritism to employees and as an example stated that Saldana was not allowed to have a water bottle at work, while another employee was allowed to have one. (Tr. 455) Terrones said he would investigate the matter. (Tr. 455) Terrones then told Bruno not to put her "hand in the fire" because nobody will put their hand in the fire for her. (Tr. 432-33)

[4] In the letter, the Committee complained that, since the time Terrones had learned of Saldana's health problems, Saldana was being forced to work in cold conditions, and in the "most difficult work positions." The Committee also complained that Saldana was not allowed to bring his own water bottle to work, while other employees were allowed to. (GC. 2) refused

At some point during the meeting, Terrones asked Bruno about the occasion when she hurt her finger, which was raised in the Committee letter as an example of employees not receiving proper training, and they discussed the problems occurring on the production floor that Bruno believed were not "right." (Tr. 433; GC 2) One example Bruno provided was when Supervisor Campos talked about an employee's "private parts"; Terrones replied that he would launch an investigation into the matter. (Tr. 434) Terrones also told Bruno that, by the following Monday there were going to be changes, and he was going to try and fix the problems.[5] (Tr. 434) Terrones then stated to Bruno "don't you think that creating a Committee" at work was going to make the work environment hostile. (Tr. 435) Bruno replied "perhaps yes," but that the workers were tired and there didn't appear to be any other solution to their problems. (Tr. 435) Towards the end of the meeting, Terrones asked Bruno whether she wanted to continue training be a supervisor – which would have been a promotion. (Tr. 457-58, 466) Bruno had earlier stopped her supervisory training in July 2012. (Tr. 457)

e. Meeting with Yolanda Galaviz [Complaint ¶ 5(g)]

On about August 10, Yolanda Galaviz was called into her meeting with Terrones. (Tr. 333) Present were Terrones and Jasso; Terrones told Galaviz to sit down because he was going to give her the meeting that the Committee had requested. (Tr. 334, 360, 378) Galaviz replied that, if this was the purpose of the meeting, she needed to have all of her coworkers present – the entire Committee. (Tr. 334, 378-79) Terrones told her that a meeting with the entire Committee was not going to happen. (Tr. 334, 379) Terrones showed Galaviz the August 7 Committee letter, and told her that "it never should have come to this." (Tr. 334, 379) He told Galaviz, "you know you signed for everyone," and further said that if Galaviz got into any problems,

[5] Bruno testified that, during this meeting Terrones also invited her to work in the corn department with him. (Tr. 435)

nobody would give her any help. (Tr. 334, 379) At some point Terrones asked Galaviz why she signed the Committee letter; Galaviz replied that she had complaints and nobody was paying any attention to them. (Tr. 335)

Terrones then told Galaviz that he knew Saldana was the one who wrote the August 7 Committee letter. (Tr. 336, 367) Referring the letter, Terrones asked Galaviz when he had ever mistreated her. (Tr. 336) Galaviz replied that, it wasn't Terrones who was mistreating her, but it was the other supervisors – Campos and Mora. (Tr. 336) Terrones asked her if it was true, that these two supervisors would call her "old" and a "heavy headed donkey," as noted in the Committee letter. (Tr. 336; GC. 2) Galaviz confirmed that they had been insulting her, along with the other workers, for some time. (Tr. 380-81) She told Terrones about the other employees they were mistreating, and Terrones said he wasn't aware of this but he would address her concerns. (Tr. 366) They then discussed Galaviz' wages, and Terrones told Galaviz that he would talk to Kalfin to see if Galaviz could get a raise. (Tr. 337, 364) Terrones also told Galaviz that there would be changes coming, and asked her if she had seen any changes.[6] (Tr. 338)

During the meeting, Terrones told Galaviz that he knew she was going around gathering signatures in order to get him fired, because somebody had told him this. (Tr. 339) Galaviz denied the accusation, requesting Terrones bring that person forward because it was untrue. (Tr. 339, 381) In her defense, Galaviz took the petition out of her pocket and showed it to Terrones. (Tr. 339; GC. 11) Terrones took the petition from Galaviz and read it out loud. (Tr. 340) The Spanish language petition contained signatures from Galaviz, and four other employees, one of whom later scratched their name out; Galaviz solicited all the signatures. (Tr. 326, 373) In the

[6] Galaviz also told Terrones about her concerns regarding the scheduling of lunch breaks, which Terrones said he would look into it. (Tr. 364)

petition, Galaviz stated that she was part of a group looking for respect and a higher salary, and asked workers for their signature to show their support. (GC. 11) The meeting ended with Terrones promising that things were going to change, and telling Galaviz that, if she had any complaints to go to his office, as his door was always open. (Tr. 337, 381, 383) After that day, Galaviz never took the Committee petition to work again. (Tr. 340)

f. Meeting with Yolanda Rivera [Complaint ¶ 5(h)]

A few days after the August 7 Committee letter, Yolanda Rivera was working on the flour line when she was summoned to Terrones' office by Supervisor Campos. (Tr. 479) This was the first time Rivera had ever been summoned to a meeting to discuss her problems at work. (Tr. 498) During the meeting, Terrones told Rivera that he wanted to speak with her about the August 7 Committee letter. Rivera said that she couldn't talk unless the entire Committee was present, along with Kalfin. (Tr. 480) Terrones told Rivera that she had to explain to him why the Committee had written the letter; he also told her that what was written in the Committee letter was a lie. (Tr. 480) Rivera replied that it was not a lie, because every day on the production line the workers lived with all the mistreatment outlined in the letter. (Tr. 481) Terrones asked Rivera to explain to him what was going on at work, and Rivera told him about the way Supervisor Campos mistreated workers by yelling at them and telling them that they were donkeys and were ignorant, and not letting them go to the bathroom. (Tr. 481-82) Rivera also explained to Terrones that Campos was asking workers inappropriate questions, like asking an employee named Saul whether he "had a big one or if he had a small one." (Tr. 481) Terrones replied that he was only learning about these things for the first time. (Tr. 481)

g. Meeting with Lilian Lopez [Complaint ¶ 5(i)]

On about August 9, Lilian Lopez was packing tortillas when she was summoned to her meeting with Terrones. (Tr. 528) Present in the office was Terrones and Jasso. (Tr. 528) Terrones asked Lilian why she had signed the Committee letter. (Tr. 529) Lilian replied that she had signed the letter because Terrones had discriminated against her by making disparaging and negative remarks about her physical appearance. (Tr. 529, 557) Terrones told Lilian that she could leave the office and the meeting ended. (Tr. 530)

h. Meeting with Gustavo Abel Lopez

Gustavo Abel Lopez was called as a witness by Respondent, to support its defenses to the various unfair labor practice allegations. As such, his testimony sheds light on what Terrones was saying to employees during the individual employee meetings.

Terrones met with Abel Lopez one or two days after Respondent received the August 7 Committee letter in Terrones' office, with Jasso also present. (Tr. 146) Abel Lopez testified that in his meeting Terrones showed him the August 7 Committee letter and asked him if he had signed the letter. (Tr. 704) Terrones told Abel Lopez, who was a new employee, that he was getting himself into problems by joining the Committee and making accusations against Terrones. (Tr. 704) Shortly after the meeting with Terrones, Abel Lopez informed Saldana that he didn't want to be part of the Committee anymore because it would cause him problems; Abel Lopez never met with the Committee after that day. (Tr. 704-05)

i. The Testimony of Terrones and Jasso about the individual meetings.

Both Terrones and Jasso gave varying and conflicting testimony about what occurred during the individual meetings with signers of the August 7 Committee letters. Regarding their credibility about what was said during these meetings, other than the admissions made by Terrones and Jasso during their testimony, the ALJ should credit the testimony of the individual

employee witnesses over the testimony of Terrones and Jasso as to what occurred. This is particularly true with respect to the testimony of Lilian Lopez, Jesus Saldana, and Yolanda Rivera, as they were still employed by Respondent when they testified at the hearing. *Advocate South Suburban Hospital*, 346 NLRB 209, 209 fn. 1 (2006) citing *Flexsteel Industries*, 316 NLRB 745 (1995) (the testimony of current testimony of current employees which contradicts testimony of their supervisors is likely to be particularly reliable because these witnesses are testifying against their pecuniary interests).

As with the entirety of his testimony, Terrones was generally elusive, evasive, or nonresponsive in his answers to the General Counsel's questions as to what occurred during these one-on-one meetings with the Committee members. For example, the words "I don't recall" appear 118 times during Terrones' testimony, and the words "I don't remember" appear 27 times. (Tr. 105-205; 718-813) In fact, when asked what he said during one of the meetings, Terrones asked rhetorically, "[i]f I don't recall the words I said yesterday, I don't believe I am going to recall the words I said seven or eight months ago. (Tr. 124-25)

As for Jasso, it was clear he knew that he was expected to give certain answers supporting Respondent's position, regardless of the questions posed. For example, when asked about the meeting in Terrones' office with Abel Lopez, Jasso testified that the purpose of the meeting was because Abel Lopez "wanted to say that . . . his name was put on a piece of paper that he never signed." (Tr. 225) He then conveniently could not remember what was said during the meeting, except that Abel Lopez's name was "one a piece of paper that he never wrote on there." (Tr. 225) Incredibly, Jasso then claims that Terrones told Abel Lopez that employees had the right to form a committee, and to send letters. (Tr. 233-34) Unfortunately for Jasso, this version conflicts with the testimony of both the testimony of Terrones and Abel Lopez.

Abel Lopez, Respondent's witness, testified that he had never seen the letter until Terrones showed it to him in the meeting. (Tr. 703-04) Thus, the purpose of the meeting could not have been because Abel Lopez wanted to say that he never signed the letter – as he testified that he had never previously seen the letter. Instead, since Terrones admitted that he asked Abel Lopez about his concerns at work, and if anyone had mistreated him. (Tr. 147) It is clear that the purpose of this meeting was the same as the purpose of the other meetings, to discuss with employees their complaints and concerns about their working conditions. Clearly Jasso knew the importance of the alleged forged signature to Respondent's case, and was tailoring his testimony accordingly.

Jasso being concerned about saying anything during his testimony that could hurt Respondent's case is further shown by his testimony that, during the meeting with Abel Lopez, Terrones never asked Abel Lopez if he had been mistreated, and that Abel Lopez never said anything about Supervisor Campos. (Tr. 228) Of course, Terrones testified otherwise. (Tr. 228) Tellingly, the words "I don't remember" appear fifty times during Jasso's testimony; as such, Jasso should not be credited when his testimony conflicts with the testimony of the employee witnesses. (Tr. 210-294)

As for the admissions, both Terrones and Jasso made several admissions worth noting. First, Terrones admitted that he thought the accusations made in the August 7 Committee letter about him were lies. (Tr. 121) With respect to the Committee's request to meet with Kalfin, Terrones admitted telling several employees, including Juan Lopez and Saldana, that Respondent resolved its problems by talking to employees individually and not in groups. (Tr. 123, 152) Terrones admits asking various employees what their complaints and concerns were, and asking "every employee" he spoke to what kind of changes they wanted. (Tr. 129, 161, 154, 157) He

also admits that the reason for the one-on-one meetings was to find out what concerns employees were having. (Tr. 161)

Terrones admits telling Bruno there would be changes at the factory, asking her if she noticed that the tortilla machine was running a little slower, and further asking Bruno if she wanted to continue training to become a supervisor. (Tr. 165) He similarly admitted to telling Rivera that he would try to improve the conditions at the factory, after first asking her how Respondent could help her, and then inquiring as to why she had not previously come to him about her problems that were stated in the Committee letter. (Tr. 157-59)

Regarding Saldana, both Terrones and Jasso testified that Terrones told Saldana he was surprised Saldana would make accusations against him, because Terrones had always treated Saldana very well.[7] (Tr. 121, 236, 240) Jasso also admitted that Terrones asked Juan Lopez what his concerns were, how he could help him, and told him that he was there to solve the problems and correct whatever issues he had. (Tr. 229-33) Jasso also testified that Terrones made similar statements to Lilian Lopez, Rivera, and Bruno. (Tr. 270, 282, 283) As for Bruno, Jasso confirmed that Terrones asked her if she wanted to be trained to be a supervisor (Tr. 271-72).

2. Analysis of the 8(a)(1) Allegations

a. Respondent's Unlawful Interrogation

The evidence shows that Respondent violated Section 8(a)(1) by interrogating employees on multiple occasions. In determining whether an unlawful interrogation occurred, the Board considers "whether under all the circumstances the interrogation reasonably tends to restrain,

[7] Terrones also admitted telling Saldana that Respondent would make an effort to address the complaints in the Committee letter. (Tr. 130)

coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177-1178, 1178 fn. 20 (1984), citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). Relevant factors include: (1) the background, i.e. is there a history of employer hostility and discrimination; (2) the nature of the information sought -- did the interrogator appear to be seeking information on which to base taking action against individual employees; (3) the identity of the questioner, i.e. how high was he in the company hierarchy; (4) the place and method of interrogation, e.g. was employee called from work to the boss's office, and whether there an atmosphere of unnatural formality; and (5) the truthfulness of the employee's reply to the questioning. *Medcare Associates, Inc*., 330 NLRB 935, 939 (2000).

This test is not exhaustive, should not be applied mechanically, and does not require strict a evaluation of each factor. Instead, "[t]he flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'" Id. Also, where employees have been subjected to several different incidents of questioning, a proper analysis must take into account all of those incidents rather than considering each one in isolation. Id. at 940 (disagreeing with the administrative law judge's dismissal of several allegations based on the individual incidents considered in isolation). "By the same token, a question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone." Id.

Here, Respondent systematically called Committee members into Plant Manager Terrones' office, for extended periods, and asked them very pointed questions about their activities with the Committee and about the activities of other employees with Committee. These meetings took place with the door closed, and the only people present were Plant

Manager Terrones, Assistant Manager Jasso, the two highest day-to-day management officials at the factory, and the respective individual employee. *M.J Metal Products*, 328 NLRB 1184, 1185 (1999) ("when the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten")

During these individual meetings, Terrones demanded to know from employees whether they had signed the Committee letter, their reasons were for doing so; he specifically asked some employees what they wanted in relation to the Committee letter, and told Rivera she had to explain to him why the Committee had drafted the letter. The Board has found such questions to be unlawful even though the employees who are open union supporters, as in this case. *Lenkei Bros. Cabinet Co.* 290 NLRB 1017, 1019, 1022 (1988) (unlawful interrogation where supervisor asked employee "about what the union adherents wanted"); *Systems West LLC*, 342 NLRB 851, 857 (2004) (company President asking employees "why do you want to go Union" constituted an unlawful interrogation); *Fontaine Body and Hoist Co.*, 302 NLRB 863, 864 (1991) (the questioning of open union supporters about their union sentiments, which was part of a pattern of interrogation and was accompanied by threats and other unlawful conduct, constituted an illegal interrogation); *Stoody Co.* 320 NLRB 18, 18 (1995) (questioning of ardent union supporter, which occurred in the office of a "high lever supervisor" where there was no apparent purpose for the questioning, and without assurances that the employee did not have to answer, or that his answers would not affect his job, constituted an unlawful interrogation).

Also, Terrones telling Galaviz that he knew Saldana was the person who wrote the August 7 Committee letter constituted an unlawful interrogation and impression of surveillance, as did his statement to her that he knew she was going around gathering signatures to get him fired. Regarding the statement to Galaviz that Saldana was the person who wrote the Committee

letter, Terrones was clearly trying to elicit information from Galaviz as to which employee drafted the letter, as such the statement was unlawful. *Peter Vitalie Co.,* 310 NLRB 865, 872-873 (1993) (supervisor asking employee if he was one of the "ring leaders" of the union and/or if his brother was constitutes an unlawful interrogation); *Mingo Logan Coal Co.*, 336 NLRB 83, 96-97 (2001) (foreman interrogated employee by asking him who had signed union cards and who the union leaders were); *Benesight, Inc*., 337 NLRB 282, 284 287 (asking employee who "the instigators of the strike were" constituted an unlawful interrogation).

Similarly, Terrones' statement that he knew Galaviz was passing out a petition to get him fired was unlawful interrogation, as he was trying to elicit information from her as to whether she was passing around a petition.[8] In reply, Galaviz showed him the petition and Terrones was able to confirm that Galaviz was passing around a membership petition, and saw the names of the signers.

It is irrelevant that Terrones made these comments as statements, instead of questions, as he was clearly trying to elicit information from Galaviz as to whether Saldana was the ring leader, and whether Galaviz was passing around the petition. See *Belcher Towing Company*, 238 NLRB 446, 459 (1978) (provocative statements to employees about union activity, which, while declarative in nature, were "designed to bring forth employee sentiments about union representation."); *Eddyleon Chocolate Co.*, 301 NLRB 887, 898 (1991) ("Although . . . statement was declarative in form rather than interrogative, it was clearly intended to elicit" information regarding employee's participation in union activities). With the same statement, Terrones also made it clear to Galaviz that the company was closely monitoring her Committee activity, and

[8] Even if the petition requested the termination of Terrones, which it didn't, it would have been protected, as it is indisputable that Terrones had an impact on employee working conditions. See *Atlantic-Pacific Const. Co., Inc. v. NLRB*, 52 F3d 260, 262 (9th Cir. 1995) (citing The Hoytuck Corp. 285 NLRB 904 n. 3 (1987)) (The Act protects employee protests regarding the selection or termination of a supervisor who has an impact on employee working conditions)

created an impression of surveillance by refusing to answer Galaviz's question of who had told him that she was collecting signatures. *Flexsteel Industries*, 311 NLRB 257, 257 (1993) (impression of surveillance where personnel manager told employee twice that he had heard a rumor that the employee instigated the union campaign and was passing out authorization cards); *North Hills Office Services*, 346 NLRB 1099, 1103 (2006) (employer's failure to identify employee's source of information was the "gravamen" of an impression of surveillance violation).

As such, the overwhelming evidence supports a finding that Respondent unlawfully interrogated employees on multiple occasions. The questioning occurred against a backdrop of hostility towards the Committee, only the letter-signers were questioned, the questioning was done by Plant Manager Terrones and Assistant Manager Jasso, two of the highest supervisors at the facility. Terrones exhibited hostility toward the Committee, and told employees the complaints in the August 7 letter were lies. Under these circumstances, Respondent's systematic questioning of each noted employee constituted an unlawful interrogation in violation of Section 8(a)(1) of the Act.

b. Solicitation of employee grievances

An employer's solicitation of grievances chills employee organizing efforts because it demonstrates that: (1) efforts to organize are unnecessary; and (2) that the employer will only improve working conditions as long as the workplace remains union-free.[9] The relevant principles regarding the solicitation of grievances are well established. Absent a previous

[9] See *Center Service System Division*, 345 NLRB 729, 730 (2005), enforced in relevant part, 482 F.3d 425 (6th Cir. 2007) (solicitation of grievances influences employee choice during an organizational campaign because it raises inferences that the employer is promising to remedy those grievances); *NLRB v. V & S Schuler Engineering, Inc.*, 309 F.3d 362, 370-371 (6th Cir. 2002 (when an employer institutes a new practice of soliciting employee grievances during a union organizing campaign there is a compelling inference that he is implicitly promising to correct those inequities and is urging employees that the combined program of inquiry and correction will make union representation unnecessary).

practice of doing so, the solicitation of grievances during an organizing campaign accompanied by a promise to remedy those grievances, whether express or implied, violates Section 8(a)(1) of the Act. *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000) (solicitation of grievances made during the midst of a union campaign inherently constitute an implied promise to remedy the grievances, which is rebuttable by showing that the employer had a past practice of soliciting complaints).

Here, the evidence shows that Respondent unlawfully solicited grievances from employees shortly after the Committee's formation in violation of Section 8(a)(1) of the Act. While Plant Manager Terrones was illegally interrogating employees in his office, he also asked them what grievances they and the Committee had with Respondent. There is no evidence Respondent had a previous practice of meeting with employees and asking them about their workplace problems, and at least two employees testified this was the first ever such meeting.

For example, Terrones admits asking every employee what kind of changes they wanted, and admits asking employee Rivera how Respondent could help her and questioning her as to why she had not previously told Respondent about the problems set forth in the Committee letter. Such questioning constitutes an unlawful solicitation of grievances. *L.M. Berry & Co.*, 266 NLRB 47, 54-55 (1983) enfd. 668 F.2d 249 (6th Cir. 1982) (employer unlawfully solicited grievances when, after employees started organizing, its assistant vice president took employees to breakfast and asked them what their problems where and why they had taken the steps they had taken); *General Electric Company*, 264 NLRB 953, 953 (1982) (Building Manager's "questioning of employees as to whether they had particular problems, and what some of their problems were" amounted to solicitation of grievances with an inference that the employer promised to remedy problems brought to its attention).

Respondent further unlawfully solicited grievances when Terrones told Galaviz that if she had any complaints she could come to him, as his door was always open. *Regional Home Care, Inc.*, 329 NLRB 85, 92-93 (1999) endf. 237 F.3d 62, 65 (1st Cir. 2001) (where no such policy previously existed, company president's statement during an organizing campaign that he had an open-door policy, and that if the drivers had any problems they should come and see him constituted ad unlawful solicitation of grievances). It was clear that in the past Terrones did not welcome Galaviz to his office to discuss her wages; Terrones never previously invited employees to his office to ask them about their problems, and a previous time that Galaviz asked him for a raise, he held a meeting afterwards telling the employees they could look for work with another employer if they did not like working there for that salary. (Tr. 360 – 363, 376)

Likewise, Terrones' various statements to multiple employees that he was there to resolve problems further violated Section 8(a)(1). *1621 Route 22 West Operating Company*, LLC, 358 NLRB 1, 26 (2012) (employers unlawfully solicited grievances by advising employees that they would attempt to "fix" or "adjust" the grievances they had). Finally, Assistant Plant Manager Jasso added to the unlawful solicitation when he told Saldana that he, too, did not like some of the things which occurred at the plant and that there were things he also wanted to change. *Baptistas Bakery, Inc.*, 352 NLRB 547, 569 (2008) (CEO's speech to employees that she was human, had made mistakes, wanted employees to come to her so she could fix problems, had an open door, and would actively participate in ensuring changes would happen constituted unlawful solicitation of grievances).

Accordingly, the record evidence supports a finding that Respondent solicited employee grievances during each individual employee meeting in order to discourage employees from

engaging in protected concerted activities and Committee activities in violation of Section 8(a)(1) of the Act.

c. Promise to Help Employees

Promises of benefits by an employer, while employees are organizing, have a coercive effect, because employees are not likely to miss the inference that the source of benefits presently conferred is also the source from which future benefits must flow, that may dry up if not obliged. *Permanent Label Corp.*, 248 NLRB 118, 131 (1980) enfd. 657 F.2d 512 (3rd Cir. 1981) citing *NLRB v. Exchange Parts Co.*, 375 US 405, 409 (1964). As the Supreme Court observed in *Exchange Parts, Co.*, "[T]he danger inherent in well timed increases in benefits is the suggestion of a fist inside a velvet glove." 375 US at 409.

"The promise of benefits need not be specific in nature or as to the time of its implementation, and need not be expressly conditioned on abandonment of union support." *Permanent Label Corp.*, 248 NLRB at 131. Thus the Board has found a violation where an employer promised that it "would someday better itself and offer the employees more," or where a company tells employees that it realizes "management mistakes had been made and it was willing to correct them" and asked employees to give the company another chance." Id. (internal citations omitted).

Here, Terrones statement to Galaviz that he would speak to President Kalfin to get her a raise, while he was interrogating her about her involvement with the Committee, was a direct promise of a benefit. *Triana Industries, Inc.*, 245 NLRB 1258, 1263 (1979) (employer's discussing a raise, in the context of interrogating employee concerning her union activity, constituted a promise of a benefit in violation of Section 8(a)(1)) Terrones' statements to employees that there would be changes, that employees could turn to management, that

management was there to resolve problems, while vague, also constituted promises of future benefits, as these statements were made in the face of employees' organizing efforts. *Permanent Label Corp.* supra. Similarly, Terrones' statement to Bruno that there would be changes, and asking her if she noticed that the tortilla machine was operating more slowly, constituted both a promise and implied grant of benefits. The timing of the promises and the explicit references to the Committee activities establish that the statements of promise were in direct response to the employees' participation in the Committee. Further, employees would have understood that the statements and meetings were a direct response to their Committee activities. Therefore, the record evidence shows that during the noted individual employee meetings, Respondent violated Section 8(a)(1) of the Act by explicitly and implicitly promising to help employees with their problems, promising raises, and by changing the speed of the machines in order to dissuade employees from engaging in activities in support of the Committee.

d. Respondent's Unlawful Threats

i. Threat of Discharge

The Board and the courts have long held that an employer violates Section 8(a)(1) by threatening employees with discharge while they are exercising their Section 7 rights. *NLRB v. Neuhoff Bros., Packers, Inc.*, 375 F.2d 372, 374 (5th Cir. 1967). Similarly, a threat of stricter discipline in response to union or protected activities violates the Act. *Schrock Cabinet Co.*, 339 NLRB 182, 185 (2003) (affirming the administrative law judge's finding of a violation where the respondent threatened stricter discipline and enforcement of rules because the employee threatened to file a grievance). Here, Terrones told Saldana that the company could fire him because he did not have proof of his medical condition. Respondent had known of Saldana's

medical condition since May 2012. However, it was not until the day Saldana was identified on the Committee letter that Terrones told Saldana that he could be fired. While Terrones then backed off the statement, at the end of the meeting he told Saldana to bring him a doctor's note. Under the circumstances, the logical inference is that Terrones told him he could be fired in the absence of medical proof because of his activities with the Committee, and not because of any consequence related to his medical condition. Cf. *Toll Mfg. Co.*, 341 NLRB 832, 851 (2004) (employer's claim that it discharged employee for failing to call in to report absences caused by medical condition, where employer previously knew of the medical condition which was explained by a doctor's note tends to support an inference of discrimination). Accordingly, based on the evidence, the General Counsel asks the ALJ to find that Respondent, by informing Saldana that he could be fired because he did not have proof of his medical condition, threatened its employees with discharge because they had engaged in Committee or other concerted activities in violation of Section 8(a)(1) of the Act.

ii. Threats of Unspecified Reprisals

To violate Section 8(a)(1) of the Act, a threat does not have to be explicitly stated; a violation can be found based on a non-specific threat of reprisal. Thus the Board has found a violation where an employer told an employee who was participating on behalf of his union in a workplace time study that "there would be problems" if the employee did not return to work in ten minutes based on the employee's reasonable belief there would be unspecified reprisals if he did not stop his union activity. *Atlas Logistics Group Retail Services (Phoenix)*, 357 NLRB No. 37, slip op. at 1 fn. 2 (Aug. 5, 2011); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007) (threat of unspecified reprisals where employee was told "she should direct her concerns to management rather than discussing them with her coworkers and 'bringing them

down'"). The Board has repeatedly found that warnings to employees to "be careful," when made in the context of an employee's protected activity, conveys "the threatening message that union activities would place an employee in jeopardy." *Gaetano & Associates*, 344 NLRB 531, 534 (2005) (supervisor's caution that an employee should "be careful" talking to the union agent was a unlawful threat of unspecified reprisal) citing *St. Francis Medical Center*, 340 NLRB 1370, 1383-1384 (2003); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995) (supervisor's "watch out" statement was an unlawful implied threat). Questioning an employee's loyalty because they engaged in protected activities, or stating that only loyal employees will keep their jobs, is coercive and a violation of Section 8(a)(1) of the Act. *E.L.C. Electric, Inc.*, 344 NLRB 1200, 1200 fn. 3, 1218 (2005) (superintendent's statement that the employer would try to keep its "loyal employees" in response to layoff rumors and a union organizing drive is coercive); *Hialeah Hospital*, 343 NLRB 391, 391 (2004) (employer's statement that that he felt "betrayed" and "stabbed in the back" because employees had contacted the Union was a threat of unspecified reprisals as it equated protected union activity with disloyalty).

Here, Terrones told Saldana that he had betrayed Terrones' trust and never thought that Saldana would do such a thing, in the context of the complaints set forth in the Committee letters. Because Terrones' statement equated Saldana's protected concerted activities with betrayal and disloyalty, the statement constituted a threat of unspecified reprisals. Id.; *E.L.C. Electric, Inc.*, 344 NLRB at 1200 fn. 3. Likewise, Respondent violated Section 8(a)(1) of the Act when Terrones and Jasso either told or asked employees whether their participation in the Committee letters created a hostile work environment. *First Legal Support Services, LLC*, 342 NLRB 350, 365, 369 (2004) (employer violated 8(a)(1) by equating employees talking about the

union with harassment); Cf. *Boulder City Hospital, Inc.*, 355 NLRB No. 203 slip op. at 3 (2010) (no harassment policy a violation where employer equated union solicitation with harassment). Accordingly, the record evidence supports a finding that during the respective individual employee meetings, Respondent threatened its employees with unspecified reprisals because they engaged in union or other concerted activities in violation of Section 8(a)(1) of the Act.

iii. Threats of Lawsuit.

While Terrones and Jasso were questioning employee Juan Lopez about the content of one of the Committee letters, Terrones told Lopez that everything in the letter was a lie. Jasso then told Lopez that, he couldn't say anything unless he was absolutely sure it was true, and if it wasn't true Jasso could take Juan Lopez to court. The Board has found that threats to sue employees in response to their protected statements is a violation of Section 8(a)(1). *DHL Express, Inc.*, 355 NLRB 680, 680, 692-693 (2010) (finding that the employer violated the Act when it threatened to sue employees for defamation based on comments in a union newsletter article). Employees are permitted to advance their views about their working conditions, even using boisterous language, so long as their views are not maliciously false. Id. at 692 citing *Valley Hospital Medical Center*, 351 NLRB 1250, 1252-1253 (2007). Here, there is no evidence that any of the statements in the Committee letters were maliciously false, that is, made with knowledge of their falsity or with reckless disregard for their truth or falsity. Accordingly, the General Counsel respectfully submits that the ALJ should find that Respondent violated Section 8(a)(1) of the Act by threatening to sue Juan Lopez because of statements made in the Committee letters, statements which are protected under Section 7 of the Act. iv. Threats of Requiring Medical Documentation

An employer violates the Act by threatening stricter enforcement of rules in response to protected activity. *Schrock Cabinet Co.*, 339 NLRB 182, 185 (2003) (violation where the respondent threatened enforcement of rules because the employee threatened to file a grievance). While interrogating Saldana about the August 7 Committee letter, Terrones told Saldana that Respondent could fire him because he has not supplied Terrones with any medical documentation. Before Saldana became involved in the Committee, Respondent never required medical documentation from him, and never required that everything regarding his medical situation be "in writing." Accordingly, the General Counsel submits that Terrones' statements to Saldana regarding this new documentation requirement violated Section 8(a)(1) of the Act. *M.J. Metal Products, Inc.*, 328 NLRB 1184, 1184 1198-99 (1999) aff'd 267 F.3d 1059 (10th Cir. 2001) (employer retaliated against employees by requiring them to bring doctors' slips when they were absent because of their union activities).

v. Threat of Futility

An employer violates the Act by telling employees that it would be futile to select a bargaining representative. The test as to whether a violation has occurred is whether "the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 5 (2011) (employer's statement that, if there was a union he would not be negotiating with it, made in response to a worker's assertion that they needed representation, was unlawful) citing *Double D Construction Group*, 339 NLRB 303, 303-304 (2003).

With respect to the Committee's requests to meet with Kalfin, Terrones told several employees, including Juan Lopez and Saldana, that Respondent resolved its problems by talking to employees individually, and not in groups. He further told employees that this was the reason

for the meetings they were having and why he was there to discuss their problems. Terrones made these statements at the time he was threatening and interrogating the various Committee members about their protected conduct. As such, it is clear that it would be reasonable for the employees to interpret Terrones' statements to convey the message that the Committee members' attempt to deal directly with their employer was never going happen. Instead, Terrones met with Committee members individually to drain the life out of the newly-formed Committee. As such, Terrones's conduct words, in this context, threatened employees by conveying the message that their organizing efforts were futile in violation of Section8(a)(1) of the Act.

e. Respondent's Rule Prohibiting Employees from Assisting Coworkers Engaged in Concerted Activities.

The appropriate inquiry to determine whether the mere maintenance of rules violates Section 8(a)(1) of the Act is to determine whether the rule reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The Board may find a violation notwithstanding the fact the rule has never been enforced. Id. A rule is unlawful if it explicitly restricts Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, (2004). Additionally, "[i]n determining whether a challenged rule is unlawful, the Board must … give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646.

Here, Respondent admits having arranged the meetings in August in response to employee concerns raised in the Committee letters. By telling Bruno during her individually-held meeting that she should not put her hands in the fire for anyone else because no one would do the same for her if she would need it, and telling Galaviz in her meeting that if she got into any problems, nobody would give her any help, Terrones created and promulgated rules that

employees should not participate in Committee activities. With regard to the statement made to Bruno, the inference is that employees should stop their activities or else negative consequences would follow if she continued to put her hands in the fire by participating in the Committee. Furthermore, on at least two occasions, when being questioned about the letter, employees asked for the entire Committee to be present, however Respondent stated on both occasions such meetings would not be allowed. Accordingly, the record evidence supports a finding that Respondent in the noted instances promulgated and maintained an overly-broad and discriminatory rule that prohibited employees from engaging in union and Section 7 activity in violation of Section 8(a)(1) of the Act.

f. Creation of the Impression of Surveillance

The Board has held that the impression of surveillance is as serious as the actual act of surveillance. In *Robert F. Kennedy Medical Center*, 332 NLRB 1536, 1539-1540 (2000), the Board noted that "[w]hen an employer creates the impression among its employees that it is watching or spying on their union activities, employees' future union activities, their future exercise of Section 7 rights, tend to be inhibited." Whether an employer's statement has created the impression of surveillance is based on the objective test of whether employees would reasonably assume from the statement that their union activities have been placed under surveillance, based on the perspective of a reasonable employee. *Milum Textile Services Co.*, 357 NLRB No. 169 slip op. at 27 (2011); *Rogers Electric, Inc.*, 346 NLRB 508, 509 (2006); *Robert F. Kennedy Medical Center*, 332 NLRB at 1540; *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); *Flexsteel Industries*, 311 NLRB 257, 257 (1993).

Here, Respondent created the unlawful impression of surveillance when Terrones told Galaviz that he knew that Saldana was the person who had written the letter. Although the

Committee had signed the letters as a group, it had not disclosed who had authored the letters; Terrones did not reveal to Galaviz the source of his information. *Avondale Industries*, 329 NLRB 1064, 1065 (1999) (violation found where supervisor told employee that he "couldn't say" how he knew the employee was a union supporter when the employee asked how he got his information); *North Hills Office Services*, 346 NLRB 1099, 1103 (2006)(employer's failure to identify employee source of information was the "gravamen" of an impression of surveillance violation). Accordingly, Terrones' statement strongly suggests that he had monitored the Committee's actions beyond what they had disclosed, including the specific workings of the Committee down to the detail of who had authored the letters. *Spartech Corp.*, 344 NLRB 576 (2005) (employer's agent's statement that company knew who had attended organizational meeting held a day or two earlier created an unlawful impression of surveillance). Terrones' statement would cause employees to reasonably conclude that Respondent was monitoring the employees' concerted activities. *New Vista Nursing And Rehabilitation, LLC,* 358 NLRB 1, 10 (2012) (Board finds impression of surveillance when employer reveals specific information about union activity that is not generally known and does not reveal its source). Therefore, the evidence establishes that Respondent created the impression with Galaviz that her protected concerted activities and Committee activities were under surveillance in violation of Section 8(a)(1) of the Act. Cf. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 2-3 (2011).

g. Additional Violations of 8(a)(1)

It is undisputed that Respondent was gathering information from employees about Galaviz and Bruno soliciting membership with the Committee; three employees documented this conduct. (GC 9, Exhibit p. 14, 16, 18) With respect to at least one such employee, Terrones testified that he instructed Orbelina Perez Barco to write down "no more and no less" than what

she told him in person about Galaviz. (Tr. 174 – 175; GC 9, p. 16) Supervisor Mora followed the same steps as Terrones when she learned from Marilyn Pineda that Galaviz was soliciting membership in the Committee. (Tr. 301 – 302) Both Mora's and Terrones' directive to Marilyn Pineda and Orbelina Perez Barco to document her interaction with Galaviz constitutes a violation of Section 8(a)(1) of the Act. *Ryder Truck Rental, Inc.*, 341 NLRB 761, 761 (2004) enfd. 401 F.3d 815 (7th Cir.2005) (in response to nothing more than a vague claim of "harassment" in connection with a union activist's solicitation, the employer's directive that workers document in writing the specifics of the activist's union activity violated Section 8(a)(1)).

Also, The prohibition of "*any lack of respect towards clients, colleagues and supervisors"* maintained in Respondent's employee handbook violates Section 8(a)(1) of the Act. (Tr. 215, 852, GC 12, p. 16) *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 slip op. at 1 (2012) ("'Courtesy' rule unlawful because employees would reasonably construe its broad prohibition against 'disrespectful' conduct and 'language which injures the image or reputation of the Dealership' as encompassing Section 7 activity, such as employees' protected statements--whether to coworkers, supervisors, managers, or third parties who deal with the Respondent--that object to their working conditions and seek the support of others in improving them."); *Community Hospitals of Central California*, 335 NLRB 1318, 1320-21 (2001) (Rule prohibiting, in part, "disrespectful conduct towards a service integrator, service coordinator, or other individual" a violation of 8(a)(1)) enf. denied in pertinent part 335 F.3d 1079, 1088 (DC Cir. 2003).[10]

[10] While the Complaint does not allege that Respondent maintained an unlawful handbook rule in violation of the Act, this allegation is closely related to the allegations in paragraph 5(f) and were fully litigated by the parties. Accordingly, under *Redd-I, Inc*., 290 NLRB 1115 (1988), Acting General Counsel moves to amend the Complaint to include these allegations and urges that they also be found by the ALJ to be violations of Section 8(a)(1) of the Act.

D. Respondent violated Section 8(a)(1) and (3) by transferring Lilian Lopez and Yolanda Rivera to the corn-tortilla line.

The General Counsel alleges, and the evidence establishes, that Yolanda Rivera and Lilian Lopez worked the flour line but were moved to the corn production line by Respondent after they began their Committee activities, in violation of Section 8(a)(3) of the Act. At the hearing, Rivera and Lopez both testified that, after the Committee delivered the August 7 Committee letter, they were moved from the flour to the corn production line, which coincided with their reduction of hours, which is discussed further below. (Tr. 482 - 483; 530 - 531) Kalfin testified that during this period of time, the corn line was operated less frequently, at times shut down, during the construction of the corn chip line, whereas the flour line continued to operate with less disruption. (Tr. 785, 787) By moving to the corn line, which was being operated less frequently, Respondent found a means for reducing Lilian Lopez' and Yolanda Rivera's work hours, and in turn the amount of time they spent in the factory.

Specifically, Lilian Lopez testified that, before the Committee letters, Respondent assigned her to the flour line Monday through Thursday. (Tr. 530, 544 - 545) After the Committee letter was given to Respondent, Lilian Lopez was assigned to work the corn line where she only worked two and a half days a week. (Tr. 531, 544 - 545) Respondent continued to assign Lilian Lopez to the corn line until December. (Tr. 560 - 561) Yolanda Rivera testified that before she began her activity with the Committee she worked the flour production line, and then was moved was moved to the corn line after the Committee letters were given to Respondent. (Tr. 482 - 483)

The testimony of Rivera and Lopez is corroborated by the weekly work schedules created by Respondent for the period of January 2012 to February 2013. (GC 26, 27) The General Counsel introduced into evidence GC 26 and 27, which summarized the weekly work hour

schedules that Respondent created. (GC 27) These weekly work hour schedules show that Respondent assigned Lilian Lopez to work the flour line from May 2012 to August 10, 2012. (GC 27) With respect to Rivera, Respondent consistently assigned her to work the flour line from January 2012 to August 16, 2012. (GC 26) Respondent continued to assign Rivera to work the corn line every day until January 13, 2013, about a month after the company stopped receiving letters from the Committee.

As such, the evidence establishes that that after the August 7 Committee letter, Respondent was motivated by its anti-union animus when it transferred Rivera and Lilian Lopez, a shift change that coincided with the reduction the work hours of Rivera and Lopez. Respondent has not, and cannot, show that it would have otherwise assigned Rivera and Lopez to the corn line, absent their involvement with the Committee. As a justification for moving Lilian Lopez, Respondent suggests that it moved her because she had performance issues working on the flour line. The circumstances prove the pretextual nature of such justification.

In cross examination by the General Counsel, Mora testified that Lilian Lopez had performance difficulties working the flour production line since she began working that line. (Tr. 843) The fact that Respondent knew that Lilian Lopez had performance issues since April but waited until <u>after</u> it received the Committee letter to move her to the corn line reveals its true and unlawful motive. Again, it is especially telling that, before the Committee letters, both Lilian Lopez and Rivera consistently worked the flour line, which was further away from the construction area at the time, whereas Respondent was running the corn line less frequently. Respondent cannot explain these changes based on business needs, or chance, because these changes were motivated by Respondent's anti-union animus and as such, the evidence

establishes that Respondent violated Section 8(a)(1) and (3) of the Act by transferring these employees to a different line, as alleged.

E. Respondent violated Section 8(a)(1) and (3) by reducing the work hours of Lilian Lopez and Yolanda Rivera.

It is an unfair labor practice to reduce employee work hours because they engaged in union or other protected activities. See *Woodline Motor Freight*, 278 NLRB 1141, 1251 (1986). Here, the General Counsel alleges, and the evidence shows, that after Respondent received the Committee letters, Respondent reduced the work hours of Yolanda Rivera and Lilian Lopez in violation of Section 8(a)(3) of the Act.[11]

At the hearing, Rivera and Lilian Lopez both testified that, after the August 7 Committee letter was given to Respondent, they experienced a reduction in their work hours. (Tr. 486-87, 505-507, 518-20, 534, 544, 550, 562-63) Specifically, Rivera testified that, before the Committee letters, she regularly worked 40 hours per week, with regular overtime; but after the Committee letters were given to Respondent, she was assigned around 28-35 hours per week. (Tr. 386-87, 517) Lilian Lopez testified that, other than when she first started working for Respondent, before the Committee was formed, she regularly worked between 40-50 hours per week; however after the Committee letters were given to Respondent, she was only getting anywhere between 20-35 hours of work per week. (Tr. 534, 548)

The testimony of Rivera and Lopez is substantiated by the payroll records introduced into evidence at hearing. The General Counsel introduced into evidence G 54, which is Respondent's hourly reports, per payroll period, for the weekly payroll periods ending January 5, 2012, through February 28, 2013. These reports include the name of each worker, the total work hours per worker, the number of employees working in the payroll period, and the cumulative

[11] Paragraph 6(e) of the Complaint also alleges that Respondent reduced the work hours of Juan Lopez. The General Counsel withdraws this allegation.

total hours paid – including overtime – per payroll period. Using the data in these reports, the General Counsel compared the total hours for Rivera and Lopez – per payroll period throughout 2012, to the average total hours per employee. See, Exhibits A, B, and C.

With respect to Rivera, Respondent's data in GC 54 shows that, before the August 7 Committee letter, Rivera regularly worked over 40 hours per week, and worked overtime in almost every pay period. Specifically, in the 32 pay periods from January 5, 2012 to August 9, 2012, Rivera worked over 40 hours in every payroll period except two. During this same time frame she worked significant overtime, sometimes working over 55 hours per week. After the August 7 Committee letter, in the 20 pay periods from August 16, 2012 to 1Deecmber 27, 2012, the converse was true; Rivera worked 40 or more hours only six times. Instead, she was generally assigned somewhere between 25-35 hours. (Exhibit B) Even more telling is the fact that, after the August 7 Committee letter, Rivera regularly worked less hours than the average employee, whereas before the August 7 Committee letter the opposite was true. Specifically, in the 32 pay periods from January 5, 2012 to August 9, 2012, Rivera worked less than the employee average only five times. After the August 7 Committee letter, in the 20 pay periods from employee August 16, 2012 to December 27, 2012, Rivera worked less than the employee average 12 times. Tellingly, in these 20 weeks when she worked more than the employee average, it was usually 2-4 hours more. However, in these same 20 weeks, when she worked below the average, it was significantly below the average, working 7, 8, 12, and 13 hours less than the other employees. (Exhibit B)

The same holds true for Lilian Lopez. In the 16 pay periods from April 26, 2012 to August 9, 2012, Lopez regularly worked 40 hours per week, with significant overtime. (Exhibit C) In fact, during this time period, she many times worked well over 45 hours per week,

sometimes working over 55 hours per week. In these 16 weeks, she only worked less than 40 hours per week four times. However, after the August 7 Committee letter, in the 20 pay periods from August 16, 2012 to December 27, 2012, Lopez only worked more than 40 hours per week four times. The other weeks, her work hours were reduced to levels far below the employee average – sometimes working anywhere between 10 to 20 hours less than the employee average. (Exhibit C) During the 20 weeks after the first Committee letter, she worked less than the average employee 15 times. Also, like Rivera, during these 20 weeks, when Lopez worked more than the employee average, she generally worked only a couple of hours above the average. However, when she worked less than the average, it was significantly less – 8, 16, and sometimes 20 hours less.

Sheer chance cannot explain the wild swings in the weekly work hours assigned to Rivera and Lopez before and after their involvement with the Committee. Before the Committee both regularly worked more than the employee average – significantly more. After the Committee, they worked significantly less than the employee average. Respondent's animus against the Committee in general, and Rivera and Lopez in particular, is shown by the multiple 8(a)(1) and (3) violations discussed herein, including the noted 8(a)(1) violations targeted directly to them.

As such, the General Counsel has met her burden of showing that, after the August 7 Committee letter, Respondent was motivated by its anti-union animus when it reduced the work hours of Rivera and Lopez. Respondent has not, and cannot, show that it would have otherwise assigned Rivera and Lopez less work, absent their involvement with the Committee. Again, it is especially telling that, before the Committee letters, Rivera worked less than the average employee only 5 times in 32 weeks (16% of the time). After the August 7 Committee letter Rivera worked less than the average employee 12 times in 20 weeks (60% of the time). As for

Lopez, before the Committee, she worked less than the average employee 5 times in 16 weeks (31% of the time). After the August 7 Committee letter she worked less than the average employee 15 out of 20 weeks (75% of the time).[12] Respondent cannot explain these changes based on business needs, or chance, because these changes were motivated by Respondent's anti-union animus. Accordingly, the evidence establishes that Respondent unlawfully reduced the hours of Rivera and Lopez in violation of Section 8(a)(3) of the Act, as alleged.

F. Respondent violated Section 8(a)(1) and (3) by discharging Yolanda Galaviz and Delfina Bruno.

1. Facts

a. Respondent Fires Yolanda Galaviz

Yolanda Galaviz (Galaviz) began working at Respondent's factory making tortillas nine years ago until she was fired on August 17. (Tr. 309 - 310) Galaviz met with her co-workers at a community center on August 6, where she complained with them about being mistreated by Supervisors Mariela Campos and Artlette de la Mora (Mora), and these supervisors repeatedly called her a "big headed donkey" and said she was good for nothing. (Tr. 312, 314 - 315) Galaviz was a founding member of the Committee, and revealed her involvement in the Committee by signing her name on the August 7 letter addressed to the company. (Tr. 312, 316, 317, GC 2) On August 8, during her lunch break, she valiantly walked to the second floor of the factory with Juan Lopez, and delivered the August 7 to President Kalfin in his office. (Tr. 319 – 321, 355, 573)

Approximately twenty minutes after delivering the letter, in the dining room of the factory, she solicited signatures on a Committee petition she had created. (Tr. 321 - 322) She

[12] Even if the weeks where Rivera and Lopez did not work at all are discarded (the week of Christmas for Rivera, and Thanksgiving for Lopez) the difference is still telling. Rivera would have worked less than the average employee 11 times in 19 weeks (58% of the time) and Lopez 14 out of 19 weeks (74% of the time).

wrote on the petition that a group of workers were seeking respect and an increase in wages, and that she needed signatures to support the group's purpose. (Tr. 322, 325; GC 11) Galaviz spoke with Edgar Lopez (Edgar) in the dining room and explained that the purpose of the Committee was to ask the company to listen to the Committee. (Tr. 321) She told Edgar that the Committee would be stronger if it was larger, showed him the petition, and invited him to join. (Tr. 321 - 322) Edgar signed his name on the petition. (Tr. 322; GC 11) A few minutes later Galaviz asked an employee named Josue if he wanted to be a part of the Committee, showed him the petition, which he read and signed. (Tr. 322, GC 11) An employee named Armando arrived while Galaviz spoke with Josue, and she also solicited his membership in the Committee. (Tr. 323) Later, Galaviz followed up with Josue's interest in the Committee by inviting him to attend the Committee meeting that was scheduled to be held on August 8. (Tr. 331) Galaviz continued to solicit her co-workers to sign the Committee membership petition. (Tr. 324, 325, 329; GC 11)

Some of workers told Galaviz that they perceived their association with the group as a threat to their job security. (Tr. 329 - 331) Galaviz showed Orbelina Perez (Perez) the petition, and asked her if she wanted to be a part of the Committee, stating that she should sign the petition for support. (Tr. 329 - 330) In response to Galaviz's solicitation, Perez said that she did not want to get into any problems and that she did not want to lose her job. (Tr. 330) Similarly, Galaviz allowed Edgar to scratch his name off the petition when he asked. (Tr. 327 – 328) Galaviz saw Edgar walk down the stairs from the second floor, where Terrones' office is located when he suddenly approached her a short time later and told Galaviz he wanted his "signature back." (Tr. 327) Galaviz joked his signature was upstairs, and he asked her where upstairs so that he could get it back. (Tr. 327) Galaviz saw that Edgar looked scared, so to calm him, she told Edgar to meet her in the dining room. (Tr. 327) There, Galaviz gave Edgar the petition and

watched as he scratched out his name from the petition.[13] (Tr. 327; GC 11) Galaviz saw Edgar clock out so she asked why he was leaving, and Edgar responded that she had gotten him into trouble because of his signature. (Tr. 327 - 328)

The following day, Galaviz was summoned out of a training course in the factory to meet with Plant Manager Terrones. (Tr. 333) Galaviz walked to Terrones' office on the second floor where Assistant Plant Manager Jasso and Terrones waited for her. (Tr. 334) Terrones told Galaviz to sit down because he was giving her the meeting the Committee had requested. (Tr. 334, 378) Galaviz objected to the meeting, asserting that all members of the Committee needed to be present. (Tr. 334, 378 - 379) The meeting continued as discussed in the above section.

Before Galaviz left the office, Terrones said that someone told him that she was going around gathering signatures to get him fired. (Tr. 339, 381) Instantly, Galaviz denied the accusation, requesting that Terrones bring that person forward because it was untrue. (Tr. 339, 381) In her defense, she took the petition out of her back pocket and showed it to Terrones. (Tr. 339) He asked if he could read it out loud, and took the petition from Galaviz. (Tr. 340; GC 11) Terrones read the petition aloud, then returned it to Galaviz. (Tr. 340) Terrones ended the meeting by telling Galaviz, with Jasso present, he was promising that things were going to change. (Tr. 337, 383)

Even after Terrones cautioned Galaviz that no one would help her if she got into problems, Galaviz courageously continued trying to change the working conditions in the factory; she signed the August 15 Committee letter, and personally handed it to Terrones in a factory hallway. (Tr. 334, 335, 379, 340 – 342; GC 4, GC 14, p. 4) Suspect of the promises that Terrones made to the members of the Committee about changes requested in the August 15 letter, Galaviz and the Committee again asked to speak with Kalfin about the working conditions

[13] A review of GC. 11 shows that the fourth name on the petition, which is scratched out, is Edgar Lopez.

at the factory, including the work hours assigned to members of the Committee. (GC 4) On August 17, Supervisor Mora approached Galaviz while she was working and told her to go see Terrones. (Tr. 343) Galaviz arrived to an office on the first floor of the factory where the surveillance monitors are kept and waited for Plant Manager Terrones, Assistant Plant Manager Jasso, and Supervisor Mora to arrive. (Tr. 343 - 344) When they did so, without explanation or paperwork, Terrones fired her on the spot. (Tr. 185, 197, 344) Mora escorted Galaviz off the property and Galaviz was never contacted by the company again. (Tr. 344) Terrones admitted that Respondent never gave Galaviz the opportunity to rebut any alleged reasons for her discharge. (Tr. 187)

b. Respondent Fires Delfina Bruno

Delfina Bruno, a tortilla worker with an unblemished disciplinary record, was fired on August 17, the same day as Galaviz, bringing her three year employment with the company to an end. (Tr. 385) At the beginning of August, Bruno joined her co-workers in forming the Committee, and signed the series of Committee letters delivered to Kalfin. (Tr. 427 – 428, 435 - 436 ;GC 2, 3, 4, 5, 6) In the August 7 letter, the Committee asked Respondent to repair the machinery at the factory, in part, because Bruno had hurt her finger while cleaning out tortillas that were stuck in a machine that had been causing problems for a long time. (GC 2)

On August 9, the day after the Committee delivered its first letter to Kalfin, Plant Manager Terrones called Bruno away from production line to speak with her in his office, as discussed in the section above. (Tr. 431) Bruno arrived at the office where she met with Plant Manager Terrones and Assistant Plant Manager Jasso behind closed door. (Tr. 432) Terrones had the August 7 letter with him, immediately asking Bruno if she believed that the allegations in the letter were true; Burno said “yes.” (Tr. 432) Terrones concluded the meeting by telling

Bruno that, to demonstrate his good faith, he was inviting her to work with his team on the corn production line. (Tr. 435)

While Bruno's involvement with the Committee landed a seat in front of the Plant Manager, she believed the Committee would bring positive changes and continued to support the Committee. On August 15, Bruno attended a Committee meeting where she helped write another letter to Kalfin, which she personally handed to him at the factory the following day. (Tr. 435 – 437, GC 4) In the letter, the Committee objected to its members having been "interviewe[d] individually" and insisted that Kalfin "set a time for a meeting with all [the members of the Committee] to resolve these matters." (GC 4) On August 17, at about nine in the morning, Bruno was working on the corn production line when Supervisor Mora instructed her to report to the office because Terrones wanted to speak with her. (Tr. 437 - 438) Bruno went to the first floor office where Jasso, Terrones, and Mora were present. (Tr. 438 – 439) When Bruno entered the office, Terrones told her that he sent for her "because as of this moment, you no longer work for" the company. (Tr. 439) Terrones asked her to leave her uniform and key card with Mora who would accompany her to her locker. (Tr. 439) Respondent never explained to Bruno the reason for her termination. (Tr. 439 - 440) Prior to being fired, Respondent never told Bruno that she had been accused of misconduct, and she was never asked if she had harassed or pressured her co-workers to sign any documents. (Tr. 440 - 441) Respondent admitted that, while investigating Bruno's alleged misconduct, it never asked her for her side of the story. (Tr. 182)

c. Respondent proffered inconsistent claims for firing Galaviz and Bruno

At hearing, President Kalfin testified that he made the decision to fire both Galaviz and Bruno after he received the Committee's August 15 letter, and instructed Terrones to carry out

his decision. (Tr. 51, 72, 103, GC 4) Kalfin testified that he fired Bruno because he believed that she and Galaviz were intimidating and harassing workers at the factory. (Tr. 93) Kalfin confirmed he did not have any other reason for firing Bruno, and he specifically denied that he fired Bruno for allegedly forging documents. (Tr. 93)

However, Kalfin's testimony contradicts Respondent's previous justifications for firing Bruno. In the underlying investigation of this matter, Respondent submitted a position statement setting forth its reasons for firing both Galaviz and Bruno. (GC 9) On the first page of the position statement, Respondent states that, the bare allegations are without merit because Respondent "terminated Galaviz and Bruno because it received numerous complaints about them from co-workers regarding harassment and other inappropriate behavior, including requests to sign blanks sheets of paper and forgery of signatures." (GC. 9, p. 1) Later in the position statement, Respondent again states that <u>both</u> Galaviz and Bruno were fired for "attempting to deceive several of their co-workers [in]to signing the [Committee] letter" but added they did so "under false pretenses, such as claiming the letter was for the sole purpose of seeking a raise," and "harassing and pressuring employees and submitting documents [Committee letters] containing at least one forged signature." (GC 9, p. 7) Respondent then notes that both Galaviz and Bruno were the ones that presented the Committee letters to Respondent, and made representations to respondent that all the "signatures were valid and obtained from current employees." (GC. 9, p. 7 fn. 3) Also contradictory is the fact that, in the position statement, Respondent asserts that the August 7 letter contains two signatures from former employees (GC. 9, p. 7 fn. 3), while Kalfin testified at the hearing that signatures on the Committee letters he received before firing Bruno and Galaviz were those of current employees. (Tr. 32 – 34, 37, 41 - 43; GC 2, 3, 4)

Kalfin initially testified that he fired Galaviz because: (1) she had forged somebody's signature on the Committee letter; (2) she was intimidating her coworkers; and (3) she was lying to her coworkers. (Tr. 72) He then added an additional reason: harassing employees, and explained that Galaviz was "asking them to sign blank documents and misrepresenting asking them to sign a blank document and under false pretenses". (Tr. 73 – 74, 80) Kalfin explained that he considered Galaviz's conduct to involve false pretenses because she was lying when she told her coworker Edgar that she had given Edgar's signature to Kalfin. (Tr. 79 – 81, 85 - 86) All of the reasons relied upon by Respondent involve the solicitation of signatures, on either the Committee letter or the petition, for respect and higher wages for all employees. (GC. 2, 3, 4, 11) In deciding to fire Galaviz because of these incidents, Kalfin testified that he relied on hearsay statements made by Galaviz's coworkers, as relayed to him from Terrones. (Tr. 79)

d. Company officials admitted they knew Galaviz and Bruno were soliciting co-workers to sign Committee letters before firing them

The record reveals that the Galaviz's solicitation of signatures circulated like wildfire in the factory. Within days of the first Committee letter, Plant Manager Terrones learned from other supervisors and employees that Galaviz and Bruno were soliciting membership in the Committee. (Tr. 188, 85 – 88, GC 9, p.14, 16, 18) Terrones admitted that he knew Galaviz was behind an effort to seek a raise, and he knew that she was trying to get other workers involved. (Tr. 195) Terrones testified that Night Shift Supervisor Edith Mendoza reported to him that both Galaviz and Bruno had been asking night shift employees to sign a letter. (Tr. 173 – 174) Terrones also received a report from Armando Salas (Salas) that suggested Bruno and Galaviz were actively trying to increase the Committee's membership. (Tr. 179; GC 11) Salas told him that he was approached by Bruno and Galaviz and they asked for his signature on a piece of

paper so they could ask for a raise. (Tr. 179; GC 11) Terrones channeled the reports referencing Galaviz and Bruno's efforts to organize Respondent to President Kalfin. (Tr. 73, 93)

Of the various reports Respondent was gathering about Galaviz and Bruno solicitation efforts, three employees documented what happened. (GC 9, Exhibit p. 14, 16, 18) Terrones testified that he instructed Orbelina Perez Barco (Perez) to write down "no more and no less" than what she had told him in person about Galaviz.[14] (Tr. 174 – 175; GC 9, p. 16) Interestingly, in her statement, Perez does not accuse Galaviz of harassment or intimidation. (GC 9, p. 16; 90 – 91) Instead, Perez's written statement confirms that Galaviz asked her to join the Committee once, and after Perez refused Galaviz never asked her again. (Tr. 90 – 91; GC 9, p. 16) Similarly, in her written statement, Marilyn Pineda (Pineda) confirms that Galaviz solicited her signature on a document in order to talk to the managers about a pay increase. (Tr. 91) Pineda does not accuse Galaviz of harassment or intimidation, nor does she claim that Galaviz asked for her signature more than once. (Tr. 91; GC 9, p. 18) Finally, statement of Edgar Lopez states that Galaviz asked him to sign a document for a raise, but that he later found out that the document "was so that we could go to my supervisor," which he didn't agree too, and he asked Galaviz to erase his signature. After Galaviz initially told Lopez that she had submitted the document to Respondent, she gave the document to Lopez, and allowed him to remove his signature. (Tr. 89-90; GC. 9, p. 14) As with the others, Lopez does not accuse Galaviz of harassment or intimidation. Before Galaviz was fired, Terrones translated the written statements from Spanish to English when he read them to Kalfin. (Tr. 176 – 77, 185, 172; GC 9, Exhibit p. 14, 16, 18)

[14] Terrones' directive that workers document their interaction with Galaviz in itself constitutes a violated of Section 8(a)(1). *Ryder Truck Rental, Inc.*, 341 NLRB 761, 761 (2004) enfd. 401 F.3d 815 (7th Cir.2005) (in response to nothing more than a vague claim of "harassment" in connection with a union activist's solicitation, the employer's directive that workers document in writing the specifics of the activist's union activity violated Section 8(a)(1)).

Even though he relied upon the statements of Orbelina Perez and Marilyn Pineda to fire Galaviz, at hearing Kalfin testified that he could not recall the content of those statements. (Tr. 86 –91; GC 9, p. 14, 16) Similarly, when asked what conduct Terrones told him had been reported against Bruno, Kalfin testified that he could not "recall the specific conversations, other than the fact that she was a party to intimidating other workers." (Tr. 93 – 94) Kalfin merely had general conversations where Terrones reported that Bruno intimidated and harassed workers; however, Kalfin did not ask Terrones to investigate the allegations any further, to secure written statements, or to meet with the employees involved. (Tr. 93 – 94) In fact, Kalfin never asked Terrones to meet with either Galaviz or Bruno to ask them about any of the allegations, including the claim that the pair was pressuring or harassing co-workers to sign letters. (Tr. 182, 197 – 198) Equally important, Respondent failed to assert any company policy or rule that Bruno or Galaviz allegedly violated, and further failed to provide any examples of having fired employees for the same or similar reason in the past. Instead the disciplinary records of other employees reveal that Respondent has investigated claims of harassment or intimidation, but has never fired anyone for these reasons. (GC 30 – 34)

e. Company officials admit that no one had accused Galaviz of committing forgery

Kalfin admitted that nobody had accused Galaviz of forging their signature. (Tr. 72, 73, 92) Instead, it was Kalfin who made the accusation, testifying that he believed Galaviz was the perpetrator of forgery and "counterfeiting documents," by signing Gustavo Abel Lopez's name on the August 7 letter. (Tr. 72, 73, GC 2) To make his determination, Kalfin reviewed a statement that Gustavo Abel Lopez (Abel) created when he was confronted by Plant Manger Terrones and Assistant Plant Manager Jasso with questions about the August 7 letter; Abel's statement merely said that he did not sign the August 7 letter. (Tr. 147 – 148, 74 – 77, 80)

Terrones also admitted that he did not know if Galaviz was the person who wrote Abel's name on the letter, testifying that he did not have "the slightest clue" as to who wrote Abel's name. (Tr. 178, 195, 197)

Although it was unclear to the company who had written Abel's name on the letter, Respondent never further investigated the matter. Respondent never asked Galaviz about the alleged forgery and, although Terrones asked the Committee members a multitude of questions about the Committee, he never asked any of the Committee members if they wrote Abel's name on the letter. (Tr. 187, 197 - 198) Kalfin couldn't really say why he held Galaviz responsible for writing Abel's name on the August 7 letter.[15] (Tr. 75 – 76, 92) Kalfin was unable to independently recognize the signatures on the August 7 letter and other Committee letters the company received before firing Galaviz, which may have been a reason that he attempted to hold Galaviz accountable for writing Abel's name. (Tr. 32 -34, 37, 42; GC 2, 3, 4) Significantly, Respondent never proffered an explanation to resolve the puzzle in Kalfin's testimony below:

> Q BY MS. ALONSO: Now, Gustavo Abel Lopez' statement, did he accuse Yolanda Galaviz of forging his signature?
>
> A No, I don't believe it said her name specifically.
>
> . . .
>
> Q So why did you decide that it was Yolanda Galaviz who had committed the forgery?
>
> A Umm, I can't really say. I guess some statements from other workers.
>
> Q You didn't have any accusation that she was the one who had committed forgery, correct?
>
> A I don't believe so.

(Tr. 78)

[15] Kalfin testified that he has no training in analyzing signatures, and didn't hire anybody to analyze the handwriting. (Tr. 92)

2. Analysis

a. Legal Framework Burnup & Sims.

The question of whether Galaviz and Bruno lost the protection of the Act while soliciting membership in the Committee is to be determined by the legal framework set forth in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, (1964). The Supreme Court, in *Burnup & Sims, Inc.*, set forth a test for determining if an employee has lost protection of the Act while engaging in protected activity. Id. The Court held that, in circumstances when an employee is fired for its protected activity, the Act is violated when "[1] it is shown that the discharged employee was at the time engaged in a protected activity, [2] that the employer knew it was such, [3] that the basis of the discharge was an alleged act of misconduct in the course of that activity, and [4] that the employee was not, in fact, guilty of that misconduct." Id. at 23. Under these circumstances, an employer cannot assert a good faith belief in the truth of the employee's misconduct.

i. Galaviz and Bruno did not harass or intimidate their co-workers into signing Committee letters

In the instant case, Respondent admitted that it fired Galaviz and Bruno for their protected activity; contrary to Respondent's claims, neither Galaviz nor Bruno harassed or intimidated their coworkers while soliciting their membership in, or support of, the Committee; nothing they did rendered their conduct unprotected by the Act.

Regarding Bruno, it is clear that Respondent violated the Act by firing her for her protected activity. Bruno had engaged in extensive protected activity on behalf of the Committee when she was fired, and Respondent knew of her activity, thus the first and second prongs of the *Burnup & Sims* test are met. Specifically, it is undisputed that Kalfin received the Committee letters where Bruno identified herself as an organizing member of the Committee, and the record establishes that Respondent at the very least suspected Bruno was a leading

member of the organizing drive. The Committee's mailing address on the first letter is the same address the company maintained as Bruno's mailing address, with the exception of a slight variation in the unit number. (GC 2, GC 55, p. 4-6) Even more so, Bruno personally delivered one of the Committee letters to Kalfin, days before she was fired, and the injury to her finger is described in the first Committee letter.

Respondent's testimony also establishes the third prong of the *Burnup & Sims* test. Kalfin testified that the only reason he fired Bruno was because she was a party to intimidating and harassing workers with Galaviz. (Tr. 93) Despite deciding to fire Bruno for harassment and intimidation, he could not recall any specific discussion with Terrones, or anyone else, where he learned of the supposed allegations made against Bruno. From this, it is apparent that Kafin fired Bruno simply for associating with the Committee, and Respondent did not care to take the time to inquire further into the purported claims made against her. (Tr. 93 - 94)

Any attempt by Respondent to argue that the company did not know that Bruno or Galaviz were soliciting signatures on documents for the Committee is unavailing. The evidence establishes that Kalfin understood the Galaviz was seeking signatures on the Committee membership petition, as is described in the written statements that Terrones translated for him before he fired both her and Bruno. (Tr. 85 – 88, 185 - 186) Moreover, as previously noted, Bruno personally delivered one of the Committee letters to Kalfin.

There is absolutely no evidence in the record that establishes or shows Bruno ever intimidated or harassed her co-workers. Under Board law, union solicitations "do not lose their protection simply because a solicited employee rejects them and feels 'bothered' or 'harassed' or 'abused"' by them. *Frazier Industrial Co.*, 328 NLRB 717, 718-719 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000). Accord: *Consolidated Diesel*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d

345 (4th Cir. 2001) (employees did not lose the protection of the Act where complaints about their union solicitations "manifested a purely subjective notion of harassment"). A detailed review of the discussions that Terrones had with employees proves that Bruno never intimidated or harassed anyone. (Tr. 170) *Willamette Industries, Inc.*, 306 NLRB 1010, 1018 (1992) (the mere fact employees may not have wanted to discuss the union with a specific coworker, or that they heard unsubstantiated rumors about how that might respond, is insufficient to elevate legitimate discussion of the union to the status of "harassment" or "intimidation.") Instead, Terrones admitted that the employees did not report any misconduct to him other than Galaviz and Bruno asking them for their signature on the petition, conduct which can hardly be defined or construed as misconduct. (Tr. 180) Moreover, Kalfin admitted at hearing that the employees who complained about Galaviz did not specifically say they felt intimidated or forced to sign documents. (Tr. 80) The law does not permit the Respondent to define Galaviz and Bruno's protected union solicitation as unprotected harassment and punish it as such. See, e.g., *Consolidated Diesel Co.,* 332 NLRB supra at 1020; *Nor-Cal Beverage Co.,* 330 NLRB 610, 611 fn. 5 (2000).

ii. Galaviz did not misrepresent the purpose of the petition to her co-workers

The evidence establishes that Respondent violated Section 8(a)(1) and (3) of the Act by firing Galaviz. Kalfin testified that he fired Galaviz for three reasons that stemmed from her protected activity: allegedly forging Abel's signature; harassing or intimidating co-workers to join the Committee or sign Committee letters; and lying to her coworkers by asking them to sign blank documents under false pretenses.

As for the claim that Galaviz misrepresented the purpose of the petition, the record establishes that Respondent was unsure exactly what, if anything, Galaviz did that was

considered securing signatures under false pretenses. At hearing, Kalfin testified that he believed Galaviz engaged in false pretenses by telling Edgar that she "lied" about giving Kalfin the document with Edgar's signature. (Tr. 79 – 81, 85 - 86). However, Edgar's written statement confirms that Edgar "erased" his signature from the document when Galaviz gave it to him, and the petition itself shows that Edgar's signature is scratched out. (Tr. 89 – 90; GC 9, p. 14; GC 11) Galaviz, in turn, testified that she told Edgar she was joking, when she initially told Edgar that she had given the petition to Kalfin. Whether Galaviz told Edgar that she was "joking" or whether she was "lying" is simply immaterial, as there is no evidence that Edgar's signature was secured under false pretenses, and Edgar was able to "erase" his signature from the petition.

The record also establishes that Galaviz had been asking several other employees, including Pineda, Edgar, and Perez to sign the Committee membership petition. There is no evidence that the purpose of the petition was for any reason other than increasing the membership of the Committee, asking for respect in the workplace, and asking for a wage increase. (Tr. 339 – 340; GC 11) Respondent never asked Galaviz about any of these allegations; certainly Galaviz never stated that she was seeking signatures on the petition for any other reason.

Contrary to the argument Respondent advanced in its position statement, the statements that Kalfin relied upon corroborate Galaviz's testimony that she never misrepresented the purpose of the petition or the Committee to anyone. (GC 9, p. 7) Edgar's statement verifies that Galaviz asked for his signature as a means to ask the company for a raise. (Tr. 89, GC 9, p. 14) Pineda also confirms that Galaviz asked her to sign the petition "because they were making signatures for a raise." (Tr. 90, GC 9, p. 16) Again, Pineda wrote that Galaviz "was asking for signatures in order to go talk to the managers concerning a raise in our wages." (Tr. 92, GC 9, p.

18) Pineda does not claim that Galaviz later told her she was seeking signatures for any other reason.

It is clear from the record that a rumor in the factory had spread accusing Galaviz of attempting to fire the supervisors, one that was presumably created by Terrones. He testified that he believed Committee's letters were filled with lies about him. (Tr. 122) The fact that he told Saldana that the claims of mistreatment painted him as a poor supervisor before Kalfin proves that Terrones was paranoid that the Committee's complaints could put his job in jeopardy. (Tr. 611 -612) Respondent offered no evidence to rebut Saldana's testimony. Thus, Terrones perceived the Committee's complaints as an effort to have him fired. At hearing, Terrones confirmed that he had nothing more than a suspicion that Galaviz was attempting to fire him and he admitted that he had no evidence to substantiate that Galaviz was seeking signatures for that purpose.

Even more revealing that Galaviz never misrepresented the purpose of the petition is the fact that, when Terrones confronted her about the rumor, she specifically denied that she was asking for signatures to get Terrones fired, and showed him the actual petition which clearly stated the Committee was seeking a raise and respect in the workplace. (Tr. 339 – 340; GC 11) There is absolutely no evidence that Galaviz engaged in false pretenses, and certainly no evidence that she ever misrepresented the purpose of the petition to her co-workers.

iii. Galaviz did not commit forgery

The record establishes that Galaviz did not commit forgery and did not counterfeit documents she submitted to the company; contrary to Respondent's assertions. Galaviz testified that she did not sign Gustavo Abel Lopez's name on the August 7 letter. Instead, the record shows the opposite, that Galaviz did not write Abel's name on the letter.

It is significant that the company officials involved in the decision to fire Galaviz admitted that they did not know whether Galaviz wrote Abel's name on the letter. Kalfin admitted that nobody had accused Galaviz of doing so and, other than his suspicion that Galaviz was responsible, he didn't know who wrote Abel's name on the letter. (Tr. 72, 73, 78, 92)

Significantly, Abel never accused Galaviz of writing his name on the Committee letter. (Tr. 78) Also, Terrones admitted that he didn't have a clue as to who signed Abel's name on the August 7 letter. (Tr. 195, 197, 178) Respondent never asked Galaviz if she wrote Abel's name on the letter and she never admitted that she was responsible for writing his name on the letter. (Tr. 187, 197 - 198) Quite simply, there is absolutely no evidence that Galaviz was responsible for writing Abel's name on the Committee letter. In fact, Abel's conversation with Terrones establishes that Respondent knew Galaviz did not write his name on the letter; Abel told Terrones that he suspected it was Saldana who wrote his name on the Committee letter. (Tr. 707)

Also, a simple comparison of the signatures on the letters highlight that Galaviz did not write Abel's name. (GC 2) A comparison of the capital "g" that she wrote on the letters bears no similarities to the capital "g" of Gustavo Abel Lopez's name on the August 7 letter. (GC 2, 3, 4, 5, 6, 7) However, comparing the lower case "s" in the name Gustavo Abel Lopez with the lower case "s" in Saldana's name, and the style of Saldana's lower case "e" with lower case "e" in the name of Gustavo Abel Lopez, might suggest that Saldana wrote Abel's name; of course Respondent never investigated this possibility.

With respect to Respondent's claim that, by writing Abel's name on the August 7 letter, that somebody committed "forgery," such an act does not constitute a crime of forgery. (GC 9,p. 6, fn. 2). In its position statement, Respondent argues that Galaviz committed forgery under

New Mexico Statutes Annotated Section 30-16-10. (GC 9, pg. 6) However, there is no evidence that a crime was committed by anybody, especially Galaviz. Kalfin admits that he never involved the police (Tr. 72 - 73), and the evidence establishes that neither Galaviz, nor the any member of the Committee, intended to commit fraud by writing the name of Gustavo Abel Lopez, on a Committee document. Instead, based upon Gustavo Abel Lopez's actions at the initial Committee meeting, that took place at the worker's center, it was reasonable for the Committee members to believe that Abel wanted to be a part of the Committee, and agreed with what was stated on the Committee letter. Gustavo Abel testified that he shared his opinion about the supervisors at work and told them that he also wanted a raise. (Tr. 701 - 702) He also confirmed that he met with the members of the Committee at the workers center, and when they discussed forming the group he said, "yes, it's okay to talk about this because we're talking about the problems at work." (Tr. 702) In fact, Gustavo Abel Lopez recognized that the Committee may have included him on the letter because he was at the first meeting. (Tr. 706) It was only after meeting with Terrones, that Abel wanted nothing to do with the Committee.

The Committee's good faith belief that Gustavo Abel Lopez wanted to be a member of the Committee as of August 7 is further demonstrated by the fact they did not include him on future Committee letters after he told them he did not want to be a member of the Committee. (Tr. 705) The Committee acknowledged Gustavo Abel Lopez's desire to no longer be with the Committee when he specifically expressed it to them, and after he did so, his name was never included on future letters. (GC 4, 5, 6, 7)

b. Legal Framework under *Atlantic Steel*

It is anticipated that Respondent might assert that an *Atlantic Steel Co.*, analysis is appropriate. 245 NLRB 814 (1979). However, the facts show otherwise. In *Atlantic Steel*, the

Board found that, even when an employee is engaged in protected activity, he or she may lose the protection of the Act by virtue of profane and insubordinate comments. Id. at 816. The Board carefully balances four factors in determining whether the protection of the Act has, in fact, been lost in a given situation between an employee and his supervisor: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, supra at 816.

Here, the *Atlantic Steel* framework is inapplicable, as Respondent has not asserted that the conduct of Galaviz or Bruno engaged in any acts of insubordination, or used any profanity. Instead, the record shows that the alleged "harassment and intimidation," which never actually happened, occurred between the Committee activists and other workers in the factory when the Committee activists were engaged in protected activity.

Furthermore, Respondent asserts that Galaviz obtained signatures from her co-workers, not supervisors, under false pretenses. Respondent does not contend that the forgery involved any supervisor of the company, but it is clear that it involved another employee. Under these circumstances where there were no profane outbursts, or insubordination, the standards articulated in *Atlantic Steel* are not applicable.

c. Legal Framework under *Wright Line*.

A Wright Line analysis is not appropriate where, as here, the only dispute is about the protected or unprotected nature of the conduct motivating the discipline. See *St. Joseph's Hospital*, 337 NLRB 94, 95 (2001). However, in the event the Administrative Law Judge believes that *Burnup & Sims* is inapplicable, the evidence shows that, under the *Wright-Line* burden-shifting analysis, Respondent violated Section 8(a)(1) and (3) of the Act by terminating

Galaviz and Bruno. *Wright Line*, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To establish a violation, the government must prove, by a preponderance of the evidence, that the employee's protected activities were a motivating factor in the employer's decision to take the adverse action. *Wright Line*, 251 NLRB 1083 (1980). In meeting its burden of persuasion, the General Counsel must establish that the Galaviz and Bruno engaged in protected activity, that the Respondent had knowledge of this activity, and that the protected activity was a motivating factor in the adverse employment actions. Once that is established, the burden of persuasion shifts to the employer to prove, by a preponderance of the evidence, that it would have taken the same action even in the absence of protected activities. Id.

A discriminatory motive or animus may be established by: (1) the timing of the employer's adverse action in relationship to the employee's protected activity; (2) the presence of other unfair labor practices;[16] (3) statements and actions showing the employer's general and specific animus;[17] (4) the disparate treatment of the discriminatees;[18] (5) departure from past practice;[19] (6) failing to adequately investigate whether the discriminatee engaged in the alleged misconduct; and (7) evidence demonstrating that an employer's proffered explanation for the adverse action is a pretext.[20] The Board will infer an unlawful motive or animus where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive."[21]

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[16] *See Mid-Mountain Foods, Inc*., 332 NLRB 251, (2000) enf'd 11 Fed.Appx. 372 (4th Cir. 2001) N.2, 260 (2000), enf'd mem., 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534, 534 (1993).
[17] *See Affiliated Foods, Inc*., 328 NLRB 1107, 1107 (1999) (statements, even if lawful, serve as background evidence of animus);
[18] *See Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).
[19] *See JAMCO*, 294 NLRB 896, 905 (1989), aff'd mem., 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991).
[20] *See, e.g., Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25. 26 (1998).
[21] *J.S. Troup Elec.*, 344 NLRB 1009 (2005) citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995) enf'd. 97 F.3d 1448 (4th Cir. 1996) (table); *ADS Elec. Co*., 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Here, it is undisputed that Respondent knew both Galaviz and Bruno played a key role in the Committee's efforts to organize its workforce. Respondent admits it learned that Bruno and Galaviz had been asking non-Committee members to sign Committee letters, through reports it began receiving from workers in the factory as early as August 9. (GC 9, p. 14, 18) Terrones knew that Galaviz was responsible for attempting to organize the workforce at the company as he took the Committee petition from her and read it the day he subjected her to interrogation. (Tr. 339 – 340) Similarly, Bruno personally delivered a Committee letter directly to Kalfin.[22] Finally, knowledge is clearly established by the fact that both Galaviz and Bruno signed the Committee letters.

As for animus against employees who engage in protected conduct, Respondent's numerous 8(a)(1) violations, standing alone, are sufficient to establish its unlawful animus. *Avondale Industries, Inc.*, 329 NLRB 1064, 1071 n. 4 (1999). Also, Respondent's numerous statements that it does address employee complaints in groups, but instead does it in one-on-one meetings are further evidence of animus.[23] *Downtown Hartford YMCA*, 349 NLRB 960, 965, 981 (2007) (manager's statement that he was not interested in meeting with a group of union workers is evidence of animus). Accordingly, the evidence establishes that Bruno's and Galaviz' protected activities were the motivating factor in Respondent's decision to fire them. As such, the burden shifts to Respondent to demonstrate that it would have fired both even in the absence of their protected conduct. Id. at 1065. Respondent cannot do so.

The timing of the discharges – less than two weeks after delivery of the initial August 7 letter – proves that Respondent fired Galaviz and Bruno to prevent them from continuing to

[22] That Respondent had no legitimate reason to fire Bruno is further shown by the fact that Terrones acknowledged that none of the written employee complaints reference Bruno. (Tr. 177) Trying to deflect the lack of evidence, Terrones claimed he did not know the reason Bruno was fired. (Tr. 177)

[23] See *Basha's, Inc.*, JD(SF)-29-09 slip. op. at 66, 2009 WL 3046525 (ALJ finds that employer's refusing to meet individually with a few employees isolate them from each other and their spokesman violates Section 8(a)(1)).

organize its workforce. See, *Overnite Transportation Co.*, 129 NLRB 1026, 1037 (1960) enf'd. 308 F.2d 279 (4th Cir. 1962) (timing of discharge, coming in the midst of the employer's anti-union campaign, supports a finding that the discharge was illegally motivated); *Carl's Jr.*, 285 NLRB 975, 999 (1987) (timing of discharge, coming in the during the company's anti-union campaign, coupled with apparent pretext, shows illegal motive). The evidence also shows that, the day after Galaviz and Juan Lopez hand-delivered the August 7 Committee letter to Terrones, he interrogated Galaviz about her Committee activity, specifically telling her that he knew she was gathering signatures; then, the day after she hand-delivered the August 15 Committee letter to Terrones, he fired her without explanation. Similarly, Bruno was interrogated about a day after Respondent received the August 7 Committee letter, and she was also fired without explanation on August 17, a day after she and Rivera hand-delivered the August 15 Committee letter to President Kalfin.

Respondent's argument that the other employees who signed the Committee letters were not disciplined or discharged does not invalidate its true motive for firing Bruno and Galaviz. It is well settled that a discriminatory motive involving the discharge of some employees is not disposed of by a showing that the employer did not discriminate against others, "or failed to weed out every union adherent." *Golden State Foods Corp.* 340 NLRB 382, 395 -396 (2003) citing *Waterways Harbor Investment Co.*, 179 NLRB 452, 459 (1969) enf'd 430 F.2d 1313 (6th Cir. 1970). Also, Respondent acknowledged that Bruno and Galaviz were actively attempting to organize the workforce; Respondent's review of the three statements written by non-Committee employees, and the fact both Galaviz and Bruno hand-delivered the Committee letters, support a finding that Respondent believed that Galaviz and Bruno were spearheading the organizing effort of the Committee. (GC 9, p. 14, 16, 18)

The shifting justifications for firing Galaviz and Bruno also prove Respondent's true and unlawful motive. At hearing, when Kalfin was questioned as to why he fired Bruno, he testified that he fired her for being a party to intimidation and harassment; he specifically testified that he did not believe she had committed forgery. (Tr. 93 – 94) Kalfin's testimony contradicts the justifications proffered in Respondent's initial position statement, which made a blanket assertion that Respondent "terminated Galaviz and Bruno because it received numerous complaints about them from co-workers regarding harassment and other inappropriate behavior, including requests to sign blanks sheets of paper and forgery of signatures." (GC. 9, p. 1)

Similarly, the justifications for Galaviz's termination offered at hearing shifted from Respondent's prior assertions in its position statement. In footnote three, Respondent gave a detailed description that "of the signatures presented, one was forged and two were from former employees, one who had not worked for the company since July of 2009" as a reason for firing Bruno and Galaviz. (GC 9, p. 7, fn. 3) The testimony proves that Respondent had previously exaggerated the justifications for firing Galaviz; Kalfin confirmed that the letters the company received before firing Galaviz and Bruno contained signatures of current employees. Notably, Respondent could not keep a consistent justification as to why Galaviz and Bruno were fired.

Also, Respondent's nonexistent investigation into the allegations against both Galaviz and Bruno also proves Respondent's unlawful motive. See, *Firestone Textile Co.*, 203 NLRB 89, 95 (1973); *Burger King Corp.*, 279 NLRB 227, 239 (1986) (virtually non-existent investigation into the matter also supports a conclusion of improper motive). Respondent fired Galaviz without asking Galaviz for her side of the story regarding the allegations made against her (Tr. 197), and similarly fired Bruno without bothering to give Bruno an opportunity to address the her alleged misconduct. (Tr. 182-83) The fact that Respondent fired both Galaviz and Bruno after

conducting only a limited investigation, and without allowing giving either an opportunity to explain the allegations against them, supports a conclusion that the discharges were discriminatorily motivated. *Alstyle Apparel*, 351 NLRB 1287, 1287-1288 (2007). (Board found that employer's limited investigation into allegations of misconduct, and its decision to discharge employees before giving them an opportunity to explain the allegations against them support the conclusion that the discharges were discriminatorily motivated and not, as the employer asserted, based upon a reasonable belief of misconduct).

Respondent's disparate treatment, compared to other employees who had engaged in harassment or intimidation further proves its unlawful motive. For example, the employee complaints that Respondent received against Galaviz and Bruno were not even comparable to the specific complaints against employee Blanca Rodas. (Tr. 727 – 729, GC 30) The disciplinary document given to Rodas states that she threatened to damage a coworker's car, and repeated threatening obscenities. Despite these threats and obscenities, Rodas received a three day suspension, whereas Galaviz and Bruno, who only asked their co-workers to join the Committee, were terminated. (Tr. 727 – 729, GC 30) Another employee, Miriam Lopez (Miriam), complained that Ana Maria Guerra (Guerra) specifically told her to "watch out" if not she was going to "see it out with her.;" despite another witness' statement validating that Guerra actually threatened Miriam, Respondent only suspended Guerra from work for three days. (Tr. 730 – 734; GC 31, 32, 33) Unlike the terminations of Galaviz and Bruno, Terrones spoke with Martha and allowed her to explain complaints that she had been elbowing her co-workers. (Tr. 734 – 735, GC 34) Terrones knew that every time that Martha walked by her co-worker she would hit her with her elbow; Respondent tolerated Martha's conduct, and only gave her a verbal warning – in contrast, Galaviz and Bruno were both fired. (Tr. 734 – 735, GC 34)

The pretextual nature of Respondent's justification is evidence of its true motive for firing Galaviz and Bruno. A finding of pretext defeats any attempt by Respondent to show it would have fired Bruno and Galaviz absent their Committee activities. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.* 255 NLRB 722 (1981) enf'd 705 F.2d 799 (6th Cir. 1982); *Sanderson Farms, Inc.*, 340 NLRB 402 (2003) enf'd 112 Fed.Appx. 976 (5th Cir. 2004). See also *Johnston-Tombigbee Furniture Co.*, 243 NLRB 116, 116 (1979) (Board found a company's stated claim for firing three employees - who admittedly forged the 18 other worker's on dues-checkoff authorization cards – to be pretext; the discharges were found to be a violation); *Gurabo Lace Mills, Inc.*, 265 NLRB 355, 362 (1982) (Board affirms the ALJ's finding that a worker named Diaz accusing his co-worker Paniagua of forgery on a union authorization card was far from misconduct, and proved knowledge that Paniagua's discharge violated 8(a)(3)).

These circumstances, coupled with overwhelming independent statements of animus discussed herein, viewed in the context of the other acts Respondent took against the Committee members that remained in the factory, prove that Respondent's proffered defense for firing Bruno and Galaviz are mere pretext, and that the true reason for their discharges was their Committee activity. The evidence establishes that Respondent perceived Galaviz and Bruno to be spearheading the Committee's efforts to organize and fired them to permanently banish them from the workplace, in violation of Sections 8(a)(1) and (3) of the Act.

G. Respondent violated Section 8(a)(1) and (3) by issuing a written warning to Yolanda Rivera.

1. Respondent Issues Write ups to Yolanda Rivera

Yolanda Rivera has worked as a tortilla maker for Respondent since 2007. (GC 57, p. 1) She was one of the few original Committee members working for Respondent

that continued to participate in the Committee even after Respondent fired Galaviz and Bruno; Rivera signed a series of Committee letter delivered to the company president, including the letters dated August 21, October 8, and December 3. (GC. 2-7)

Rivera was scheduled to work a morning shift beginning at 5:00 a.m. on September 29. (Tr. 487) At approximately 4:30 a.m., she spoke with Supervisor Campos on the phone telling her that she was not reporting to work because she was feeling sick. (Tr. 487 – 488) Supervisor Campos said it was fine and that she would let Supervisor Mora know that she (Rivera) would not be working that day. (Tr. 487) Rivera reported to work for her next scheduled shift on Monday, October 1. (Tr. 488) Despite having given the company notice of her absence, while Rivera was working the corn production line, Supervisor Campos gave Rivera a document and instructed her to sign it for not showing up to work on September 29. (Tr. 488, 713; GC 28) Rivera protested the write up, asking Campos why she being written up when she had previously informed Campos that she would be absent. (Tr. 488) Campos said she was getting the write up because Campos believed that Rivera felt good enough to go out dancing but wasn't feeling good enough to report to work. (Tr. 489) Rivera signed the document but was not given a copy. (Tr. 488) Rivera spoke with Assistant Plant Manager Jasso to protest the write up, however, he never re-visited the issue with her even though he assured Rivera that the company would follow up. (Tr. 489) A documented absence under Respondent's attendance policy can lead to termination. (Tr. 854 - 855; GC 28, 56)

In the past, before the Committee had been formed, Rivera had called in sick the same day of her scheduled work shift, as she did on September 29, without receiving a disciplinary write up for being absent. (PX 22 at 156) In the summer of 2012, Rivera was absent from work because she was in the hospital, and her daughter called the supervisor's assistant to notify

Respondent that Rivera would be absent from work that same day. (Tr. 490 – 491) Rivera did not receive a write up when she returned to work the following day, and the company did not ask her for proof that she had been sick. (Tr. 491) Similarly, before the Committee had been formed, Rivera had previously been absent from work five other times during her employment with the company. (Tr. 492) On each occasion, Respondent did not give her a write up for being absent or ask her for a doctor's note or other proof that she was unable to work while she was absent. (Tr. 492)

Other workers followed a similar practice of calling in sick the day of their scheduled shift without receiving a write up or being required to present a doctor's note. In about August 2011, Bruno notified her supervisor, the same day that she was scheduled to work at 5:00 p.m., that she was going to be absent. (Tr. 404) Bruno explained that she could not report to work because she was at the hospital with her son. (Tr. 405) Her supervisor did not ask her for a medical note to prove that she had been at the hospital with her son. (Tr. 405) Bruno was also scheduled to work the following day; again, she called her supervisor the following day to notify Respondent that she was unable to report to work. (Tr. 405) The supervisor again did not request a note from Bruno the second day that she spoke with him. (Tr. 405) Bruno was absent from work for two days and the company did not give her a warning or disciplinary form for being absent those two days. (Tr. 406)

On November 26, Rivera was outside of the factory during her lunch break. (Tr. 494) Rivera was wearing a long sleeve sweater underneath her uniform, and returned to work on the production line wearing her sleeves about an inch above her wrist. (Tr. 492 – 493) Rivera was at the corn production line packaging station when she came back from lunch, and Supervisor Mora called her away from the production line, instructing her to sign a write up for not rolling up her

sleeves. (Tr. 492 - 493; GC 17) Mora gave Rivera a written warning claiming that Rivera's long sleeves constituted three violations: (1) failure to follow instructions; (2) a "production" violation; and (3) a "GMP violation." (Tr. 499; GC 17)

There are a number of workers who wear long sleeves under their uniform, particularly in the winter season. In 2011, Bruno, who worked the night shift at the time, observed Night Shift Supervisor Edith Mendoza wear long sleeve sweaters more than once. (Tr. 403, 404) In January 2013, Rivera Ruth Piche (a/k/a "Mimi") wore long sleeves under her uniform while she was working at the flour line band. (Tr. 494 – 495, 513 – 514;GC 15) The sweater that Piche wore while working would brush up against the flour production line belt, leaving her sleeves dirty. (Tr. 494 – 495, 513 - 514) Piche did not receive a write up for wearing long sleeves until February 13, 2013 – just days before the hearing opened in this matter; instead of three separate violations, Piche's write-up was only for one GMP violation. (R 2) Lilian Lopez also saw Lorena, Marilyn, and Celia wear long sleeves while they worked the production line. (Tr. 539) In one instance, Mora saw that Celia was wearing long sleeve while working the corn line and told Celia that she was contaminating the tortillas. (Tr. 540 - 541) However, Respondent offered no disciplinary record showing that Celia, Lorena, or Marilyn were written up for wearing long sleeves at the production line. (Tr. 553 – 554, 564).

2. Respondent issued written warnings to Rivera in violation of Section8(a)(1) and (3) of the Act

It is undisputed that Respondent knew Rivera supported the Committee and signed the Committee letters that were delivered to the company; Rivera is one of the few original Committee members after Bruno and Galaviz were banished from the workplace. Respondent is likely to argue that her September 29 write-up was merely a documentation of her absence, and does not amount to adverse action against Rivera; however any such claim is without merit.

Respondent's policy on attendance and punctuality permits the company to terminate employees for an excess of six absences. (GC 28, 56; Tr. 854 - 855) Accordingly, despite Respondent's argument to the contrary, the warning issued to Rivera for her absence on September 29 is a stepping stone toward her termination, and is an adverse action.

Moreover, the circumstances prove that Respondent's justifications for Rivera's September 29 write up are mere pretext. Rivera was disciplined even though she took the same measures to call in sick as she had in the past. Before the formation of the Committee, Rivera and Bruno called in sick by notifying the company of their absence the day of their scheduled shift, without ever presenting a medical note to justify that they were sick; neither Bruno nor Rivera were ever disciplined. However, after Rivera's involvement with the Committee, Respondent gave her a write up when she followed the same call in procedure; clearly, under these circumstances, the reasoning behind Rivera's write-up is pretext. See, e.g. *Toll Mfg. Co.*, 341 NLRB 832, 833-34, 847 (2004) (disparate enforcement of "call-in" procedures against union activist violates 8(a)(3)).

As for the November written warning, the timing of the write up in relation to the Rivera's protected activity supports a finding of unlawful motive. Rivera was written up thirteen days after the company was fined $3,000 by OSHA for a "serious" violation involving the machine that the Committee had specifically complained about – seven days after the company took corrective action for the violation. (GC 2, 6, 13, p. 9 - 10) Clearly the company believed that the Committee, particularly Rivera, spearheaded the OSHA complaints that resulted in the inspection fine against the company. Since the August 7 letter, the Committee had been protesting the unsafe machinery at the company, specifically complaining that Rivera suffered an accident from dislodging tortillas from the machinery at the factory. (GC 2) After the August 7

letter, the Committee continued to complain about the safety issues and risks in using Respondent's machinery in four separate letters, all signed by Rivera. (GC 3, 4, 5, 6) Two days before OSHA inspected the property, the Committee again complained that Campos demanded that Rivera clean out tortillas that were stuck in the machinery. (GC 6) Rivera was on Respondent's radar screen, and the written warning for the innocuous act of wearing a sweater during the winter was a message to her that her protected activities would not be tolerated.

The evidence of disparate treatment also supports Respondent's animus in issuing the November write up to Rivera. The record reveals employees regularly wore long sleeves to work during the winter season, however, Respondent only targeted Committee members. Respondent failed to submit any write ups it issued to Lorena, Celia, and Marilyn who had been wearing sweaters while working on the production lines during the winter months. More revealing is that Celia's conduct was more egregious than Rivera. Mora told Celia that she was contaminating the product at the corn line when she wore a sweater, but Respondent failed to produce any disciplinary write up that was issued to her. (Tr. 540 - 541)

The evidence Respondent offered to show it has consistently disciplined employees does not merit any weight. All the comparator write-ups introduced by Respondent relating to this issue occurred after the Committee's initial letters, and after the charges were filed in this matter. (R. 2; GC. 1(a), 1(c)) Diana Castaneda (Castaneda) was disciplined after she signed Committee letter. (R2) The company learned that Castaneda was a member of the Committee through her signature on the October 6; the first Committee letter that she signed. (GC 6; R2) As for the other disciplinary write up offered by Respondent, Piche had been wearing long sleeves since January 2013, however, she was not written up for this conduct until this allegation was included in the Consolidated Complaint issued on January 31, 2013. (GC 1(s); R 3) Further revealing of

Respondent's true motive is that Rivera's conduct was less egregious than Piche's. However, Respondent trumped up violations against Rivera, finding she committed three violations, whereas Piche was only cited for one violation. (Tr. 499; GC 17) Rivera was packaging tortillas at the corn line and received three separate violations in one warning; whereas Piche received only a single "GMP violation," even though this had been previously brought to her attention, and her sleeves were contaminating the product line by brushing up against flour line belt. (Tr. 836; GC 15, R 3)

Respondent did not show it would have issued the two write ups to Rivera absent her protected activity. The timing of these disciplines, in relation to her on-going Committee activity in the face of Respondent's attempt to rid itself of the Committee leaders, considered in the context of Respondent's score of 8(a)(1) and (3) violations discussed above and below, further suggests Respondent's unlawful motive for disciplining Rivera establish that Respondent violated Section 8(a)(1) and (3) of the Act.

H. Respondent violated Section 8(a)(1) and (3) by suspending Jose Saldana in August and December 2012.

1. Respondent prohibits Saldana from working without a medical note after he joined the Committee

Jesus Saldana (Saldana) began working for Respondent in April 2010.[24] (Tr. 595) Saldana is a founding member of the Committee, and signed all of the Committee letters received by the company, (Tr. 606, 612 – 613, 619 - 622; GC 2, 3, 4, 5, 6) Saldana was diagnosed with cancer in spring of 2012. (Tr. 595, 801) Despite the company accommodating Saldana's work assignment and schedule Respondent did not ask Saldana for a medical note in

[24] Luis Alberto Juarez was called as a witness and testified that he has the alternate name of Jesus Saldana. (Tr. 595) He used the name Jesus Saldana at work and with the members of the Committee; he will be referred to as Saldana in this brief.

the months that followed his diagnosis until Saldana became involved with the Committee. (Tr. 24 – 25, 111, 203 – 205, 137, 603; GC 10)

It is undisputed that Saldana discussed with Terrones that he had a terminal illness when he learned of his diagnosis in early May. (Tr. 24, 110, 596 - 600, 801) Saldana told Terrones and Mora that he would be undergoing 12 session of chemotherapy, and they both offered to accommodate him without asking for a medical note listing his restrictions. (Tr. 597 – 599, 662, 671 - 672) Later, when Saldana showed Terrones images of Saldana's colonoscopy, Terrones and Saldana discussed his work assignment and Terrones offered to move Saldana to a different area. (Tr. 600 – 601)

Concerned with Saldana's condition, Terrones spoke with President Kalfin. (Tr. 24, 26) President Kalfin decided he wanted to assure that the company accommodated and took care of Saldana, without requesting a medical note from Saldana's physician. (Tr. 24) Without qualification, or further inquiry, President Kalfin decided that the company would assist Saldana and offer him any accommodation he needed at work. (Tr. 24 – 25) Terrones carried out this initiative and instructed Mora to make all accommodations necessary to help Saldana. (Tr. 114, 124) At hearing, Terrones testified that he told Saldana that the company would support him and accommodate any needs that he had in reference to his work. (Tr. 110) Terrones elaborated that Saldana did not need to worry about his job or work hours because the company was going to help him. (Tr. 110, 124 – 125, 806) Terrones testified that he also told Saldana to let him know if he was carrying out any job or task that he could not do, so that the company could accommodate him. (Tr. 110, 657)

At the end of May, Terrones authorized Saldana to transfer from the sanitation department to work on the tortilla production lines, without asking Saldana to provide a medical

note. (Tr. 25, 203– 205, 600 – 601, GC 9, p.10) In the months that followed, the company went to great lengths to accommodate Saldana, and took other measures to assure that Saldana could attend work while also attending his chemotherapy sessions, never denying Saldana's requests for time off, and never requiring a doctor's not – until Saldana joined the Committee. (Tr. 111 - 112) For example, Terrones authorized an adjustment to Saldana's work schedule, which permitted Saldana to attend his chemotherapy treatment. (Tr. 111) Every other week, Saldana worked Monday and Tuesday and had Wednesday through Friday off to attend his chemotherapy sessions. (Tr. 602 - 603) Terrones had the authority to allow Saldana to use vacation time for the days he attended his treatment so that he was still paid at least 40 hours a week; this is reflected in Saldana's payroll records, and Terrones authorized all this without requiring a medical note. (Tr. 112 – 113; 602 - 603) (GC 55, p.10) Terrones testified that he did everything he possibly could do to help Saldana. (Tr. 124) Terrones even gave Saldana his personal cell phone number, a ride home from the hospital, and at another time gave Saldana money. (Tr. 125, 657)

Given this backdrop, Terrones testified that he was bothered that Saldana accused him of mistreatment in the Committee letter that was handed to President Kalfin. (Tr.125 - 126; GC 2) In the August 7 letter, the Committee requested a meeting with Kalfin, rather than with Terrones, to discuss Saldana being "forced to work in cold conditions" and his being "forbidden to bring his own water bottle while other workers have the right to do so." (GC 2) Although Terrones discovered that another employee had been taking a water bottle onto the production floor, while Saldana was not allowed to do so, Terrones considered the accusation against him to be lies, and was bothered that Saldana was associated with the accusations. (Tr. 117, 122, 125 - 126, GC 2)

a. <u>Respondent demands a medical note from Saldana for the first time after he joined the Committee</u>

On Friday August 10, just a few days after Respondent received the first Committee letter, Terrones approached Saldana at the flour production line. (Tr. 615) Terrones admitted at hearing that he told Saldana he could not enter the production area until he knew Saldana's specific medical restrictions. (Tr. 137) Terrones was clear in his conversation with Saldana, and told Saldana that he needed to provide a note from his doctor "before he could go back to work." (Tr. 137) Saldana went to his doctor's office that same afternoon and got the note that Terrones demanded. (Tr. 614) He returned to the factory the same day and gave Terrones the note. (Tr. 617, 614) Terrones refused to accept the note, responding that it was no good because it didn't indicate the work restrictions that he had requested. (Tr. 143, 617, 614) Saldana said he had an appointment on the following Tuesday and could ask for a second note from the doctor at that time; Saldana was scheduled to work Monday, August 13. (Tr. 617) However, Terrones told Saldana that he could not work until he provided Terrones another letter from his doctor. (Tr. 617) On August 14, Saldana attended his medical appointment and asked for the second note that Terrones was demanding from him. (Tr. 618) Saldana reported to work with a second doctor's note after his doctor's appointment. (GC 10; Tr. 613) Terrones testified that he was still not pleased with the medical note dated August 14, but permitted Saldana to return to work. (Tr. 145 – 146; GC 10)

b. Respondent demands a third medical note from Saldana in December

In late November, Saldana spoke with Terrones in his office, and explained that he would be undergoing the second session of his chemotherapy treatments. (Tr. 633 – 634) Terrones then demanded still another medical note from Saldana's physician detailing his work restrictions. (Tr. 803, 633 - 634) Later, Terrones told Kalfin that Saldana would be undergoing a session of therapy that required a different work schedule. (Tr. 25)

Saldana complied with Terrones' request and obtained a medical note that addressed him in his alternate name, Luis Juarez, that stated he could not lift more than ten pounds. (GC 19) On about December 3, Saldana delivered the letter to Terrones at the factory. (Tr. 634; GC 19) Terrones said the letter was no good because it had Saldana's alternate name of Luis Juarez. (Tr. 634) Terrones also claimed that Saldana could be a liability to the company if the hose on the medical device he wore to work were to get caught while he was working. (Tr. 635) Terrones prohibited Saldana from working until he presented a physician's letter addressed to the name Jesus Saldana. (Tr. 634, 635)

About ten days later, Saldana visited the factory to speak with Terrones and give him another doctor's note, dated December 12, which stated that he (Saldana) could not work more than eight hours a day. (Tr. 636; GC 19, 20) Saldana explained that the hospital could only provide him with a letter addressed to Luis Juarez. (Tr. 636, GC 20) Terrones reaffirmed that Saldana could not work until he brought the company a letter from his doctor that was addressed to the name Jesús Saldana, not one addressed to Luis Juarez. (Tr. 636 - 637, 668) The testimony is uncontroverted that, since 2011, both Terrones and Mora knew that Saldana was also known as Luis Juarez. (Tr. 647 -653) Notwithstanding, Terrones refused to accept Saldana's doctor's note. Saldana did not work until he met with Terrones on December 19. (Tr. 636 - 637, 668)

On December 19, Saldana met with Terrones in his office at the factory. (Tr. 637, 641 - 642) Terrones handed Saldana a letter dated December 19, which demanded that Saldana clarify his use of the name Luis Juarez, giving him thirty days to provide the requested information or the company "may have no choice but to terminate [his] employment." (Tr. 641 – 642; GC 21) Saldana returned to work after receiving the company's letter dated December 19, and wearing a

medical device to work. (Tr. 642) When Saldana returned, Terrones understood that he was still undergoing the second session of chemotherapy, which required Saldana to wear a medical device to work. (Tr. 809) When he returned, Terrones kept Saldana assigned to working on the production line. (Tr. 642 – 642, 668, 672)

Respondent claims it was justified in seeking a note from Saldana's doctor in August, because it was the first time that Terrones learned that Saldana had work restrictions. (Tr. 801) Terrones testified that, after Respondent received the first Committee letter, and while Terrones was interrogating Saldana about the workplace complaints in the Committee letter, Saldana told him "that he was being sent to do jobs that he could not carry out." (Tr. 802) Respondent claims it asked Saldana for another note in December because Saldana was undergoing new treatment. (Tr. 803 – 804) However, Respondent admits that, in the months after first learning of Saldana's diagnosis, it "bent over backwards" to accommodate him, and in fact made several changes to Saldana's schedule and work area assignments. (GC 9) It was only after Respondent learned of his membership in the Committee, which angered Terrones, that Respondent prohibited Saldana from working without a doctor's note indicating the restrictions on his ability to work. (Tr. 125 – 126, 137)

2. Respondent suspend Saldana in August and December in violation of Section 8(a)(1) and (3)

There is no dispute the company knew Saldana actively participated in the Committee since he revealed his membership in the August 7 letter. (GC 2, 3, 4, 5, 6, 7) Saldana was a bold Committee member who showed his support for the Committee in the face of Respondent's attempt to rid itself of the Committee by firing of Galaviz and Bruno. On about August 22, even after Respondent had fired his fellow Committee members, Saldana walked to Kalfin's office on

the second floor of the factory and hand-delivered the August 21 Committee letter to him. (Tr. 619 - 621)

The General Counsel has presented evidence to prove its burden of persuasion under *Wright Line*, establishing that Respondent prohibited Saldana from working until he provided a medical note in August, then again in December. Respondent knew of Saldana's involvement with the Committee, and Terrones manifested animus against both Saldana's protected activity, and the Committee. Terrones admitted that, when he saw Saldana's name on the first Committee letter, that he could not resist feeling bothered that Saldana accused him of mistreatment. (Tr.125 - 126 ; GC 2) He further admitted that he believed all the accusations against him to be lies; particularly the Committee's claim relating to Saldana because he had been doing everything within his possibilities to help Saldana. (Tr. 124) Also, Respondent's various other violations of the Act, including threats made directly to Saldana, standing alone, are sufficient to establish its animus. *Avondale Industries, Inc.*, 329 NLRB 1064, 1071 n. 4 (1999). As such, the burden now shifts to Respondent to demonstrate that it would have taken these actions absent Saldana's protected conduct; this is something Respondent cannot show.

Contrary to Respondent's argument that it did not suspend Saldana in August, there is no dispute that Terrones prohibited Saldana from returning to work without a medical note, an action that constitutes a suspension. *Bannon Mills, Inc.*, 146 NLRB 611, 632 (1964) (by refusing to allow a union activist to return to work without a doctor's note, the employer discriminatorily laid-off the employee, and "discriminatorily required a doctor's excuse prior to permitting her to return to work because of her known union membership and activities in violation of Section 8(a)(3) and (1) of the Act"). Here, there are several factors present to establish Respondent's purported reasons for requiring Saldana to obtain a doctor's note are

pretext, and its true motive is an unlawful one – Saldana's involvement with the Committee. *Rose Co.,* 154 NLRB 228, 240 (1965) (employer's demand that union activist produce a medical certificate was pretext).

First, the timing of Respondent's newly instituted requirement prohibiting Saldana to work without a doctor's note in August, just days after receiving the first Committee letter, is of no coincidence. After first learning of Saldana's medical condition in about May 2012, Respondent made several accommodations to Saldana's working conditions, and never asked him to provide doctor's letter substantiating those restrictions. (Tr. 597-599) For example, after first learning of Saldana's medical condition, Terrones admitted that he offered to accommodate Saldana's work schedule and told Saldana to let him know if he had any issues with performing his work so Terrones could transfer him to another area; an action Respondent took without hesitation – by transferring Saldana from sanitation to the production line - without requiring a doctor's note. (Tr. 110, 137, 657) Also, before Saldana joined the Committee, Respondent quickly granted his request for a work accommodation by moving him from the mixing area to the working on the flour production line. When Saldana requested a schedule adjustment, it was granted and he was permitted to work only Monday and Tuesday every other week, rather than his regular Monday through Friday schedule. Respondent was also quick to grant Saldana's request to use vacation time every other week to accommodate his medical needs. Before the Committee letters, Terrones did anything he could to help Saldana, including giving him a ride home from the hospital and giving him money.

However, things dramatically changed for Saldana after the first Committee letter – instead of sympathy he incurred Respondent's wrath. Two days after learning that Saldana was an originating member of the Committee, Respondent demanded he produce a doctor's note, and

refused to let him work without one. The message to Saldana couldn't have been clearer – because of his activities on behalf of the Committee he would now suffer the consequences. The foreshadowing of this message came during Saldana's meeting in Terrones' office, just after the August 7 Committee letter. While in the office with Saldana, Terrones threatened to fire him because he had never previously submitted a medical note to Respondent. The threat came to fruition August 10, when Terrones approached Saldana at the production line, and prohibited him from being on the production floor until he secured a note from his physician.

The fact that before the Committee letters, Respondent sympathized with, and freely accommodated, Saldana's medical issues, without requiring a doctor's note, but after the Committee letters was rigid in its requirement that Saldana could not work without providing documentation from his physician shows Respondent's unlawful motive, and substantiates the finding of a violation. *Bannon Mills, Inc.*, 146 NLRB at 632; *Rose Co.*, 154 NLRB at 240.

With respect to Saldana's December suspension, the General Counsel has again met its *Wright Line* burden of persuasion that Respondent suspended Saldana from December 3 to December 19 by prohibiting him from working because Respondent deemed Saldana's doctor's note insufficient. Despite Respondent's threats and coercion, Saldana continued signing the Committee letters, and even personally delivered the August 21 and October 6 letters to Respondent. (Tr. 622) In late November, Terrones again prohibited Saldana from working until he submitted another medical note setting forth his specific work restrictions and this time addressed to Jesus Saldana rather than Luis Juarez, despite the fact the company knew since 2011 that Saldana was also known as Juarez. (Tr. 647 – 650, 673)

Respondent, including Terrones specifically, had known since at least 2011 that Saldana was also know as Luis Juarez. (Tr. 647-650, 673) This testimony is unrebutted. In fact, in

2011 and 2012, before the Committee letters Saldana discussed with Torrones changing his name to Luis Juarez on multiple occasions (Tr. 651-53) Saldana's name was never an issue until after the Committee letters were given to Respondent.

Notwithstanding that Respondent knew, and tolerated, the fact Saldana used the name Luis Juarez, on December 3, the same day Respondent received another Committee letter signed by Saldana, Torrens rejected the note from Saldana's doctor regarding is medical conditions because it contained the name Luis Juarez. (Tr. 56-57, 634; GC. 19) The fact that the issue of Saldana also having the name Luis Juarez only became a concern after the Committee letters supports a finding that Respondent's purported reasons for demanding a doctor's note with the specific name of Luis Juarez, instead of Jesus Saldana is pretext, and the true motive is an unlawful motive, Saldana's involvement with the Committee.

Similarly without merit is any claim that Respondent was concerned about Saldana working on the production floor while wearing a medical device. This excuse is contradicted by the fact that Respondent ultimately allowed Saldana back to work on December 19, even though he was still wearing a medical device, and only after providing him with a warning that he faced termination because of the issue involving his name. (GC. 21). Accordingly, the record evidence proves that Respondent's motive for refusing to allow Saldana to work between December 3 and December 19 is unlawful. Therefore, the Administrative Law Judge should find that Respondent's true motives for suspending Saldana were unlawful, and find that Respondent violated Section 8(a)(3) of the Act by requiring Saldana produce a medical note from his doctor and from being able to work between December 3 and December 19, as alleged.

I. Respondent violated Section 8(a)(1) and (3) by suspending Jose Saldana in October 2012.

1. Respondent suspends Saldana for five days without pay in October

On about October 9, Saldana hand delivered the Committee's October 8 letter to Kalfin in his office. (Tr. 622) In the letter, the Committee requested a meeting with Kalfin to discuss the safety risks the workers were experiencing while operating the machinery in the factory, as it had in the prior letters. (GC 6, 4) The following day, on October 10, an agent from OSHA inspected the factory, later finding the company to have committed a "serious" violation. (GC 13) Ten days following OSHA's inspection of the factory, Respondent suspended Saldana from work for five days without pay. (Tr. 625;GC 6, GC 8, GC 23) Terrones admitted that Saldana is the first employee Respondent has suspended for five days without pay for either an insubordination or a packaging violation. (Tr. 768, GC 36, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53) The workers regularly used one hand to seal packages when the packages move on the conveyer belt rapidly, and employees testified at hearing they were unaware of anyone ever being suspended for five days for using a single hand to seal packages. (Tr. 631, 711, 714, 716, 669)

On October 18, Saldana was summoned to speak with Terrones' in Mora's office. (Tr. 623, 645, GC 23) When Saldana arrived at the office Terrones asked Saldana who he thought he was. (Tr. 623) Saldana protested the grounds of the suspension, explaining that he was using one hand because the packages were coming out too fast and he had to fix them on the belt so that the printer could mark the dates on the packages. (Tr. 624 – 625) Saldana attempted to explain that the belt was moving too fast, but it did not matter to Terrones. (Tr. 624 - 625)

Earlier that day Saldana was working at the sealing station on the flour production line He was responsible for overseeing the printer located to the right of the sealing machine,

ensuring that the printer was marking the tortilla packages with production and expiration dates, and also sealing the packages by sliding them through the sealing machine. (Tr. 625 –628; GC 15, p. 1) As he worked the sealing station, the packages were traveling down the belt too fast, and the dates were not printing on the packages properly. (Tr. 626, 629) To prevent the printing problem, Saldana used his left hand to seal the packages, and his right hand to separate the bags that were piling up on top of one another. (Tr. 626 – 627, 629 -630) By doing so, he was able to properly seal the packages with one hand, resulting in none of the bags that he sealed that day required resealing. (Tr. 630) Saldana was approached by Mora's twice that day, and he followed her directions to use both hands to seal the packages when she approached him the third time – even though it meant the packages would not get printed with the dates. (Tr. 628) At that time, Mora became irritated with Saldana, and moved him to another work station at the flour line. Saldana obeyed her instruction and moved. (Tr. 845 – 846, 646 - 647)

Respondent asserted different justifications for issuing Saldana a five-day suspension. At hearing, Mora testified that one of the reasons for suspending Saldana was that bags he sealed with one hand were not fitting properly in the boxes. (Tr. 845) She then added that another reason for Saldana's suspension was because he had raised his voice when he spoke to her the morning that he was disciplined. (Tr. 846) Mora confirmed that she wrote the disciplinary document which Saldana eventually signed, and that these two reasons should be included in the written discipline. (Tr. 845 – 847) However, contrary to Mora's testimony, the disciplinary document that she wrote explains that Saldana was suspended for failing failure to follow operating procedures – by sealing the packages with one hand – even after he had attended training on packaging, and that he ignored his supervisor. (Tr. 692 - 693;GC 23) Nowhere does

it state that Saldana raised his voice, or that his tortilla bags were not fitting properly in the boxes.

2. Respondent suspended Saldana for five days in violation of Section 8(a)(1) and (3)

Respondent's five-day suspension of Saldana which began on October 18, was clearly motivated by his union activities as evidenced by the record. In addition to knowledge of Saldana's union activities, and Respondent's animus towards them, the timing of his suspension, Respondent's shifting reasons for his suspension, and the disparate treatment of Saldana, all establish that Respondent acted unlawfully.

"It is well settled that the timing of an employer's action in relation to known activity can supply reliable and competent evidence of unlawful motive." *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). In the instant case, Respondent made the decision to suspend Saldana eight days after the company was subjected to an inspection by OSHA, and nine days after Saldana personally hand-delivered a Committee letter to Kalfin. The fact that Saldana hand delivered to Kalfin a letter stating the Committee was "concerned about the safety of our members" a day before the factory was inspected by OSHA supports a finding that the Respondent knew, or at the very least suspected, that Saldana and/or the Committee orchestrated OSHA's visit. (Tr. 622, GC 2, 6, 13) The timing of Respondent's suspension of a bold employee is no coincidence and sent a clear message to employees of what they could expect if they continued to bring government regulators to the factory, and continued supporting the Committee. The timing also supports a finding that Saldana's suspension was unlawful. See *Extreme Building Services, Corp.*, 349 NLRB 914, 933 (2007) (worker who the employer believed had called OSHA was fired for his union activities, with the ALJ finding that it was clear the employer "believed that any assistance given by employees to OSHA was in aid of the Union's" campaign against the

employer). *Jenkins Elevator Co., Inc.*, JD-159-92, 1992 WL 1465853 (Employer's reasoning for the layoff of employee 9 days after he complained of safety conditions, and 8 days after the union insisted on an inspection and certification of elevator equipment before dispatching employees, was pretext, to mask its unlawful reason, which was the hostility towards the employee's protected activities).

Respondent's evolving defenses further prove its unlawful and discriminatory motive. *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) enfd. 160 F.3d 353 (7th Cir. 1998) (where an employer provides inconsistent or shifting reasons for its actions, a permissible inference is that the reasons proffered are mere pretext to mask an unlawful motive). Mora testified on direct examination that Saldana received his October discipline because he "was ignoring his supervisor," namely Mora's instructions to seal the tortilla packages with both hands. (Tr. 837-38) On cross-examination, she then added two additional reasons for the discipline: Saldana's tortilla packages were not fitting properly in the boxes, and Saldana raising his voice. (Tr. 845-46) However, in the disciplinary document given to Saldana on October 18 neither of the additional issues were mentioned. (Tr. 692 - 693; GC 23)

Terrones was similarly inclined to proffer additional justifications for Saldana's five-day suspension that were never included in the disciplinary document. (Tr. 740) Terrones testified that the company had to re-package the bags that Saldana sealed; another purported reason that is not mentioned in the disciplinary form. (Tr. 740) These additional purported reasons for Saldana's suspension, which are not included in the actual written disciplinary form, are evidence of pretext. *GATX Logistics, Inc.*, 323 NLRB at 335; *Metal Container Corp.*, 331 NLRB 575, 581 (2000) (employer's "additional, shifting reasons" for discharge lacked merit as

they were not included in the official termination letter) (citing *Scientific Ecology Group*, 317 NLRB 1259 (1995))

Further evidence of pretext is shown by the disparate treatment Saldana received when compared to other employees who had engaged in similar conduct. See *Pro-Spec Painting, Inc.*, 339 NLRB 946, 950-51 (2003). Here, evidence was presented that there were many other employees who received write-ups for improperly sealing packages, or ignoring their supervisor, but none of them were suspended. (GC 36-49, 51-53; Tr. 744-68) When confronted with a chain of documents showing that other employees with disciplines for insubordination, or sealing violations, were not suspended, Terrones scrambled in an attempt to justify the disparity of the disciplines, by implying that Saldana had a "series of warnings" for ignoring his supervisor. (Tr. 761) Terrones claimed that, of the "series of warnings," two were documented and two were not. (Tr. 768) Terrones then testified that he gave Saldana a documented verbal warning involving the use of a hairnet, and a documented written warning for the not wearing a harness. (Tr. 769) However, the evidence reveals that Terrones was simply fabricating grounds to justify Respondent's disparate treatment of Saldana. Respondent admitted that it only produced two disciplinary documents from Saldana's personnel file, aside from Saldana's October 18 discipline. (Tr. 851, GC 23) These other two disciplinary documents are a verbal warning for the use of a proofer in March 16 2012, and a disciplinary document for the use of a hairnet dated March 21, 2012. Neither involved Saldana ignoring his supervisor. The other two purported written disciplines that Terrones claims to have issued Saldana simply do not exist. Clearly Terrones was seeking ways to justify the excessive and disparate discipline he imposed on Saldana to mask Respondent's unlawful motive. (Tr. 769, 581) When asked to explain which violations Saldana had allegedly committed which culminated in a five-day suspension, Terrones

gave puzzling testimony exposing his uncertainty of Saldana's prior disciplines and whether any of those disciples were either verbal warnings or written warnings. (Tr. 772 – 773)

As for Saldana's disparate treatment, compared to other employees, the record shows that Laura Dominguez (Dominguez) committed two violations when she improperly sealed packages and on several occasion had a "mess" in the area. (Tr. 747) Despite Dominguez having a prior incident on file, her misconduct only netted her a verbal warning. (Tr. 746 – 747, GC 38) In June, Respondent spent its time having to reseal bags that had been "badly sealed" by Marta Leon Maria, who also created a mess in the packaging area; however, Respondent only gave her a verbal warning. (Tr. 742 - 744, GC 36) Another production line worker, Isidra German, on several occasions had made a "mess" in her area and had "badly sealed at the time of sealing." (Tr. 759 – 760) She was also cautioned to "pay more attention for sealing and caring for the belt" and received just a written warning. (Tr. 47) Respondent had to regenerate packages for twenty boxes of tortillas because Samuel Loya initially packaged twenty boxes of packages without expiration dates printed; however, Respondent gave him a written warning. (Tr. 753 – 754; GC 42) Respondent also invested time reprinting expiration date on bags that Alfredo Alvarez put in eight boxes, he gained a verbal warning for his conduct. (Tr. 754 – 755, GC 43) In August, Jesus Ardon, who did not sign the Committee letter, was given a verbal warning when "35 bags of tortillas were found that were not properly sealed." (Tr. 760, GC 48)

Moreover, other employees who did not follow their supervisor's instructions were never suspended. Yasmin Rodas, who never signed the Committee letters, ignored instructions from the person in charge of her shift at least two times, but received only a verbal warning. (Tr. 745, GC 37) Gilberto Nunes not only ignored instructions to clean and throw out trash, he left his work area; Respondent gave him a verbal warning. (Tr. 474 – 478, GC 39) Felix Suarez did not

follow directions to notify a supervisor when he was to start on a last pallet of tortillas for Sam's, and he only received a verbal written. (Tr. 751, GC 41) Similarly, Respondent gave Karen and Dora Campos a verbal warning for having a "dirty" area in the packaging department and for not obeying orders. (Tr. 764 765, GC 52, 53) Given this evidence, Respondent was clearly imposing harsher discipline on Saldana because of his involvement with the Committee. *Christie Elec. Corp.* 284 NLRB 740, 772 (1987) (employer's true motive for sending employee home was to discourage union support by singling the employee out for harsh treatment).

As show above, the evidence presented by the General Counsel supports a conclusion that Respondent's reasons for issuing Saldana a five-day suspension is pretext, and the real reason for being given this discipline was his Committee activities. See *Pro-Spec Painting, Inc.*, 339 NLRB 946, 950-51 (2003) (evidence that respondent "tolerated a lot worse" constituted disparate treatment that belied respondent's assertion that it fired employee for cause); *Guardian Automotive Trim, Inc.*, 340 NLRB 475 fn.1 (2003) (relying on evidence of disparate treatment to show the respondent's antiunion motive where respondent issued a greater corrective action to discharged employees than it did to other employees disciplined for similar conduct); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002) (rejecting respondent's claim that absent an exact comparable situation, the judge erred in finding disparate treatment, where there was evidence of respondent's leniency towards employees who committed similar transgressions). A finding of pretext defeats any attempt by Respondent to show it would have issued a five-day suspension to Saldana despite his Union activities. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *Sanderson Farms, Inc.*, 340 NLRB 402 (2003). Accordingly, the record supports a finding that Respondent's violated Section 8(a)(1)

and (3) of the Act by suspending Saldana in October 2012 because he engaged in Committee activities.

V. CONCLUSION

Based on the foregoing, the General Counsel requests that the Administrative Law Judge find that Respondents violated Section 8(a)(1) and (3) of the Act as alleged. The General Counsel requests that the Administrative Law Judge order that Respondent cease and desist from such conduct, post an appropriate Notice to Employees, in English and Spanish, a proposed copy of which is attached, and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

Dated at Albuquerque, New Mexico, this 16th day of April 2013.

Respectfully submitted,

/s/ Sophia Alonso
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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE in SFTC, LLC D/B/A SANTA FE TORTILLA COMPANY, Cases 28-CA-87842, 28-CA-95332, was served by E-Gov, E-Filing, and E-Mail on this 16th day of April, on the following:

Via E-Gov, E-Filing:

The Hon. Gerald M. Etchingham
Associate Chief Administrative Law Judge
901 Market Street #300
San Francisco CA 94103

A copy on the following via email:

Respondent's Representatives:

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Charging Party's Representative:

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Average Work Hours
Per Employee Per Pay Period

Pay Period Ending	Number of Employees Working	Total Work Hours	Average Total Hours per Employee
1/5/2012	53	2,079.10	39.23
1/12/2012	56	2,580.30	46.08
1/19/2012	56	2,375.90	42.43
1/26/2012	56	2,773.43	49.53
2/2/2012	56	2,283.33	40.77
2/9/2012	56	2,377.13	42.45
2/16/2012	55	2,655.22	48.28
2/23/2012	56	3,107.22	55.49
3/1/2012	56	2,579.90	46.07
3/8/2012	58	2,428.28	41.87
3/15/2012	58	2,172.90	37.46
3/22/2012	57	2,231.98	39.16
3/29/2012	58	2,346.38	40.45
4/5/2012	58	2,422.43	41.77
4/12/2012	58	2,284.02	39.38
4/19/2012	58	2,772.40	47.80
4/26/2012	61	2,552.53	41.84
5/3/2012	62	2,497.45	40.28
5/10/2012	60	2,359.70	39.33
5/17/2012	60	2,410.97	40.18
5/24/2012	60	2,580.78	43.01
5/31/2012	61	2,500.10	40.99
6/7/2012	61	3,099.32	50.81
6/14/2012	61	3,190.25	52.30
6/21/2012	62	2,944.10	47.49
6/28/2012	59	2,549.20	43.21
7/5/2012	62	2,143.85	34.58
7/12/2012	64	2,790.07	43.59
7/19/2012	60	2,677.17	44.62
7/26/2012	60	2,575.82	42.93
8/2/2012	65	2,691.18	41.40
8/9/2012	69	2,744.28	39.77
8/16/2012	67	2,604.02	38.87
8/23/2012	68	2,726.05	40.09
8/30/2012	73	3,196.97	43.79
9/6/2012	74	2,634.27	35.60
9/13/2012	76	2,849.03	37.49
9/20/2012	76	3,089.13	40.65
9/27/2012	78	3,189.22	40.89
10/4/2012	82	3,339.87	40.73
10/11/2012	80	2,752.22	34.40
10/18/2012	74	2,868.48	38.76
10/25/2012	78	3,033.95	38.90
11/1/2012	79	2,558.38	32.38
11/8/2012	76	2,434.03	32.03
11/15/2012	71	2,513.35	35.40
11/22/2012	69	2,163.03	31.35
11/29/2012	72	2,347.13	32.60
12/6/2012	72	2,479.87	34.44
12/13/2012	72	2,798.62	38.87
12/20/2012	72	3,108.30	43.17
12/27/2012	72	1,617.78	22.47

Exhibit A
(Data from GC. 54)

Yolanda Rivera Work Hours
Compared to Average Work Hours

Pay Period Ending	# of Employee	Total Work Hours	Average Total Hours per Employee	Y. Rivera Total Hours Worked	Difference Y. Rivera vs. Average	
1/5/2012	53	2,079.10	39.23	43.50	4.27	
1/12/2012	56	2,580.30	46.08	49.02	2.94	
1/19/2012	56	2,375.90	42.43	42.85	0.42	
1/26/2012	56	2,773.43	49.53	50.15	0.62	
2/2/2012	56	2,283.33	40.77	41.55	0.78	
2/9/2012	56	2,377.13	42.45	43.22	0.77	
2/16/2012	55	2,655.22	48.28	49.05	0.77	
2/23/2012	56	3,107.22	55.49	43.13	(12.36)	1
3/1/2012	56	2,579.90	46.07	49.02	2.95	
3/8/2012	58	2,428.28	41.87	39.38	(2.49)	2
3/15/2012	58	2,172.90	37.46	42.67	5.21	
3/22/2012	57	2,231.98	39.16	43.05	3.89	
3/29/2012	58	2,346.38	40.45	43.05	2.60	
4/5/2012	58	2,422.43	41.77	46.20	4.43	
4/12/2012	58	2,284.02	39.38	38.05	(1.33)	3
4/19/2012	58	2,772.40	47.80	49.67	1.87	
4/26/2012	61	2,552.53	41.84	43.25	1.41	
5/3/2012	62	2,497.45	40.28	42.85	2.57	
5/10/2012	60	2,359.70	39.33	42.80	3.47	
5/17/2012	60	2,410.97	40.18	43.95	3.77	
5/24/2012	60	2,580.78	43.01	49.12	6.11	
5/31/2012	61	2,500.10	40.99	48.20	7.21	
6/7/2012	61	3,099.32	50.81	48.53	(2.28)	4
6/14/2012	61	3,190.25	52.30	61.68	9.38	
6/21/2012	62	2,944.10	47.49	56.37	8.88	
6/28/2012	59	2,549.20	43.21	45.95	2.74	
7/5/2012	62	2,143.85	34.58	45.45	10.87	
7/12/2012	64	2,790.07	43.59	48.83	5.24	
7/19/2012	60	2,677.17	44.62	43.40	(1.22)	5
7/26/2012	60	2,575.82	42.93	51.08	8.15	
8/2/2012	65	2,691.18	41.40	42.03	0.63	
8/9/2012	69	2,744.28	39.77	45.15	5.38	
8/16/2012	67	2,604.02	38.87	40.97	2.10	
8/23/2012	68	2,726.05	40.09	43.37	3.28	
8/30/2012	73	3,196.97	43.79	40.52	(3.27)	1
9/6/2012	74	2,634.27	35.60	22.38	(13.22)	2
9/13/2012	76	2,849.03	37.49	38.63	1.14	
9/20/2012	76	3,089.13	40.65	39.42	(1.23)	3
9/27/2012	78	3,189.22	40.89	35.93	(4.96)	4
10/4/2012	82	3,339.87	40.73	28.22	(12.51)	5
10/11/2012	80	2,752.22	34.40	41.02	6.62	
10/18/2012	74	2,868.48	38.76	38.63	(0.13)	6
10/25/2012	78	3,033.95	38.90	30.22	(8.68)	7
11/1/2012	79	2,558.38	32.38	33.80	1.42	
11/8/2012	76	2,434.03	32.03	26.60	(5.43)	8
11/15/2012	71	2,513.35	35.40	30.62	(4.78)	9
11/22/2012	69	2,163.03	31.35	34.23	2.88	
11/29/2012	72	2,347.13	32.60	32.25	(0.35)	10
12/6/2012	72	2,479.87	34.44	27.12	(7.32)	11
12/13/2012	72	2,798.62	38.87	40.92	2.05	
12/20/2012	72	3,108.30	43.17	47.25	4.08	
12/27/2012	72	1,617.78	22.47	0.00	(22.47)	12

Exhibit B
(Data from GC. 54)

Lilian Lopez Work Hours
Compared to Average Work Hours

Pay Period	# of Employee	Total Work Hours	Average Total Hours per Employee	Lilian Lopez Total Hours Worked	Difference Lopez vs. Average	
4/26/2012	61	2,552.53	41.84	21.67	(20.17)	1
5/3/2012	62	2,497.45	40.28	30.35	(9.93)	2
5/10/2012	60	2,359.70	39.33	34.65	(4.68)	3
5/17/2012	60	2,410.97	40.18	41.77	1.59	
5/24/2012	60	2,580.78	43.01	41.10	(1.91)	4
5/31/2012	61	2,500.10	40.99	48.33	7.34	
6/7/2012	61	3,099.32	50.81	57.92	7.11	
6/14/2012	61	3,190.25	52.30	54.87	2.57	
6/21/2012	62	2,944.10	47.49	56.10	8.61	
6/28/2012	59	2,549.20	43.21	45.68	2.47	
7/5/2012	62	2,143.85	34.58	36.40	1.82	
7/12/2012	64	2,790.07	43.59	48.63	5.04	
7/19/2012	60	2,677.17	44.62	43.42	(1.20)	5
7/26/2012	60	2,575.82	42.93	43.28	0.35	
8/2/2012	65	2,691.18	41.40	43.43	2.03	
8/9/2012	69	2,744.28	39.77	42.95	3.18	
8/16/2012	67	2,604.02	38.87	35.00	(3.87)	1
8/23/2012	68	2,726.05	40.09	31.85	(8.24)	2
8/30/2012	73	3,196.97	43.79	40.75	(3.04)	3
9/6/2012	74	2,634.27	35.60	34.57	(1.03)	4
9/13/2012	76	2,849.03	37.49	28.85	(8.64)	5
9/20/2012	76	3,089.13	40.65	33.17	(7.48)	6
9/27/2012	78	3,189.22	40.89	39.25	(1.64)	7
10/4/2012	82	3,339.87	40.73	42.68	1.95	
10/11/2012	80	2,752.22	34.40	34.58	0.18	
10/18/2012	74	2,868.48	38.76	44.30	5.54	
10/25/2012	78	3,033.95	38.90	39.85	0.95	
11/1/2012	79	2,558.38	32.38	30.53	(1.85)	8
11/8/2012	76	2,434.03	32.03	10.20	(21.83)	9
11/15/2012	71	2,513.35	35.40	34.27	(1.13)	10
11/22/2012	69	2,163.03	31.35	0.00	(31.35)	11
11/29/2012	72	2,347.13	32.60	26.22	(6.38)	12
12/6/2012	72	2,479.87	34.44	28.15	(6.29)	13
12/13/2012	72	2,798.62	38.87	22.80	(16.07)	14
12/20/2012	72	3,108.30	43.17	34.53	(8.64)	15
12/27/2012	72	1,617.78	22.47	24.30	1.83	

Exhibit C
(Data taken from GC. 54)

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

You have the right to join with your fellow employees in **concerted activitie**s. These activities include discussing working conditions among yourselves and making common complaints about your wages, hours, and terms and conditions of employment, including by discussing with each other and concertedly complaining to us about low wages, unsafe equipment, unreasonable work assignments and locations, verbal abuse by supervisors, and unjustified threats of disciplinary action, and becoming a member of Comité de Trabajadores de Santa Fe Tortilla (the Committee) or any other union. **WE WILL NOT** try to stop you from engaging in these or other communications relating to your working conditions.

WE WILL NOT solicit your complaints and grievances and suggest that we will fix them in order to discourage you from supporting or engaging in Committee, union or other concerted activities.

WE WILL NOT ask you about your membership with the Committee or a union t or the union membership and support of other employees.

WE WILL NOT promise to help you get a raise, to help you, to solve your problems, to make changes, or to improve your working conditions with the purpose of discouraging or encouraging you from supporting a union or from engaging in other concerted activities.

WE WILL NOT threaten you with unspecified reprisals, firing you, requiring you to document your medical conditions, or filing lawsuits against you if you choose to be represented by or support a union or if you engage in other concerted activities.

WE WILL NOT tell you that we will never meet with the Committee or a union because you engage in Committee, union or other concerted activities.

WE WILL NOT tell you that no one will help you if you engage in Committee, union or other concerted activities.

WE WILL NOT promulgate and maintain an overly-broad and discriminatory rule and policy by telling you that you are not allowed to assist employees who engage in Committee, union or other concerted activities.

WE WILL NOT create the impression that we are watching out for your Committee, union, or other concerted activities.

WE WILL NOT move you away from other employees to prevent you from engaging in Committee, union, or other concerted activities.

WE WILL NOT fire you, suspend you, discipline you, transfer you, or reduce your hours of employment because you engage in union or other concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self organization, to form labor organizations, to join or assist the Committee or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer reinstatement to **Yolanda Galaviz** and **Delfina Bruno,** to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any all other rights or privileges they previously enjoyed , and **WE WILL** make them whole for any loss of earnings and other benefits suffered as a result of our firing them, with interest.

WE WILL expunge and physically remove from our files all reference to our discharges of **Yolanda Galaviz** and **Delfina Bruno** on August 17, 2012, and **WE WILL** notify them in writing that this has been done and that the expunged material will not be used as a basis for any future personnel action against them or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference-seeker.

WE WILL make whole **Jesus Saldaña** for any loss of earnings and other benefits he suffered as a result of our discrimination against him, with interest.

WE WILL expunge and physically remove from our files all references to our unlawful suspension of **Jesus Saldaña** on August 14, 2012, and **WE WILL** notify him in writing that this has been done and that the suspension will not be used as a basis for any future personnel action against her or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference-seeker.

WE WILL expunge and physically remove from our files all references to any unlawful write ups we issued **Yolanda Rivera** in October 2012 and November 2012, and **WE WILL** notify her in writing that this has been done and that the expunged materialwill not be used as a basis for any future personnel action against her or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference-seeker.

WE WILL make whole **Lilian Lopez** and **Yolanda Rivera** for any loss of earnings and other benefits they suffered as a result of our reducing their hours of because they engaged in Committee, union and other concerted activities.

WE WILL restore to **Lilian Lopez** and **Yolanda Rivera** the hours of employment they enjoyed prior to August 10, 2012 and rescind any changes made to their hours of employment after August 10, 2012.**WE WILL** offer to transfer **Lilian Lopez** and **Yolanda Rivera** to the flour line where they worked prior to August 10, 2012.

WE WILL rescind any overly broad and discriminatory policies that prohibit you from assisting other employees who engage in Committee, union or other concerted activities.

SFTC, LLC d/b/a Santa Fe Tortilla Company
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

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Telephone: (602) 640-2160
Hours of Operation: 8:15 a.m. to 4:45 p.m.