UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

K-AIR CORPORATION

Respondent

and Case 16-CA-091326

SHEET METAL WORKERS LOCAL #67
a/w SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION

Charging Party

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Jonathan Elifson, Counsel for the
Acting General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

K-AIR CORPORATION

Respondent

and **Case 16-CA-091326**

SHEET METAL WORKERS LOCAL #67
a/w SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION

Charging Party

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

COMES NOW Counsel for the Acting General Counsel, pursuant to Section 102.46(d)(1) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, and files this Answering Brief to Respondent's Exceptions and Brief in Support of Exceptions (herein Exceptions) to the Decision and Recommended Order of the Administrative Law Judge. The Honorable Associate Chief Administrative Law Joel P. Biblowitz heard this case on April 8, 2013. On May 30, 2013, the Judge issued his recommended Decision and Order. In his Decision and Order, the Judge correctly found that Respondent violated Section 8(a)(3) and (1) of the Act by interrogating employees about their union membership and the union membership of fellow employees and by discharging employee John Vega. The recommended Decision and Order requires Respondent to, *inter alia,* cease and desist its unlawful conduct, offer Vega reinstatement

and make him whole for any loss of earnings and other benefits as a result of the discrimination against him and post an appropriate notice to employees. (JD slip op. at 10-11).[1]

On June 26, 2013, Respondent filed twenty-nine Exceptions to the Judge's finding of facts, conclusions of law and recommended remedy.[2] This Brief addresses Respondent's Exceptions. Section I contains a statement of material facts, and Section II contains specific points of fact in record evidence and case law that support the Judge's findings and conclusions with regard to Respondent's Exceptions. Counsel for the Acting General Counsel submits that the Judge's decision is fully supported by the credible record evidence and case law and urges the Board to adopt the Judge's decision and deny the Exceptions filed by Respondent.

I. STATEMENT OF FACTS

A. Facts Pertaining to John Vega

This case concerns Respondent's discharge of employee John Vega during its work as an HVAC subcontractor at an LA Fitness job in San Antonio, Texas. (JD slip op. at 2, LL 21-22, Tr.153). Respondent is primarily engaged in installing residential heating, ventilation and air conditioning (HVAC) and occasionally serves commercial customers. (Tr. 149). Kyle Villarreal, Respondent's president and owner, opened Respondent around April 7, 2009. (JD slip op. at 1, Tr. 149). Villarreal manages Respondent's day-to-day operations and does the hiring and firing. (Tr. 152).

[1] Citations are as follows: JD slip op. for Administrative Law Judge's Decision, Tr. for transcript, GC Exh. for General Counsel's Exhibits and Jt. Exh. For Joint Exhibits.
[2] Respondent did not except to the Judge's finding that Respondent's workers are employees under the Act.

Respondent has eight employees, including an office manager, office assistant, two air conditioning (AC) installers and two AC technicians. (Tr. 153).

Vega is a sheet metal worker who has been a member of the Union since 1996. (JD slip op. at 1, Tr. 12). He was not a member in good standing from January 2011 to November 2012 due to his moving between San Antonio and Houston and not being able to pay dues temporarily. (JD slip op. at 1, Tr. 12). Vega worked for Respondent for three days: September 22, 23, and 25, 2012. (JD slip op. at 1, Tr. 12, Jt. Exh. 3(a), 3(b)).

Vega was referred to Respondent by Justin Reeder, a friend who had been working for Respondent and with whom Vega had worked at another HVAC subcontractor, Swisher Heating and Air Conditioning, Inc. (JD slip op. at 1, Tr. 14, 28).

Upon referral from Reeder, Vega contacted Villarreal by phone and arranged an interview. (JD slip op. at 2, Tr. 15, 16). That same day, Villarreal interviewed Vega. (JD slip op. at 2, Tr. 16, 48). During the interview, Vega discussed his qualifications and background. (JD slip op. at 2, Tr. 16). Villarreal stressed that he had upcoming jobs and was hoping to focus more on light commercial work and was looking for people to staff his jobs and work as foremen. (JD slip op. at 2, Tr. 16). Villarreal offered to pay Vega an hourly wage rate of $17 and said they would discuss a pay raise in two weeks. (JD slip op. at 2, Tr. 17). Villarreal also stated that he would consider making Vega a foreman in two weeks if things worked out. (Tr. 17, 49). Vega accepted the job and Villarreal instructed him to show up at 7:00 a.m. the following day. (JD slip op. at 2, Tr. 17).

The following day, September 22, 2012, Vega arrived at Respondent's worksite at 7:00 a.m. (JD slip op. at 2, Tr. 18). He wore a hard hat and vest bearing the name of

Brandt Engineering, a large and well-known union signatory contractor with operations in San Antonio and Dallas. (JD slip op a 2, Tr. 18, 49-50).

Upon Vega's arrival, Villarreal went over the prints with all present employees, instructing everyone on which areas to focus. (JD Slip op at 2, Tr. 18). Villarreal instructed Vega to work on aluminum duct in the pool area, where Vega worked most of the day. (Tr. 19, 51). At the end of the day, Villarreal questioned Vega about his knowledge regarding issues between Justin Reeder and Swisher, asking Vega if he knew about an altercation involving Reeder and that Reeder had filed a Board charge. (JD slip op. at 3, Tr. 20). Villarreal told Vega that "he didn't want that to happen to his company, whatever it was happening over there. He didn't want that to happen here..." (JD slip op at 3, Tr. 21). At the end of the discussion, Villarreal instructed Vega to fill out a time card and Vega complied. (Tr. 19, Jt. Exh. 3(a)). Villarreal told Vega he was doing a great job and told him to report for work the following Monday morning (JD slip op. at 3, Tr. 19-21).

On Monday, September 24, 2012, Vega arrived at Respondent's jobsite at 7:00 a.m., but discovered that the start time was 6:30 a.m. from Monday through Friday. (JD slip op. at 3, Tr. 22, 53). Villarreal told Vega not to worry about it, but reminded him of the start time for the future. (JD slip op at 3, Tr. 22). Villarreal instructed Vega to work in the pool area with another employee named Albert, who recognized Vega from his participation in a strike with another employer. Vega told Albert not to say anything to Villarreal about it. (JD slip op at 3, Tr. 23, 54). Vega also worked with foreman Roger Trinidad that day, and the two acknowledged each other's union affiliations. (Tr. 24).

At the end of the day, Vega spoke to Villarreal at the gangbox. (JD slip op. at 3, Tr. 24). Villarreal asked him about his hard hat, asking if Brandt was a union company. (JD slip op. at 3, Tr. 24, 57). Vega said yes. (JD slip op at 3, Tr. 25). After Vega explained that it was his brother's hat, Villarreal repeatedly asked Vega if he was union. (JD slip op. at 3, Tr. 25, 67-69). Vega explained several times that he was a union member not in good standing. (JD slip op. at 3, Tr. 25, 67). Villarreal said that he wanted to replace Vega's hard hat and Vega said that was fine. (JD slip op. at 3, Tr. 25). Vega again filled out a time sheet for the day and then left. (JD slip op. at 3, Tr. 25, Jt. Exh. 3(b)).

On Tuesday, September 25, 2013, Vega reported to Respondent's jobsite at 6:30 a.m. (JD slip op. at 4, Tr. 26, Jt. Exh. 3(b)). He wore the same vest and hard hat bearing the name of the union contractor, Brandt Engineering. (JD slip op. at 4, Tr. 26). Upon arrival, Vega reported to foreman Trinidad, who assigned Vega to replace a drive on an aluminum duct in the pool area. (JD slip op at 4, Tr. 26-27). Later that morning, Villarreal approached Vega and Trinidad and said, "What is this shit? You are supposed to be looking out for K-Air." (JD slip op. at 4, Tr. 27). Villarreal told Trinidad that since he was the foreman, he was responsible for the work and, that if it happened again, both Trinidad and the employee who did the work would be fired. (JD slip op. at 4, Tr. 27). Just before lunch, Trinidad asked Vega if Villarreal had asked him if he was union and said that Villarreal had asked him as well. (JD slip op. at 4, Tr. 28). Vega said that Villarreal had asked him that question and that Vega was a union member but was not in good standing at the time because he had moved. (JD slip op. at 4, Tr. 28). During a

lunch break that same day, Villarreal told Vega that he had jobs coming up, including jobs at post offices, and was looking for a good crew. (JD slip op. at 4, Tr. 29).

After lunch, Vega went back to work in the pool area for about 20 more minutes until foreman Trinidad assigned him, at around 1:45 p.m., to work on some unistrut that was holding a plenum in the dressing room. (JD slip op. at 4, Tr. 30, 58-59). Support bars to the plenum had been installed sideways and the improper installation created a dangerous situation which Trinidad asked Vega to repair. (JD slip op. at 4, Tr. 30). Vega recognized the danger of the improper installation and made a video depicting the condition of the unit. (JD slip op. at 4, Tr. 31, 58-59, GC Exh. 2). After taking the video, Vega used baling wire to fix the unistrut temporarily and worked on this until the end of the day. (JD slip op. at 4, Tr. 32, 63). As he was fixing the unistrut temporarily, foreman Trinidad instructed Vega to stop working on the unit as Respondent would not pay overtime for additional work. (JD slip op. at 5, Tr. 32). Vega informed Trinidad that he was not finished repairing the unistrut, but Trinidad said that it did not matter. (JD slip op at 5, Tr. 32).

Trinidad told Vega that Villarreal wanted to speak with him. (JD slip op. at 5, Tr. 32). Vega went to speak to Villarreal near the gangbox at around 3:00 p.m. (JD slip op. at 5, Tr. 33, 62). Villarreal instructed Vega to complete a job application and a W-9 form, which Vega did. (JD slip op. at 5, Tr. 33). Vega did not know what a W-9 form was and had never worked under a W-9. (JD slip op. at 5, Tr. 33). Villarreal told Vega that he was having Vega fill out the W-9 form because it would save Respondent on its taxes. (Tr. 33). Villarreal again asked if he could get Vega another hard hat, and Vega said he didn't have a problem with that. (JD slip op. at 5, Tr. 33-34, 71-72). Villarreal

acknowledged that he was ticked off because he did not want to see Brandt's logo on his job. (JD slip op at 3, Tr. 204). Significantly, Villarreal already had Vega's final paycheck prepared and gave it to Vega prior his leaving the jobsite that day. (Tr. 201-202, Jt. Exh. 2).

Vega left the jobsite and went to the Union hall to seek work because he suspected he would be fired. He thought this because he was being accused of doing jobs he did not do, because co-workers recognized him as having gone on strike with a former employer and because Respondent had interrogated him about his Union affiliations. (Tr. 33-35). Vega was at the Union hall for 15-20 minutes and received a call from Villarreal just as he left. (Tr. 33-35). Villarreal asked him if he had installed a unistrut sideways on a duct, and Vega said no. (JD slip op. at 6, Tr. 36). Vega explained that he had not installed it, but had temporarily fixed it and that it needed to be welded. (JD slip op. at 6, Tr. 36). Vega explained that he had made a video of the unistrut and offered to show it to Villarreal (JD slip op. at 6, Tr. 36) Villarreal then told Vega that he had no money to pay him. (JD slip op. at 6, Tr. 36). Vega twice responded that he could wait for a few weeks to be paid and that he needed the work (JD slip op. at 6, Tr. 36). Villarreal refused to relent and declined twice. (JD slip op. at 6, Tr. 36). Villarreal terminated Vega during this discussion. (Tr. 196). Vega said that he would return the next day to collect his tools. (Tr. 36). On cross-examination and redirect examination, Vega acknowledged that he told Villarreal that the unistrut repair was the best he could do under the circumstances with the time and the materials that he had. (JD slip op. at 6, Tr. 36).

Villarreal failed to ask Trinidad, the acting foreman, about the unistrut, even though Trinidad was the one who assigned Vega to fix it. (JD slip op. at 9, Tr. 258).

Trinidad himself observed and inspected the strut after Vega repaired it. (Tr. 261). Trinidad found that it posed no continued danger. (Tr. 264). Vega's performance in repairing the strut was fully satisfactory to Trinidad. (Tr. 264). Had Villarreal asked Trinidad about the strut, Trinidad would have told him that Vega had been working to repair it when the workday ended. (JD slip op at 9).

Vega returned to the jobsite the next day to collect his tools. (JD slip op. at 6, Tr. 36-37). While there, he noticed a former co-worker, George Duarte. Duarte told Vega that Respondent had hired him that day. (JD slip op. at 6, Tr. 36-37). Duarte also told him that Villarreal had hired another worker that day. (JD slip op. at 6, Tr. 36-37). Vega also spoke to Villarreal and told him, "You told me you had no money, but you hired two guys the next day." Villarreal just looked at him with no response. (Tr. 38).

B. Facts Concerning Justin Reeder

Reeder, a sheet metal worker with ten years' experience, worked for Respondent from approximately September 15, 2012 to October 10, 2012. (Tr. 109). He held the position of foreman or lead. (Tr. 110). He worked primarily at the same LA Fitness jobsite where Vega worked. (Tr. 111, 127). Prior to working for Respondent, Reeder worked with Vega at another LA Fitness project operated by Swisher HVAC. (Tr. 113). Reeder previously filed unfair labor practice charges against Swisher, a fact Reeder disclosed upon being hired by Respondent. (Tr. 113, 128, GC Exh. 5(a), 5(b), 5(c)).

Although he could not recall the exact date, Reeder testified that on a Monday in September 2012, while Vega was still employed with Respondent, Reeder and Villarreal spoke in the parking lot of Respondent's worksite at LA Fitness. (JD slip op. at 4, Tr. 115, 145-146). During this discussion, Villarreal asked Reeder about the Swisher

charges. (JD slip op. at 4, Tr. 115). Reeder explained the charges. (Tr. 115). Villarreal then asked Reeder if he was a union member. (JD slip op. at 4, Tr. 115, 134). Reeder said no. (JD slip op. at 4, Tr. 115). Villarreal then said that he did not really have any interest in having union members on the job. (JD slip op. at 4, 9, Tr. 115). He also asked Reeder if he had recommended union employees. (JD slip op. at 4, Tr. 117). Specifically, Villarreal asked if Vega, George and Albert were union members. (JD slip op. at 4). Reeder told Villarreal that Vega had previously been in the union, but was not an active member and was out of a different local. (JD slip op. at 4, Tr. 117, 134). Reeder said that he did not know about the union status of the others he had referred. (JD slip op. at 4, Tr. 117, 138).

During another discussion that occurred while Vega was still employed with Respondent, Villarreal made more coercive statements about union members on his jobsite. (Tr. 146-146) On this occasion, Reeder and Villarreal had a discussion in a van. Reeder observed that Roger Gihardi of Swisher had called Villarreal, but Villarreal ignored the call. (Tr. 118, 135). Reeder expressed concern that Villarreal was speaking to Gihardi as Reeder had charges pending against Swisher. (Tr. 118). Villarreal said he could make up his own mind about Reeder. (Tr. 118). Reeder told Villarreal that he did not want him to think that he had sent union members to him intentionally. (Tr. 119). Villarreal said he was stressed and again said that he did not want union members on the jobsite. (JD slip op. at 9, Tr. 119). Vega worked only one more day at K-Air after this conversation. (Tr. 119).

II. RECORD EVIDENCE FULLY SUPPORTS THE JUDGE'S CONCLUSIONS AND FINDINGS

In its Exceptions, Respondent contests virtually all of the Judge's critical findings of fact, credibility resolutions, legal conclusions and recommended remedies. The Judge's findings of fact, credibility resolutions, legal conclusions and recommended remedies are fully supported by the record evidence and Board law and should be affirmed.

A. Respondent's Exceptions to Credibility Resolutions are Unfounded and Should be Disregarded

Respondent excepts to the Judge's credibility resolutions that found Vega to be credible and discredited Villarreal. (JD slip op. at 8-9). Under the Board's well established policy as set forth in *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), an administrative law judge's credibility resolutions will not be overturned unless the clear preponderance of all the relevant evidence demonstrates that the administrative law judge is incorrect. Here, Respondent challenges virtually each of the Judge's credibility resolutions including those it specifically identifies at Exceptions 11, 12, 18 and 19. As further detailed below, the record evidence in this case fully supports the Judge's credibility resolutions and Respondent's blanket Exceptions to the Judge's credibility resolutions are unfounded and should be disregarded.

B. The ALJ's Factual Finding and Legal Conclusions Are Fully Supported by Record Evidence and Case Law

Respondent excepts to virtually all of the Judge's critical findings of fact and legal determinations. These exceptions are unfounded and should be disregarded.

1. The Judge Correctly Found that Respondent Restrained and Coerced Employees in Exercise of their Section 7 Rights by Interrogating Employees about their Union Membership and the Union Membership of Fellow Employees

The ALJ correctly found that Respondent, via Founder and President Kyle Villarreal, restrained and coerced employees in exercise of their Section 7 rights. Villarreal was present for all of the testimony concerning interrogation and did not deny any of the alleged conduct attributed to him. Therefore, the credited testimony is unrefuted.

a. The Judge Correctly Found that Respondent Unlawfully Interrogated Vega

Respondent excepts to the interrogation findings concerning Vega in exceptions 3 and 14. These exceptions are baseless and should be disregarded. The judge correctly found that Respondent unlawfully interrogated Vega. Contrary to Respondent's assertions, there is no evidence that Vega referenced his union membership prior to Villarreal unlawfully interrogating him.

In determining whether an employer's interrogation is lawful, all surrounding circumstances must be considered to determine whether the questioning amounted to an unlawful interference with the employee's rights protected under the Act. *Rossmore House*, 269 NLRB 1176 (1986). While not prerequisites to a finding of coercive interrogation, the Board considers the following factors in examining an interrogation: (1) the background (the surrounding circumstances including unfair labor practices); (2) the nature of information sought; (3) the identity of the questioner; (4) and the place and method of interrogation. *Rossmore House* at 1178, fn. 20; *Medicare Associates*, 330 NLRB 935, 939 (2000). Under *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), factors to

be considered include (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of interrogation; and (5) the truthfulness of the reply. Only the fifth factor, the truthfulness of the reply, differs from *Rossmore House.*

In the instant case, the Judge correctly found that Villarreal asked Vega if he was a union member and that "it requires no case citation to establish that such a question initiated by a boss to an employee, without any lawful justification, violates Section 8(a)(1) of the Act." (JD slip op. at 8). However, should the Board apply the *Rossmore House* and *Bourne* factors, the evidence still supports a violation of the Act. All five *Rossmore House* and *Bourne* factors favor a finding of unlawful interrogation. First, as the Judge found, Villarreal interrogated another employee, Reeder, and made coercive statements to him. The Judge also correctly found that Respondent discharged Vega unlawfully. Therefore, the first factor supports a violation of the Act. Second, the nature of the information sought also supports finding a violation of the Act, as Villarreal continually asked Vega if he was a union member. Contrary to Respondent's assertions, the Judge's decision and the record show that Vega only spoke of his union affiliations upon Respondent's interrogation; he did not volunteer the information. Third, Villarreal's role as president and Owner of Respondent support's the Judge's finding of a violation, as he is the highest ranking official within Respondent. Fourth, the interrogation took place on the job near the gangbox. Although the location was not particularly threatening, the fact that Villarreal continually asked Vega the same questions about his union affiliations supports the Judge's finding a violation of the Act. Finally, Vega answered truthfully in response to Respondent's unlawful interrogation.

b. The Judge Correctly Found that Respondent Unlawfully Interrogated Reeder

Respondent excepts to the Judge's findings concerning the unlawful interrogation of Reeder in Exception 5. This exception is baseless and should be disregarded. The judge correctly found that Respondent interrogated Reeder unlawfully.

The Judge correctly found that Villarreal asked Reeder if he was a union member and if Vega and workers named George and Albert were union members. (JD slip op. at 8). Again, the Judge concluded that "it requires no case citation to establish that such a question initiated by a boss to an employee, without any lawful justification, violates Section 8(a)(1) of the Act." (JD slip op. at 8).

However, should the Board apply the *Rossmore House* and *Boerne* factors, the evidence still supports a violation of Section 8(a)(1) of the Act. Again, all five *Rossmore House* and *Bourne* factors favor finding a violation regarding Villarreal unlawfully interrogating Reeder. First, Respondent also interrogated Vega and unlawfully discharged him; therefore, this factor supports finding a violation. Second, Respondent sought to determine if Reeder was a union member and also sought to ascertain the identity of any other union members working for Respondent. Although Reeder acknowledged that he had filed a charge prior to Respondent's interrogation, he did not disclose his union affiliation or that of Vega until Respondent repeatedly questioned him. Reeder identified Vega as one with a previous union affiliation. The nature of the information sought supports a violation. Again, Villarreal's role as president of Respondent supports a violation. The place and method of the interrogation supports a violation, as Villarreal was alone with Reeder in a van. Last but not least, Reeder

answered Villarreal's questions truthfully. When all five factors are considered together, Respondent's interrogation of Reeder was unlawful. See *Management Consulting, Inc.*, 349 NLRB 249, 250 (2007) (ALJ found interrogation regarding which employees had talked to the union violated Section 8(a)(1)). See also *Frank Black Mechanical Service, Inc.*, 271 NLRB 1302, 1314 (1984) (Section 8(a)(1) violation where employer asked who supported the union).

2. Respondent Violated the Act by Discharging Vega

The judge correctly applied the *Wright Line* test to determine that Respondent unlawfully terminated Vega. (JD slip op. at 8-9). Under a *Wright Line* analysis, the General Counsel meets his initial burden by showing "'(1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action.'" *See, e.g., Naomi Knitting Plant,* 328 NLRB 1279, 1287 (1999). Proof of unlawful motivation may be based on direct evidence or may be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services,* 343 NLRB 1183, 1184 (2004). This includes proof that the employer's reasons for the adverse personnel action were pre-textual. *Rood Trucking Co.*, 342 NLRB 895-897-898 (2004).

a. The Judge Correctly Found that Vega Discussed Union Wages with Other Employees and that Respondent Knew of His Union Affiliation

The Judge found that Villarreal overhead Vega discussing union wages with employees. The Judge also found that Villarreal interrogated Vega about his union activity and that Vega truthfully answered that he was a member but not in good standing at the time. (JD slip op. at 9). The Judge further found that Villarreal interrogated Justin

Reeder about Vega's union affiliations and that Reeder revealed that Vega had union ties. (JD slip op at 4). The Judge correctly found that the Acting General Counsel met his burden for the protected activity and knowledge portion of the *Wright Line* test. (JD slip op. at 9).

b. The Judge Correctly Found that Respondent Exhibited a Discriminatory Motive in Unlawfully Terminating Vega

The judge correctly found that Counsel for the Acting General Counsel met his burden to demonstrate that Vega's protected conduct was a motivating factor in Respondent's decision to discharge him. (JD slip op. at 8-9). To make this determination, the Judge found that Villarreal unlawfully interrogated Vega and Reeder about their union membership and said he had no interest in having union members on the job, and asked Reeder if he had referred union members to the job (stating that Villarreal "obviously was referring to Vega, whom Reeder had initially told about the job"). (JD slip op. at 9). Moreover, the Judge also found that Vega did not install the unistrut in question and had begun to repair it when the work day ended. (JD slip op. at 9). Last but not least, the Judge found that Villarreal never asked Trinidad about the strut even though Trinidad would have told him that Vega had been working to repair it when the workday ended (JD slip op. at 9). Respondent suggests, in its exceptions, that another employee fixed the unistrut in question after Vega was unlawfully terminated. This contention is irrelevant as the Judge correctly found that Vega did not install the strut in question and was working on repairing it at the time of his unlawful termination. Respondent also asserts that Vega did not show Villarreal the video depicting the dangerous situation. Again, such a contention is irrelevant because the Judge correctly

found that Vega offered to show Villarreal the video in question, but Villarreal refused this suggestion. (JD slip op. at 6).

c. The Judge Correctly Found that There Is No Credible Evidence to Demonstrate that Vega Would Have Been Terminated Absent his Protected Conduct

The Judge correctly found that Respondent did not meet its burden of establishing that Vega would have been terminated absent his protected conduct. (JD slip op. at 9). The Judge found that the only possible evidence supporting this burden was Villarreal's purported pro-union attitude and desire to hire union members, which the Judge explicitly and correctly discredited. (JD slip op. at 9). In its exceptions, Respondent also argues that it kept Reeder on the job after it terminated Vega and that Reeder had a union affiliation. However, the Judge correctly found that Reeder had no union affiliation at the time, and, in fact, told Villarreal he was not a union member. (JD slip. op at 4).

C. The Judge Correctly Determined the Backpay Period

Respondent's exceptions reference evidence which is not part of the record, namely Vega's alleged criminal background, which Respondent asserts it learned about after the unfair labor practice hearing. Respondent argues that this makes Vega ineligible for rehire. Respondent also argues that, since the job on which Vega worked ended (the LA Fitness job), the Judge should have awarded back pay only up to the point the job ended. Respondent presented no evidence at the hearing concerning either issue.

Initially, Respondent raises matters in its exceptions and brief which are not supported by record evidence. Accordingly, these facts and arguments should be rejected outright. These issues should also be rejected because they are properly considered at a compliance hearing upon issuance of a Board order, rather than in the instant underlying

unfair labor practice hearing. *See First Transit, Inc.,* 350 NLRB 825, 829 (2007), *citing John Cuneo, Inc.* 298 NLRB 856 (1990). In *John Cuneo*, the Board held that, in order for reinstatement to be denied and backpay to terminate, an employer must establish misconduct for which the employer would have discharged any employee. Should an employer establish this, backpay is tolled only on the date when the employer first learns of the misconduct. *See East Island Swiss Products*, 220 NLRB 175 (1975).

With regard to Respondent's argument about the job ending, this issue is also appropriate for the compliance stage. *See Peter Scalamandre & Sons, Inc.* 330 NLRB 1991, 1998 (2000). The Board has declined to adopt a precompliance presumption against reinstatement and has left reinstatement and backpay issues for resolution at the compliance stage. *See id, citing Dean General Contractors*, 295 NLRB 573 (1987).

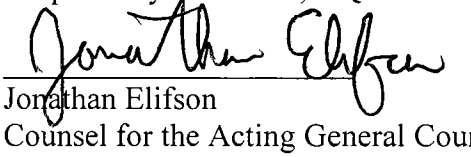
Because the issues are properly left to compliance, the Board should affirm the Judge's award and leave reinstatement and backpay issues for resolution at the compliance stage.

III. CONCLUSION

For the foregoing reasons, Counsel for the Acting General Counsel requests that the Board deny Respondent's Exceptions in their entirety, affirm the Judge's findings of fact and conclusions of law and adopt the Judge's recommended Order in full, except as modified as requested in Counsel's limited cross-exceptions. Counsel also requests any further relief the Board deems appropriate.

Dated July 11, 2013

Respectfully submitted,



Jonathan Elifson
Counsel for the Acting General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions has been served this 11th day of July 2013, upon each of the following:

Melissa Morales Fletcher, Attorney
GOODE CASSEB JONES RIKLIN CHOATE & WATSON, P.C.
P.O. Box 120480
2122 N. MAIN
SAN ANTONIO, TX 78212
e-mail: Fletcher@goodelaw.com

Gilbert Garcia, Organizer
Sheet Metal Workers Local #67
11 Burwood Ln
San Antonio, TX 78217-7038
e-mail: ggarcia@smw67.org

Jonathan Elifson, Counsel for Acting General Counsel
National Labor Relations Board
Region 16
Room 8A24, Federal Office Bldg.
819 Taylor Street
Fort Worth, Texas 76102