

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

**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**

**THE ACTING GENERAL COUNSEL'S BRIEF
IN SUPPORT OF CROSS EXCEPTIONS**

Sophia Alonso
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
421 Gold Avenue, Suite 310
PO Box 567
Albuquerque, NM 87103
Phone: (505) 248 – 5128
Fax: (505) 248 - 5134
Email: Sophia.Alonso@nlrb.gov

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In his decision dated June 25, 2013 [JD(SF)-13-11] (ALJD), Administrative Law Judge William G. Kocol (ALJ) properly found that SFTC, LLC d/b/a Santa Fe Tortilla Company (Respondent) swiftly, and unjustly, violated Section 8(a)(1) and (3) of the Act by: (1) discharging Union activists Yolanda Galaviz and Delfina Bruno; and (2) unlawfully transferring Union supporters Yolanda Rivera and Lilian Lopez.¹ However, the ALJ erred by failing to find several other violations as urged by the Acting General Counsel (General Counsel). Accordingly, pursuant to Section 102.46 of the Board's Rules and Regulations, the General Counsel files this Brief in Support of Cross Exceptions to the ALJD. As set forth in the General Counsel's Cross Exceptions, filed separately, the General Counsel excepts to the ALJ's failure to find that Respondent violated Section 8(a)(1) by: (a) interrogating employees; (b) soliciting employee complaints and grievances; (c) promising to help employees solve their problems,

¹ SFTC, LLC d/b/a Santa Fe Tortilla Company will be referred to as "Respondent." The Comité de Trabajadores de Santa Fe Tortilla, will be referred to as "the Committee" or the "Union." Transcript citations will be designated as (Tr.), with the appropriate page reference. The General Counsel's and Respondent's trial Exhibits will be referred to as (GC.) and (R.), respectively with the appropriate exhibit number. All dates are in 2012, unless otherwise stated.

improve their working conditions by effecting changes at work; (d) threatening employees with unspecified reprisals; (e) threatening employees with discharge; (f) threatening to require employees to document their medical conditions; (g) informing employees it would be futile to select the Union as their bargaining representative; (h) threatening to file a lawsuit against employees; (i) promulgating unlawful work rules; (j) telling employees that no one would assist them if they engaged in union or concerted activities; (k) creating an impression of surveillance; (l) promising to help employees get raises if they refrained from engaging in protected activities; (m) instructing employees to document a coworker's protected conduct; and (n) maintaining an overly-broad handbook provision. Additionally, the ALJ erred by not finding that Respondent violated Sections 8(a)(1) and (3) by: (a) suspending Jesus Saldana in August, October, and December; and (c) issuing Yolanda Rivera written warnings in September and November.

I. BACKGROUND

A. The Committee's nascent organizing drive

Respondent operates a tortilla factory that is open 24 hours a day. (ALJD at 2) In early August, Respondent's tortilla workers Jesus Saldana (Saldana) and Juan Lopez (Juan) invited their coworkers to meet at a local community/worker center to discuss their problems at work. Juan, Saldana, and Gustavo Abel Lopez (Gustavo Abel) visited Delfina Bruno (Bruno) at home, asked if she wanted to be part of a workers' committee, and invited her to meet with her coworkers at the community center. (Tr. 313, 424, 472, 569-71, 604-05)

On August 6, Respondent's tortilla workers Saldana, Gustavo Abel, Bruno, Yolanda Galaviz (Galaviz), Yolanda Rivera (Rivera), Lilian Lopez (Lilian), and Juan met at the center, and discussed their working conditions; their complaints included the velocity of the machines, physical injuries they suffered at work, and the need for pay increases. The workers formed 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 improving their working conditions. (ALJD at 2-3; Tr. 470, 472-73, 314-16, 425-27, 472, 525,571, 604-06)

On August 7, the Committee met again at the center. Rivera jotted down some of the concerns the Committee wanted to address with the company, such as staffing on the production lines and unfair preferential treatment in the workplace. During the meeting the Committee wrote a letter to Respondent identifying their concerns.² In the letter, the Committee revealed the names of its members and stated that the “workers of Santa Fe Tortilla have decided to form a workers committee” and that they were “informing [President Kenny Kalfin] of some of the concerns [the Committee members] were having with [their] working conditions.” (GC 2)³

On August 8, Galaviz and Juan hand-delivered the Committee’s August 7 letter to Kalfin, which complained about safety, the lack of training, and how Bruno and Rivera had been hurt on the job. The letter further noted that workers were unhappy with their pay and wanted raises, and discussed how Respondent mistreated Saldana by forcing him to work in cold areas while forbidding him from using a water bottle. (ALJD at 2-3; Tr. 320, 573; GC. 2) After Galaviz handed the letter to Kalfin she went to the factory dining room and solicited her co-workers to join the Committee. She created a membership petition, showed it to her coworkers, and explained the benefits of joining the Committee. (Tr. 322, 320-24, 328-31; GC 11) Galaviz’s organizing efforts caught Terrones attention. At the hearing, he admitted knowing that Galaviz was involving her coworkers to ask Respondent for a pay raise. (Tr. 193, 339-40)

B. Respondent’s swift efforts to end the workers’ organizing drive

² (Tr. 317-19, 427-29, 473-77, 477, 526-27, 606-07; GC 14, 16)

³ The Committee wrote similar letters to Kalfin on: August 8, 15, 21; October 8; and December 3. (GC. 2-7, 14).

Because Kalfin believed that the workers were not hired as a group, and that the company should “talk to them individually and address their individual concerns” the employees were never addressed as a Committee despite their numerous requests that Respondent do so. (Tr. 65-66, 152-53; ALJD 4-6; GC 2, 4, 5, 6, 14) Consistent with his philosophy against dealing with groups of employees, Kalfin gave Terrones the Committee’s initial letter with instructions to meet with the workers individually. (ALJD at 3) Plant Manager Terrones and Assistant Plant Manager Alfredo Jasso (Jasso) pulled each Committee member into Terrones’s office for one-on-one meetings, where the members were subjected to threats and interrogation, as discussed below. Although the Committee members objected to having these individual meetings and asked for the presence of the other members, Respondent addressed them as individuals in an effort to disband the Committee.

On August 15, the Committee signed another letter addressed to Kalfin, which Rivera and Bruno hand delivered to his office the next day; separately, Galaviz handed a copy of the letter to Terrones. (ALJD at 13; Tr. 436; GC 4) The letter again complained about mistreatment and work assignments, and stated that the Committee members felt intimidated when Terrones called them into his office individually. (GC. 4)

The day after Galaviz and Bruno hand-delivered the August 15 letter to Respondent, both were fired. (ALJD at 15; Tr. 342, 436, 437, 439; GC 4) The ALJ properly found that these discharges violated Sections 8(a)(1) and (3) of the Act. (ALJD at 15) Soon after the terminations, the ALJ properly found that Respondent then illegally transferred two other Committee members, Rivera and Lilian, to another department, again violating Section 8(a)(1) and (3) of the Act. (ALJD at 10-11)

The Committee wrote other letters to Respondent on August 21, October 8, and December 3, again asking for a meeting with Kalfin, and setting forth their workplace complaints. (GC 5, 6, 7, 14) Despite these multiple requests, Kalfin never met with the Committee. Instead of meeting with the employees as a group, the nascent Committee and its members were met with threats, interrogation, suspensions, transfers, and discharges.

II. The ALJ ERRED IN HIS CREDIBILITY DETERMINATIONS REGARDING RESPONDENT'S INDIVIDUAL MEETINGS WITH COMMITTEE MEMBERS

It is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). This is such a case. A review of the entire record proves this standard has been met in relation to the ALJ's credibility findings regarding statements Terrones and Jasso made in the individual meetings they had with the Committee members.

The ALJ failed to cite contradicting testimony of Terrones and Jasso as to what occurred during the individual meetings with the letter signers, and erred by crediting them without accounting for the material discrepancies in their testimony. Moreover, the ALJ did not account for the fact that Lilian, Saldana, and Rivera were still employed by Respondent when they testified at the hearing, thereby bolstering their credibility. *Advocate South Suburban Hospital*, 346 NLRB 209, 209 fn. 1 (2006) citing *Flexsteel Industries*, 316 NLRB 745 (1995) (testimony of current testimony contradicting their supervisors is particularly reliable because these witnesses are testifying against their pecuniary interests). The documentary evidence also corroborates the testimony of Respondent's employees. The letters the Committee wrote near the time of their meetings with Terrones and Jasso reveal what occurred in those meetings, and is consistent with their testimony. (GC 14, GC 4) For example, employees consistently testified that Terrones

asked them why they had signed a Committee letter; which is confirmed by the August 15 Committee letter. (Tr. 335, 480, 530, 574, 609; GC. 4) However, the ALJ ignored the corroborative nature of this testimony being consistent with the statement in the letter, which was drafted near the time of the individual meetings, and well before any charges were filed in this matter.

Unlike the employees' testimony, the entirety of Terrones' testimony was generally elusive, evasive, or nonresponsive to the General Counsel's 611(c) examination as to what occurred in his one-on-one meetings with the Committee members.⁴ In fact, when asked what he said during one of the meetings, Terrones answered 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, he avoided answers that could potentially blemish Respondent's defenses. Jasso, for example, conveniently forgot the questions that Terrones asked Gustavo Abel in their meeting. (Tr. 229) In comparison, Jasso selectively remembered testimony that aided the Respondent's case – such as claiming that Gustavo Abel said he did not sign the letter. (Tr. 225-27) Another example of Jasso's biased testimony is his denial that Terrones asked Gustavo Abel if he had been mistreated or insulted. (Tr. 228) Unfortunately for Jasso, his version conflicts with the testimony of both Gustavo Abel and Terrones. (Tr. 146-47) Although Jasso conveniently forgot what Terrones said, Gustavo Abel's testimony that Terrones asked him questions about the letter, and specifically asked if he signed it, was unrebutted. (Tr. 704)

The ALJ also erred in stating in his decision that that "the record is unclear" whether Terrones told Saldana during the August 8 meeting that he needed to bring a note from his doctor

⁴ 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) Similarly in Assistant Plant Manager Jasso's testimony, the words "I don't remember" appear 50 times. (Tr. 210-94) For this reason, Jasso should not be credited when his testimony conflicts with the testimony of the employee witnesses.

describing his limitations and restrictions. (ALJD at 4, fn. 5) However, at the first day of hearing, Terrones clearly admitted this conversation took place on August 8 meeting. (Tr. 131)

The ALJ also erred in his decision by stating that Terrones “credibly denied that he asked Lopez whether he understood what was written in the August 7 letter, answering the General Counsel’s question during 611(c) examination: ‘Honestly, I don’t care. What I care about is the content of the letter, and not who wrote it.’” (ALJD at 6) The testimony the ALJ refers to, is as follows (Tr. 149-50):

- Q [General Counsel] And you showed him the letter and asked him whether he understood the English that was written on the letter, is that right?
- A [Terrones] That is false.
- Q Okay. Did you ask him anything about signing an English letter?
- A No.
- Q Okay, didn’t you think that it was weird that Mr. Lopez spoke Spanish, but signed an English letter?
- A It is odd, yes, but obviously somebody translated it for him.
- Q Did you suspect that Mr. Lopez was signing something he didn’t understand?
- A Perhaps, yes.
- Q Why did you care?
- A Honestly, I don’t care. What I care about is the content of the letter, and not who wrote it.

In context, Terrones’ statement “Honestly, I don’t care . . .” is not the answer to the General Counsel’s question of whether he asked Lopez if he understood what was written in the letter. The inconsistencies in the testimony of Terrones and Jasso, discussed above, along with these errors, support a finding that the ALJ erred by crediting Terrones and Jasso, over the employee witnesses regarding what occurred during the individual meetings.

Another example is shown by the ALJ’s discrediting part of Galaviz’ testimony as to what occurred during her meeting with Terrones because “much of Galaviz’ testimony was in response to leading questions.” (ALJD at 9) A review of the record shows that, other than preliminary matters, the General Counsel did not ask Galaviz leading questions about the

meeting. (Tr. 334-340) This is particularly true regarding Galaviz' testimony that Terrones asked her why she signed the Committee letter, which the ALJ did not credit. (Tr. 335)

Specifically, Galaviz testified on direct as follows (Tr. 335-36):

- Q [General Counsel] Okay. And did Mr. Terrones ask you any questions about the letter?
A Yes.
Q What did he ask you?
A Why did you sign the letter?
Q Did you respond?
A Yes, because I had a complaint and nobody was paying any attention to us.
Q Okay. Did you say anything else about, did you say anything else about your complaints to Mr. Terrones?
A He said, "I know that Jesus wrote this letter."
Q Okay. And what --
A And I answered that we, the entire committee created it.

This line of questioning was not leading, as it does not suggest to the witness an answer.⁵ The question was proper, and the ALJ erroneously discredited Galaviz' testimony noted above.

III. THE ALJ ERRED IN PRECLUDING RELEVANT EVIDENCE

. During the 611(c) examination of Terrones, the ALJ denied the General Counsel's motion to admit into the record disciplinary documents of employees who received a lower level of discipline for production issues; one of the reasons proffered by Respondent for Saldana's suspension, as discussed more fully below. (Tr. 758, 762; GC 46, 49) The ALJ also refused the General Counsel's request to move the documents in the rejected exhibit file. (Tr. 759, 763-64) The ALJ went so far as to declare he was "growing impatient with the time that's being consumed [in the hearing] with documents that are not relevant to this case" when the documents were clearly relevant to Respondent's proffered defenses and were comparator disciplines. (Tr. 763) See *Laing v. Federal Exp. Corp.*, 703 F.3d 713, 719 (4th Cir. 2013) (discussing the use of comparator evidence and noting that "federal courts now routinely rely on comparator evidence

⁵ See, *U.S. v. Cephus*, 684 F.3d 703, 707 (7th Cir. 2012) (in sex crimes case, prosecutor's question to witness "Did he ever tell you what P-I-M-P stood for?" was not a leading question).

when deciding whether an adverse employment action was driven by a discriminatory motive.”) As such, the ALJ erred by rejecting the General Counsel’s request to include the exhibits in the rejected exhibit file, and precluding the General Counsel’s ability to preserve the admissibility of the exhibits for appellate review.

In sum, the ALJ committed compounded error by refusing to admit relevant comparator evidence, and further refusing the General Counsel’s request that this evidence be placed in the rejected exhibit file. *Omaha World-Herald*, 357 NLRB No. 156, slip op. 4 at n. 13 2011 (ALJ error by refusing to place rejected exhibits into the rejected exhibit file).

IV. THE ALJ ERRED IN DISMISSING RESPONDENT’S UNLAWFUL STATEMENTS TO EMPLOYEES IN THE INDIVIDUAL MEETINGS

A. Facts

1. Kalfin instructs Terrones to meet with Committee members

After receiving the Committee letter on August 8, President Kalfin distributed a copy of it to his management team (Tr. 217), and instructed Terrones and Jasso to meet with everyone who signed the letter individually so Respondent could understand their concerns and remedy them. (ALJD at 3; Tr. 37-41) Terrones complied, and immediately set up individual meetings which took place in his office located on the second floor of the tortilla factory. (Tr. 115-120) When the employees arrived for their individual meetings, Terrones and Jasso were present to 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 to hear the complaints of the Committee members. (Tr. 200-01) Terrones also admitted he held the August 7 Committee letter in his hands, or on the top of his desk, during each of these meetings. (Tr. 162)

Respondent’s reaction to the Committee’s letter and complaints was unprecedented. About a year before the Committee was formed, Galaviz had asked Terrones for a pay raise; in

response Terrones held a meeting and said the doors were open for anybody who didn't want to work for what Respondent paid. (Tr. 360-63, 377) Rivera and Bruno who worked an upward of five years had never previously been invited to share their problems with Respondent. (Tr. 435, 466, 479, 498)

2. Meeting with Jesus Saldana⁶

On about August 8, Saldana was working when Supervisor Campos summoned him to Terrones' office, where Terrones and Jasso were present. (ALJD at 4; 608) Terrones was holding a Committee letter in his hand and asked Saldana if he had signed the letter; Saldana admitted that he had done so.⁷ (Tr. 608) Terrones told Saldana that he wanted to speak with him about the letter. (Tr. 608-09) Saldana objected saying that he wanted the entire Committee present; Terrones replied that it was Respondent's policy to meet with employees individually, and not as a group. (ALJD at 4) Terrones asked Saldana why he had signed the letter; Saldana replied that he had his reasons. (Tr. 609) Terrones asked what he wanted; Saldana replied that he didn't want any changes for himself personally, but wanted changes for everyone in the plant. (ALJD at 4) Terrones responded that there were going to be changes. (ALJD at 4; Tr. 609)

During the meeting, Terrones told Saldana that what was written in the letter were lies (ALJD at 4), and that Saldana was going to find himself in trouble for creating a letter that wasn't true. (Tr. 609) Terrones said that, of anybody at the plant, he never expected that Saldana would "do that," saying Saldana had betrayed his trust. (Tr. 610) Terrones admitted he was surprised (ALJD at 4), and that it bothered him that Saldana had accused him of mistreatment in the letter. (Tr. 125-26) Discussion then turned to Saldana's medical condition.

⁶ As discussed above, the ALJ improperly credited Terrones and Jasso, at times, over testimony of the individual employees as to what occurred in these one-on-one meetings. Gustavo Abel, testimony was consistent with the testimony of other employees and uncontested; however, the ALJ did not address or consider Gustavo Abel's testimony.

⁷ Terrones admits having the letter with him, but could not "recall" showing it to Saldana. (Tr. 120)

Terrones testified that, during this meeting he told Saldana that he needed to bring him a doctor's note describing his limitations; this was the first time Terrones had asked Saldana for a doctor's note.⁸ (Tr. 663) According to Saldana, Terrones said he could get fired because he didn't have a doctor's note, but then backed off this comment when Saldana challenged the claim. (Tr. 610, 661) Terrones ended the meeting saying his door was always open. (ALJD at 4)

3. Meeting with Juan Lopez

On about August 8, Juan was summoned to Terrones' office, where Terrones and Jasso were waiting; Terrones held the Committee letter in his hand, and asked Juan why he had signed the letter. (Tr. 574-75) Terrones said everything in the letter was a lie. (ALJD at 5, Tr. 575-76) Juan replied that everything in the letter was true, as each person described what they had experienced. (ALJD at 5; Tr. 575) Terrones asked whether Juan had been mistreated by a supervisor, and Juan complained about Supervisor Mariela Campos; Terrones said that he would look into it. (Tr. 585) At some point, Juan said that he did not want to continue talking without the Committee and Kalfin present. (ALJD at 5; Tr. 586-87) Terrones told Juan that his request was never going to be possible – and that was the reason he (Terrones) was there.⁹ (Tr. 587) Terrones told Juan to stop sending letters; then Jasso told Juan that his participation in the Committee would create a hostile work environment.¹⁰ (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. (Tr. 576, 586) At some point, Terrones told Juan there would be changes. (ALJD at 5)

⁸ The ALJ erred by stating in footnote 5 of the ALJD that “the record is unclear” whether this conversation occurred during the August 8 meeting or during another conversation. (ALJD at 4, fn. 5) Terrones clearly admitted this conversation happened during the August 8 meeting. (Tr. 131)

⁹ Terrones told Juan that Respondent speaks to employees individually, and not in groups. (ALJD at 5; Tr. 152)

¹⁰ The ALJ's conclusion that Jasso said “said nothing of consequence” at the meeting (ALJD at 5) is belied by the fact his comment about a hostile work environment is similar to the one Terrones made to Bruno. (ALJD at 8, Tr. 435).

4. Meeting with Delfina Bruno

Terrones and Jasso met with Delfina Bruno on August 9. (Tr. 431; ALJD at 7) Terrones and Jasso were present in the office when Bruno arrived, and Terrones had the August 7 Committee letter with him. Terrones told Bruno the purpose of the meeting was to discuss her complaints and concerns about working conditions at the plant. (Tr. 435) This was the first time that Bruno, a five year employee, had ever been called into a meeting with Terrones to discuss her working conditions or work problems. (Tr. 435, 466) During the meeting, Terrones asked Bruno if she believed what was written in the Committee letter was true, and if she believed what the letter said about Saldana was true; Bruno answered “yes” to both questions.¹¹ (ALJD at 7; Tr. 432) Terrones then asked Bruno if she knew whether Saldana had anything in writing confirming that he was ill; Bruno answered “no,”. (Tr. 432, 456) Terrones asked what her concerns were (ALJD at 7), and Bruno complained about favoritism – for example Saldana not being allowed to have a water bottle at work, while another employee was. (Tr. 455) Terrones said he would investigate the matter. (Tr. 455) Terrones told Bruno not to stick her neck out for anybody, because nobody would stick their neck out for her. (ALJD at 7; Tr. 432-33)

Terrones then asked Bruno about the time she hurt her finger (ALJD at 7), which was raised in the Committee letter as an example of employees not receiving proper training, and they discussed the problems on the production floor that Bruno believed were not “right.” (Tr. 433; GC 2) For example, Bruno complained about Supervisor Campos asking an employee whether he had “a small one.” (ALJD at 7) Terrones said that by the next Monday things were going to change and he would try and fix the problems.¹² (ALJD at 7-8) Terrones then stated to

¹¹ The Committee letter stated 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)

¹² During this meeting Terrones also invited Galaviz to work in the corn department with him. (Tr. 435; ALJD at 8)

Bruno “don’t you think that creating a Committee” at work was going to make the work environment hostile. (ALJD at 8; 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. (ALJD at 8) Terrones asked Bruno whether she wanted to continue training to be a supervisor – which would have been a promotion; Bruno had stopped this training in July 2012. (Tr. 457-58, 466; ALJD at 8) Terrones also asked her whether she noticed the tortilla machine was working a little slower. (ALJD at 8)

5. Meeting with Yolanda Galaviz

On about August 10, 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 the Committee had requested. (ALJD at 9; 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. (ALJD at 9) Terrones showed Galaviz the August 7 Committee letter, and told her that “it never should have come to this.” (ALJD at 9; Tr. 334, 379) He told Galaviz, “you know you signed for everyone,” and further said that if Galaviz got into any problems, nobody would give her any help. (ALJD at 9; 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.¹³ (Tr. 336, 367) Referring the letter, Terrones asked Galaviz if he had

¹³ Regarding Galaviz’ testimony on the subject, the ALJ credits substantial portions of the testimony, but does not credit it entirely claiming that, in part, “much of Galaviz’ testimony was in response to leading questions.” (ALJD at 9) As discussed above, a review of Galaviz’ testimony on direct examination shows that, other than preliminary matters, the questions posed to her by the General Counsel were not leading. (Tr. 334-340) Of course, on cross-

mistreated her; Galaviz replied that it wasn't Terrones but Supervisors Campos and Mora who had done so (ALJD at 9; Tr. 336) Galaviz confirmed to Terrones 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 they had been insulting her for some time. (Tr. 380-81) She told Terrones the supervisors mistreated other employees, 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. (ALJD at 9; Tr. 337, 364) Terrones also told Galaviz there would be changes coming, and asked her if she had seen any changes.¹⁴ (ALJD at 9; 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. (ALJD at 9; Tr. 339) Galaviz denied the accusation, requesting Terrones bring that person forward; in her defense, Galaviz took the petition out of her pocket and showed it to Terrones. (ALJD at 9; Tr. 339; GC. 11) Terrones took the petition from Galaviz and read it out loud. (Tr. 340) The Spanish language petition had the signature of Galaviz, and four other employees, one of whom later scratched his name out; Galaviz solicited all of the signatures. (Tr. 326, 373; GC 11) In the 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, Tr. 322) The meeting ended with Terrones promising that things were going to change, and telling Galaviz that, if she had any complaints to come to his office, as his door was always open. (Tr. 337, 381, 383)

6. Meeting with Yolanda Rivera

examination by Respondent, Galaviz answered leading questions – but leading questions are the basis for cross-examination. (Tr. 359-364) Significantly, Galaviz' response to the questions posed to her by the ALJ were consistent with her answers on direct. (Tr. 378-84) Other than cross-examination, it is unclear what "leading questions" the ALJ is referring to as the reason to discredit this part of Galaviz' testimony.

¹⁴ Galaviz also discussed her concerns about lunch breaks schedules; Terrones said he would look into it. (Tr. 364)

Days after the August 7 Committee letter, Supervisor Campos summoned Rivera to Terrones' office; Rivera had never previously been invited to a meeting with Terrones to discuss her work problems. (Tr. 479, 498) Terrones said that he wanted to speak with her about the August 7 Committee letter; Rivera replied she couldn't talk unless the entire Committee was present, along with Kalfin. (ALJD at 6-7; Tr. 480) Terrones told Rivera what was written in the letter was a lie (ALJD at 7), and that she had to explain to him why the Committee had written the letter. (Tr. 480) Rivera replied that it was not a lie, because workers were mistreated daily on the production line. (ALJD at 7) Terrones asked Rivera to explain to him what was going on at work, and Rivera told him that Supervisor Campos mistreated workers by yelling at them, calling them donkeys, saying they were ignorant, and not letting them go to the bathroom. (ALJD at 7) Rivera also explained that Campos was asking workers inappropriate questions, such as asking Saul whether he "had a big one or if he had a small one." (Tr. 160, 481) At some point, Terrones told Campos to stop. (ALJD at 7)

7. Meeting with Gustavo Abel Lopez

Employee Gustavo Abel was called as a witness by Respondent, to support its defenses to the various unfair labor practice allegations. His testimony sheds light on what Terrones said to other employees in the individual meetings. As Respondent's witness, Gustavo Abel was presumably friendly to Respondent.¹⁵

One or two days after the August 7 letter, Terrones and Jasso met with Gustavo Abel in Terrones' office. (Tr. 146) Gustavo Abel testified that Terrones showed him the August 7 letter and asked him if he had signed the letter. (Tr. 704) Significantly, this testimony is unrebutted; Terrones never denied that he asked Gustavo Abel if he had signed the letter. (Tr. 146-149)

¹⁵ The record is devoid of evidence that Gustavo Abel's testimony on behalf of Respondent was compelled by subpoena, as such it is presumed that Gustavo Abel testified voluntarily in support of Respondent's case.

Terrones told Gustavo Abel, who was a new employee, that he was getting himself into problems by joining the Committee and making accusations against Terrones. (Tr. 704) This is also un rebutted. Terrones admitted he asked Gustavo Abel to write a statement for Respondent that the signature on the August 7 letter was not his. (Tr. 148) Shortly after the meeting, Gustavo Abel told Saldana he did not want to be part of the Committee anymore because it would cause him problems; Gustavo Abel never met with the Committee again. (Tr. 704-05)

B. ARGUMENT

1. The ALJ erred in not finding Respondent unlawfully interrogated employees and created an impression of surveillance

The evidence shows that, during the individualized meetings, Terrones and Jasso questioned employees about their participation in the Committee, their signing the Committee letter, and their Committee activities. When considering all the circumstances, and analyzing all the incidents to which employees were subjected, the ALJ erred by refusing to find that Respondent had interrogated its employees. *Rossmore House*, 269 NLRB 1176, 1177-1178, 1178 fn. 20 (1984) (for an unlawful interrogation to have occurred, the Board considers whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act) citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Medcare Assoc. Inc.*, 330 NLRB 935, 939 (2000) (when workers have been subjected to several different incidents of questioning, a proper analysis must take into account all those incidents rather than considering each one in isolation).

The ALJ also erred by refusing to find that Respondent created the unlawful impression of surveillance. As the Board noted in *Robert F. Kennedy Medical Center*, 332 NLRB 1536, 1539-1540 (2000), “[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.” The Board uses an objective test to determine 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. *Id.* at 1540; *Milum Textile Services Co.*, 357 NLRB No. 169 slip op. at 27 (2011).

a. Respondent’s meeting with Yolanda Galaviz

The facts credited by the ALJ establish Terrones called Galaviz in his office, and behind closed door, told her that someone told him she was going around gathering signatures to get him fired.¹⁶ (ALJD at 9) In response, Galaviz requested that Terrones produce the informer because the claim was untrue. To defend herself, Galaviz took the petition out of her pocket and showed it to Terrones. While the ALJ credited this version of events, he did not find a violation and failed to analyze whether this constituted an illegal interrogation. This was error; the credited facts support findings of an unlawful interrogation and impression of surveillance. (ALJD at 9 n. 6)

Here, Galaviz could reasonably construe that Terrones was closely monitoring her Committee activity through his statement that someone told him she was gathering signatures, and that such a statement constituted an unlawful impression of surveillance. *Flexsteel Industries*, 311 NLRB 257, 257 (1993) (impression of surveillance where manager told employee he had heard a rumor the employee instigated the union campaign and was passing out union cards). Significantly, Terrones refused to answer Galaviz’ question as to who the “someone” was who said she was collecting signatures. *North Hills Office Svcs.*, 346 NLRB

¹⁶ Even if the petition sought Terrones’ discharge, which it didn’t, it would have been protected as it is indisputable that Terrones impacted employee working conditions. *Hoytuck Corp.*, 285 NLRB 904, 904 n. 3 (1987) (preparing and circulating petition seeking the selection or termination of supervisor who has an impact on working conditions is protected); *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 784 (6th Cir. 2002). Here, the petition sought respect and a raise, which is clearly protected. *South Jersey Sanitation Corp.*, 357 NLRB No. 124 slip op. at 6 (2011).

1099, 1103 (2006) (employer’s failure to identify the source of information was the “gravamen” of an impression of surveillance violation).¹⁷

Terrones’s questioning Galaviz about circulating a petition among employees also constituted unlawful interrogation. *Ready Mix Inc.*, 337 NLRB 1189, 1190 (2002) (managers statement to employee that “he had heard that you were passing out union cards” constitutes interrogation). Because Terrones made the comment in an accusatory fashion, he compelled Galaviz to reply either confirming or denying whether she gathered signatures from her coworkers on a petition – conduct which is protected. *Continental Bus System*, 229 NLRB 1262, 1264-65 (1977) (declarative statement “begs a reply,” and therefore constitutes an unlawful interrogation as it invites the employee to either confirm or deny the truth of the statement); *Belcher Towing Company*, 238 NLRB 446, 459 (1978) (same); *Eddyleon Chocolate Co.*, 301 NLRB 887, 898 (1991) (same); *Winkle Bus Co., Inc.*, 347 NLRB 1203, 1219 (2006) (statement to employee that “there are people here trying to organize the Union,” . . . “I don’t know whether you’re for that or not,” constituted an unlawful interrogation). Terrones statement can be construed as eliciting information about Galaviz’ protected activity, thus establishing unlawful interrogation in violation of Section 8(a)(1) of the Act. Therefore, the ALJ erred by refusing to address this statement and failing to find both violations.¹⁸

Furthermore, the General Counsel asserts that Terrones told Galaviz he knew Saldana was the person who wrote the August 7 letter.¹⁹ This statement is similarly an unlawful

¹⁷ Although not specifically alleged in the Complaint, the impression of surveillance was fully litigated, and is closely related to the interrogation allegations. Furthermore, Complaint paragraph 5(g)(4) alleges an impression of surveillance by Terrones, albeit involving another incident.

¹⁸ Galaviz defended herself against the claim by showing Terrones the actual petition; Terrones was then able to confirm that Galaviz was passing around a membership petition asking for respect and a pay raise, and saw the names of the signers. (GC 11) Terrones conduct could inhibit protected activity.

¹⁹ The ALJ credited Terrones, and found this statement did not occur. (ALJD at 9) Therefore, this violation depends upon the Board reversing this specific credibility finding, for the reasons asserted in the above section.

interrogation and impression of surveillance.²⁰ *Peter Vitalie Co.*, 310 NLRB 865, 872-873 (1993); *Flexsteel Indus.*, 311 NLRB at 257. Although Respondent had a Committee letter with the signatures of its members, the Committee had not disclosed who had authored the letter. Because Terrones did not reveal the source of his information, an employee could construe the statement to suggest that Terrones was monitoring 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. *Avondale Industries*, 329 NLRB 1064, 1065 (1999) (violation where supervisor said he "couldn't say" how he knew the employee was a union supporter when 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); *Spartech Corp.*, 344 NLRB 576 (2005) (statement that company knew who had attended union meeting created an unlawful impression of surveillance). *New Vista Nursing & Rehab., LLC*, 358 NLRB 1, 10 (2012). Accordingly, the General Counsel submits that the ALJ erred in not finding that Respondent had violated Section 8(a)(1) of the Act by creating the unlawful impression of surveillance and interrogating the employees.

b. Other Interrogations²¹

The General Counsel asserts that Respondent unlawfully interrogated employees by systematically calling individual Committee members into Terrones' office, for extended periods, and asking very pointed questions about their Committee activities and the activities of other employees. These meetings took place with the two highest day-to-day officials at the factory, Terrones and Jasso, behind closed door. *M.J Metal Products*, 328 NLRB 1184, 1185

²⁰ This allegation is contained in Complaint paragraph 5(g)(5). The ALJ did not find that Terrones made this statement, but the General Counsel urges the Board to find that Galaviz' testimony should be credited. (ALJD at 9)

²¹ Complaint Paragraphs 5 (b), (d), (f), and (g) alleged, in part, that on about August 8 and 9, Terrones "interrogated its employees about their union and concerted activities and sympathies."

(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”)

The questions posed by Terrones coupled with his act of showing employees the Committee letter is coercive, as it demands the employees justify their protected activity to him.²² Terrones specifically asked Rivera to explain to him why the Committee had drafted the letter.²³ 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) (questioning of open 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 at 18. Accordingly, the General Counsel submits the ALJ erred by not finding the questioning of the employees constituted unlawful interrogations in violation of Section 8(a)(1) of the Act.

c. The ALJ erred in not analyzing or finding similar violations in Terrones’ meeting with Gustavo Abel

Gustavo Abel’s testimony that Terrones asked him if he had signed one of the Committee letters is unrebutted, as is his testimony that Terrones told him that he was getting into problems by joining the Committee and by making accusations against Terrones. Because Gustavo Abel was Respondent’s witness, his unrebutted testimony as to what Terrones said in this meeting

²² The ALJ properly found that Terrones showed Galaviz the letter, and said that it should not have come to this (ALJD at 9). However, the ALJ erred in not finding this conduct and statement could have been construed as a demand that Galaviz explain her Committee sentiments and protected activity, constituting interrogation.

²³ The ALJ credited Terrones, in finding that these conversations did not occur. (ALJD at 9) Therefore, these interrogation violations depend upon the Board reversing the ALJ’s credibility findings.

should be found credible. This testimony establishes that Terrones questioning whether Gustavo Abel signed the August 7 letter is unlawful interrogation. *Ready Mix, Inc.*, 337 NLRB at 1190; *Stoody Co.* 320 NLRB 18 (1995) (questioning of union supporter in the office of a “high lever supervisor” for no apparent purpose, and without assurances that the employee did not have to answer, or that his answers would not affect his job, constituted an unlawful interrogation). *ABS Auto Parts, Inc.* 177 NLRB 440, 443 (1969) (asking employee if he signed a union card is an interrogation); *Fontaine Body and Hoist Co.*, 302 NLRB 863, 864 (1991) (asking open union supporters about their union sentiments, as a pattern of interrogation that was accompanied by threats and other unlawful conduct, was a violation). Gustavo Abel’s meeting is covered by the existing allegations because Paragraphs 5 of the Complaint alleges that Terrones interrogated employees on about August 8 at Respondent’s facility.

Second, Terrones’s warning to Gustavo Abel that he was getting himself into problems by joining the Committee, and making accusations against Terrones is a threat of unspecified reprisals. *Atlas Logistics Group Retail Services (Phoenix)*, 357 NLRB No. 37, slip op. at 1 fn. 2 (Aug. 5, 2011) (employer’s statement that “there would be problems” is a threat of unspecified reprisals); *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); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995) (supervisor’s “watch out” statement was an unlawful implied threat). Accordingly, the General Counsel submits that Paragraphs 5(b)(4), 5(f)(3) and 5(g)(3) of the Complaint cover these allegations, and further submits the ALJ erred by not finding any of these noted violations, or even analyzing the statements made by Respondent during these meetings.

2. The ALJ erred by not finding an unlawful Solicitation of Grievances

Absent a previous practice of doing so, the solicitation of grievances during an organizing campaign, accompanied by a promise to remedy those grievances, express or implied, violates Section 8(a)(1) of the Act. *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000). 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.²⁴

Here, the evidence shows the Committee members were organizing the workforce, and Terrones admitted knowing Galaviz was trying to get others involved with those efforts. Further, Respondent did not have an established practice of calling individual employees to the office to meet with high ranking officials to ask them about their problems before the existence of the Committee; at least two employees testified this was the first ever such meeting.²⁵ The ALJ also erred by not considering Galaviz' testimony, on cross examination, that a year before the Committee formed, she asked for a raise and Terrones held a meeting with employees telling them employees the "doors were open" for anybody who did not want to work for what Respondent paid. (Tr. 361-63, 377)

The evidence establishes Terrones unlawfully solicited grievances during the one-on-one employee meetings. Terrones admits asking every employee what kind of changes they wanted (Tr. 129); he admits asking 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. (Tr. 157-59) 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) (violation when, after

²⁴ See *Center Service System Division*, 345 NLRB 729, 730 (2005), enfd. in part, 482 F.3d 425 (6th Cir. 2007); *NLRB v. V & S Schuler Engineering, Inc.*, 309 F.3d 362, 370-371 (6th Cir. 2002).

²⁵ Both Bruno (Tr. 435, 466) and Rivera (Tr. 479, 498) testified that no such meetings had previously occurred.

employees started organizing, assistant vice president took employees to breakfast and asked them what their problems were and why they had taken the steps they had taken); *General Electric Co.*, 264 NLRB 953, 953 (1982) (“questioning of employees as to whether they had particular problems, and what some of their problems were” was a solicitation of grievances).

Respondent further solicited grievances when Terrones told Galaviz she could come to him with her complaints, 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 he had an open-door policy a violation). Before the Committee, Terrones had never previously invited employees to his office to ask them about their problems, and in the past did not welcome Galaviz’ request for a pay raise; therefore his invitations to remedy those problems while the Committee was organizing constitutes a violation.

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) (employer’s advising employees that it would attempt to “fix” or “adjust” their grievances a violation). Finally, 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 wanted to change. *Baptistas Bakery, Inc.*, 352 NLRB 547, 569 (2008).

The ALJ erred dismissing these allegations, finding that “employees outwardly expressed their concerns,” asked that they be addressed, and “the employer asked about those concerns and promised to rectify them if appropriate. The employees cannot voice concerns and ask that they be rectified and then complain when an employer does just that.” (ALJD at 5) The ALJ’s decision is inconsistent with the law. The Board has found that, even where “employees volunteer information to their employer that they are seeking union organization because of their

displeasure with their conditions” at work, the employer is not then “free to continue to press the inquiry in such a way as to indicate to the employees that it was prepared to remedy their grievances and thus render union representation unnecessary,” as such conduct constitutes a solicitation of grievances. *Emery Air Freight Corporation*, 207 NLRB 572, 575 (1973).

Here, the employees decided to form a group to improve their working conditions, and asked to meet with Respondent as a group to discuss their problems. As part of its strategy to disband the Committee, and stop Galaviz and the others from soliciting membership in the Committee, Respondent refused to meet with the entire Committee. Instead Respondent scheduled mandatory individual meetings with Terrones, over objections from the employees. In the meetings, Terrones solicited their problems and promised benefits, thereby showing employees it was prepared to remedy their grievances rendering union representation unnecessary. *Emery Air Freight Corporation* 207 NLRB at 575. In these circumstances, the General Counsel submits the ALJ erred by refusing to find any solicitation of grievances violations in violation of Section 8(a)(1) of the Act.

3. The ALJ erred by failing to find Promise of Benefits

Promises of benefits during an organizing drive are inherently coercive. *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 promises that it “would someday better itself and offer the

employees more,” or 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.*

Here, the ALJ found that Terrones told Galaviz that he would speak to President Kalfin to get her a raise (ALJD at 9), a statement that constitutes a direct promise of a benefit.²⁶ *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). The ALJ also found that Terrones offered Bruno to continue training to become a supervisor (ALJD at 8), which also constitutes a promise of benefit. *Brewton Fashions, Inc.*, 145 NLRB 99, 127 (1963) (finding an implied promise of benefit that plant manager told employee that he was training her to be a supervisor and hoped she would not involve herself in the union drive) Terrones’ statements to employees that there would be changes, that employees could turn to management, that management was there to resolve problems, and asking if employees noticed the machines were running more slowly (ALJD at 4, 5, 8, 9), while vague, also constituted promises of future benefits, as these statements were made in the face of employees’ organizing efforts. *Permanent Label Corp.*, *supra*. 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, in light of the timing and Terrones act of having the letter in each meeting, the employees would reasonably have understood that the statements and meetings were a direct response to their Committee activities. Accordingly, while the ALJ made the requisite factual findings to support a violation, he erred by failing to find that Respondent’s conduct constituted promises of benefits in violation of Section 8(a)(1) of the Act.

²⁶ This statement viewed in the context of Terrones showing her the letter and saying it should not have come to this (ALJD at 9), while he had a different reaction to her same request in the past further supports finding this violation.

4. The ALJ erred in dismissing Respondent's threats

a. Threats of Discharge

An employer violates Section 8(a)(1) of the Act by threatening employees with discharge or stricter discipline while they are exercising their Section 7 rights. *NLRB v. Neuhoff Bros., Packers, Inc.*, 375 F.2d 372, 374 (5th Cir. 1967); *Schrock Cabinet Co.*, 339 NLRB 182, 185 (2003). Here, Terrones told Saldana that the company could fire him because he did not have proof of his medical condition.²⁷ (Tr. 610) Respondent had known of Saldana's medical condition since May 2012. However, it was only after Saldana was identified on the Committee letter that Terrones told Saldana he could be fired without producing a doctor's note. (Tr. 610) Previously, Respondent never required medical documentation from him, and never required that everything regarding his medical situation be "in writing." Under the circumstances, the logical inference is that Terrones threatened Saldana with discharge because of his activities with the Committee. 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); *M.J. Metal Products, Inc.*, 328 NLRB 1184, 1185, 1198-99 (1999) aff'd 267 F.3d 1059 (10th Cir. 2001) (requiring employees bring doctors' slips when they were absent, because of their union activities, a violation). Accordingly, the General Counsel submits the ALJ erred in not finding these statements to constitute an unlawful threat of discharge in violation of Section 8(a)(1) of the Act.

b. Threats of Unspecified Reprisals

²⁷ The ALJ credited Terrones regarding this statement. (ALJD at 4) Therefore, this violation depends upon the Board reversing this specific credibility finding.

A threat does not have to be explicitly stated, and a violation can be found based on a non-specific threat of reprisal. The Board has found a violation where an employee engaged in protected conduct was told that “there would be problems” if he 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 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 a violation) citing *St. Francis Medical Center*, 340 NLRB 1370, 1383-1384 (2003).

In addition to the threat, when Terrones warned Gustavo Abel that he was getting himself into problems by joining the Committee (discussed above), Terrones’s statement to Bruno that she should not stick her neck out for anybody, because nobody would stick their neck out for her (ALJD at 7), and his statement to Galaviz, while referencing her signature on the letter, that if she got into any problems, nobody would give her any help (ALJD at 9), also constituted threats of unspecified reprisals. *Clark Equipment Co.*, 250 NLRB 1333, 1334 (1980) (telling an employee “you are sticking your neck out,” while pointing to a union badge constitutes a threat); *Arkansas Rice Growers Coop. Ass’n* 162 NLRB 1576, 1580 (1967) (telling employee who was joining the union negotiating committee that he was sticking his neck out constitutes a violation).

While the ALJ properly found that Respondent asked and told employees that their involvement with the Committee created a hostile work environment (ALJD at 8), he erred by failing to find these statements established violations of Section 8(a)(1) of the Act. See *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). As such, the General Counsel respectfully requests that the Board find these threatening statements violated Section 8(a)(1) of the Act.

Similar to other threatening statements, Saldana testified that Terrones said he had betrayed Terrones' trust and never thought that Saldana would do such a thing, referring to the Committee letters. (Tr. 610) As Terrones' statement equated Saldana's protected activities with betrayal and disloyalty, the statement also constituted a threat. Id.; *E.L.C. Electric, Inc.*, 344 NLRB at 1200 fn. 3; *Hialeah Hospital*, 343 NLRB 391, 391 (2004) (statement that employer felt "betrayed" and "stabbed in the back" because employees had contacted the Union violation). The record evidence shows Respondent threatened its employees with unspecified reprisals, and the General Counsel respectfully requests the Board reverse the ALJ's errors and find that Respondent violated Section 8(a)(1) of the Act as set forth above.

c. Threat of Futility

An employer violates the Act by telling employees that it would be futile to select a bargaining representative. The test 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). Here, with respect to the requests to meet with President Kalfin as a group, Terrones admitted telling employees that Respondent resolved its problems by

talking to employees individually, and not in groups. (Tr. 152) In fact, when Galaviz requested the presence of the other members, Terrones said that was not going to happen. (ALJD at 9) Terrones made these statements at the time he was also threatening and interrogating the various Committee members about their protected conduct.

While it is true, that in certain circumstances, the Board has declined to find a violation where an employer has refused to deal with the employees except on an individual basis, the circumstances here differ. See *Charleston Nursing Center*, 257 NLRB 554, 555 (1981) (refusing to meet with a group of employees engaged in concerted activities, at specified time because of a prior commitment, and suggesting a reasonable alternative date, did not violate the Act.) In the instant case, Respondent refused to deal with the Committee, which was composed of Respondent's workers, and lacking any formal third party representative, at all – under any circumstances. Instead of meeting with the group, Terrones split them up as a means to deteriorate their ability to collectively address their problems, as a newly-formed labor organization. In this context, Terrones' statement that Respondent did not meet with groups of employees, particularly after the Committee requested such a meeting, would be construed as a refusal to meet and bargain with a traditional labor organization.

Specifically, Terrones' actions and statements, viewed along with his telling Galaviz that meeting with the entire Committee was not going to happen (ALJD at 9), is a threat of futility. As such, it is clear that it would be reasonable for the employees to interpret Terrones' statements to convey the message that the Committee's or any labor organization's attempt to deal with their employer was never going to happen. Terrones' conduct and words, viewed with his surrounding statements discussed in the sections above and below, are reasonably construed

to mean that employee organizing efforts were futile, in violation of Section 8(a)(1) of the Act. The General Counsel submits the ALJ erred by not finding this violation.

d. Threat of Lawsuit

While Terrones and Jasso were questioning Juan Lopez about one of the Committee letters, Terrones told Lopez that everything in the letter was a lie. (ALJD at 5) Jasso said that Juan 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.²⁸ The Board has found that threats to sue employees in response to their protected statements is a violation of Section 8(a)(1) of the Act. *DHL Express, Inc.*, 355 NLRB 680, 680, 692-693 (2010). Employees are permitted to advance their views about their working conditions, so long as their views are not maliciously false. *Id.* at 692. Here, there is no evidence that any of the Committee letters contained maliciously false statements. Accordingly, the General Counsel submits that the ALJ erred in dismissing the threat of lawsuit allegation.

5. Rule Prohibiting Employees from Assisting Coworkers

The appropriate inquiry to determine whether the maintenance of rules violates 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). "In 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 646, 646 (2004).

Here, by telling Bruno during that she should not put her hands in the fire for anyone else because no one would do the same for her, and telling Galaviz that if she got into any problems, nobody would give her any help, Terrones promulgated rules that employees should not

²⁸ The ALJ did not find that Jasso made this statement, but Juan Lopez testified to these statements in cross examination by Respondent's counsel. (Tr. 576)

participate in Committee activities. Terrones's statements create the inference that employees should stop their activities or else negative consequences would follow. Accordingly, the record evidence supports the finding of a violation, and the ALJ erred in not finding this Section 8(a)(1) violation, as alleged.

6. The ALJ erred in refusing to find Additional Violations of 8(a)(1)²⁹

It is undisputed that Respondent was gathering information from employees about Galaviz and Bruno soliciting membership in the Committee; three employees documented this conduct. (GC 9, Ex. p. 14, 16, 18) With at least one employee, Terrones testified that he instructed Orbelina Perez Barco to write down "no more and no less" than what she had told him about Galaviz. (Tr. 174-75; GC 9 at p. 16) Supervisor Mora did the same when she learned from Marilyn Pineda that Galaviz was soliciting membership in the Committee. (Tr. 301-02) Respondent's directives to employees to document their interactions 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 the specifics of the activist's union activity was a violation). Finally, a part of Respondent's employee handbook that prohibits "any lack of respect towards clients, colleagues and supervisors" also violates Section 8(a)(1) of the Act. (Tr. 215, 852, GC 12, p. 16) See *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 slip op. at 1 (2012) ("courtesy rule" unlawful); *Community Hosp. of Ctrl. Cal.*, 335 NLRB 1318, 1320-21 (2001) ("disrespectful conduct" rule a

²⁹ The ALJ refused to find the clear violations set forth in this section, claiming they were not specified in the Complaint. (ALJD at 9, fn. 6). However, all these allegations are closely related to the allegations contained in the Complaint, and were fully litigated by the parties. Accordingly, under *Redd-I, Inc.*, 290 NLRB 1115 (1988), the General Counsel urges that the Board find these additional Section 8(a)(1) violations.

violation) enf. denied in pert. part 335 F.3d 1079, 1088 (DC Cir. 2003). The General Counsel submits that the ALJ erred in not finding any of these noted Section 8(a)(1) violations.

V. EXCEPTIONS TO ALJ DISMISSING RESPONDENT'S DISCRIMINATION

A. Discrimination of Jesus Saldana

Saldana³⁰ is a founding member of the Committee, and he signed all of the letters sent to the company. (ALJD at 2-3; GC 2, 4, 5, 6) Saldana was diagnosed with cancer in the spring of 2012, and in the months following his diagnosis Respondent generously accommodated his work assignment and schedule, never asking him for a medical note, until Saldana became involved with the Committee.³¹

Without qualification, or further inquiry, President Kalfin decided that the company would assist Saldana and offer him any accommodation he needed at work when Respondent first learned of Saldana's diagnosis. (Tr. 24-25) Terrones carried out Kalfin's initiative and instructed Mora to make all accommodations necessary to help Saldana. (ALJD at 2) Terrones testified that he told Saldana the company would support him and accommodate *any needs* that he had regarding 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, 124-25, 806) Terrones 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) Saldana discussed with Terrones and Mora that he would be undergoing 12 chemotherapy sessions; they both offered to accommodate him without asking for a medical note listing his restrictions. (Tr. 597-99, 662, 671-72) Later, when Saldana showed Terrones images of his colonoscopy (ALJD at 2), Terrones

³⁰ Saldana is also known as Luis Alberto Juarez (ALJD at 1 fn. 2) He began working for Respondent's in April 2010, using the name Saldana at work and with the Committee; he was referred to as Saldana in this proceeding

³¹ (ALJD at 2-3, 12-13; Tr. 24-25, 111, 137, 203-05, 603; GC 10)

and Saldana discussed his work assignment and Terrones offered to move him to a different work area. (Tr. 600-01)

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.³² In the following months, the company went to great lengths to assure that Saldana could attend work while also attending his chemotherapy sessions, never denying his requests for time off, and never requiring a doctor's note. (Tr. 111-12) Terrones testified that he did everything he possibly could to help Saldana; he shared his personal cell phone number with Saldana, drove him home from the hospital, and at another time gave Saldana money. (Tr. 124-25, 657)

Given this background, Terrones testified that he was *bothered* that Saldana accused him of mistreatment in the Committee letter. (Tr.125-26; GC 2) In the August 7 letter, the Committee asked to meet and 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 Committee's accusation against him to be lies, and admitted he was bothered that Saldana was involved in the accusations against him. (Tr. 117, 122, 125-26, GC 2)

1. Prohibiting Saldana from working without a medical note in August

On Friday August 10, two days after Respondent received the first Committee letter, Terrones spoke with Saldana on the flour production line. (Tr. 615) Terrones admitted telling Saldana that he could not enter the production area until he knew Saldana's specific medical restrictions; Terrones was clear with Saldana that he needed to submit a doctor's note "before he could go back to work." (Tr. 137; ALJD at 12) Saldana went to his doctor's office that same

³² (Tr. 25, 203-05, 600-01, GC 9, p.10)

afternoon and got the note 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 submitted 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. (Tr. 618) After the doctor's appointment, Saldana reported to work with a second doctor's note. (GC 10; Tr. 613) Terrones testified he was still not pleased with the note dated August 14, but permitted Saldana to return to work. (Tr. 145 –46; GC 10)

2. Respondent demands another note from Saldana in December

In late November, Saldana spoke with Terrones, and explained that he would be undergoing the second session of his chemotherapy treatment. (ALJD at 17; Tr. 633-34) Again, Terrones demanded another note from Saldana's physician detailing his work restrictions. (Tr. 633-34, 803) Kalfin testified that Terrones later informed him that Saldana would be undergoing a therapy session that required a different work schedule. (Tr. 25)

Saldana complied with Terrones' request and obtained a note addressed to him in his alternate name, Luis Juarez, which stated he could not lift more than ten pounds. (GC 19) On about December 3, Saldana delivered the letter to Terrones at the factory. (ALJD at 17; Tr. 634; GC 19) Terrones said the letter was no good because it had Saldana's alternate name of Luis Juarez, and that Saldana could be a liability if the hose on his medical device were to get caught

while he was working. (Tr. 635) Terrones prohibited Saldana from working until he presented a physician's letter addressed in the name of Jesus Saldana. (ALJD at 17-18; Tr. 634-35)

About ten days later, Saldana visited the factory to speak with Terrones and gave him another doctor's note, dated December 12, which stated that he could not work more than eight hours a day. (Tr. 636; GC 19, 20) Terrones reaffirmed that Saldana could not work until he brought the company a letter from his doctor that was addressed to the name Jesus Saldana, instead of Luis Juarez. (Tr. ALJD at 18; 636-37, 668) The testimony is uncontroverted that, since 2011, both Terrones and Mora knew that Saldana was also known as Luis Juarez. (Tr. 647-53; ALJD at 19) Notwithstanding, Terrones refused to accept Saldana's doctor's note, and Saldana did not work until he met with Terrones on December 19. (Tr. 636 -37, 668)

On December 19, Saldana met with Terrones in his office at the factory. (Tr. 637, 641-42) Terrones handed Saldana a letter dated December 19, requesting that Saldana clarify his use of the name Luis Juarez within thirty days, and to provide information requested in the letter, or the company "may have no choice but to terminate [his] employment." (ALJD at 18; Tr. 641-42; GC 21) Saldana returned to work after receiving Respondent's December 19 letter, wearing his medical device. (ALJD at 18; Tr. 642) When Saldana returned to work, Terrones understood that Saldana was still undergoing chemotherapy, and that Saldana had to wear a medical device at work. (Tr. 809) However, Saldana was not assigned to a different work area and Terrones kept Saldana working on the production line. (Tr. 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) However, he had no such work restrictions. Instead, Terrones testified that while he interrogated Saldana about the workplace complaints in the first Committee letter, Saldana told him "that he

was being sent to do jobs that he could not carry out.” (Tr. 802) Respondent claims it demanded another note in December because Saldana was undergoing new treatment. (Tr. 803-04) However, Respondent admits they never asked Saldana for a note in the months after first learning of Saldana’s diagnosis, while it “bent over backwards” to accommodate him (GC 9, p. 10). It was only after Terrones learned of Saldana’s Committee membership, which Terrones admitted bothered him, that Respondent prohibited Saldana from working without a doctor’s note detailing his work restrictions. (Tr. 125–26, 137)

a. Analysis of Saldana’s suspension in August

The ALJ properly found that the General Counsel met his *Wright Line* burden that Respondent’s insisting on a doctor’s note from Saldana, before allowing him to return to work, was motivated by its anti-Committee animus. (ALJD at 13) However, the ALJ erred in not finding this conduct to be a Section 8(a)(3) violation, instead finding that Respondent had met its *Wright Line* defense. (ALJD at 13, 19). Cf. *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” the Act).

Here, Respondent did not, and cannot, show that it would have required a doctor’s note from Saldana absent his protected conduct. Instead of considering evidence that Respondent’s demands were pretextual, the ALJ determined Respondent did not know Saldana was restricted from working in cold areas before the Committee letter. (ALJD at 12) However, this is irrelevant; in the months following Saldana’s diagnosis, when Saldana individually requested accommodations, Respondent unconditionally addressed his concerns, never previously

requiring a medical note to validate or verify his issues. Instead, Terrones immediately asked Saldana to inform him if he was carrying out any job or task he could not do so the company could accommodate him. (Tr. 110, 657) However, once Saldana's concerns were expressed by the Committee, as part of a group complaint, Respondent, motivated by its anti-union animus, demanded a specific medical note from Saldana.³³ Notwithstanding, the ALJ did not consider this evidence, which conclusively shows that Respondent's asserted defenses for demanding a note from Saldana after his participation in the Committee are pretext. *Rose Co.*, 154 NLRB 228, 240 (1965) (demand that union activist produce a medical certificate was pretext).

It is well settled that the timing of Respondent's actions in relation to protected activity supports finding discriminatory motive. 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). Here, Respondent's attitude toward Saldana dramatically changed 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; previously Respondent “bent over backwards” to accommodate Saldana without a note. Up and down Respondent's chain of command, from President Kalfin to Supervisor Arlette de la Mora, Respondent welcomed Saldana to share his health concerns so that the company could accommodate him. From April 2012 until August 2012, on more than one occasion, Respondent listened to Saldana's concerns and addressed

³³ Also, the Committee letter does not state that Saldana has a work restriction. It simply says he was being forced to work in “cold conditions and the most difficult work positions.” (GC. 2)

them; the only time that Respondent imposed more difficult requirements to meet Saldana's requests were in response to his signature on a Committee letter.

For example, pre-Committee, the company did not demand proof that Saldana had to attend 12 sessions of chemotherapy, or ask him to show that he could not perform work in the sanitation department as a prerequisite to assigning him to the tortilla production line. (Tr. 110, 137, 657) Instead, Respondent quickly granted the requested schedule adjustment, and Saldana 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 needs – without a doctor's note. Additionally, Respondent granted Saldana's request for a work accommodation by moving him from the mixing area to working on the flour production line. Respondent's help had been unmeasured. (GC. 9, p. 10; ALJD at 2) Significantly, Respondent had never prohibited Saldana from reporting to work without a note, not even when Saldana may have faced potential health risks from continuing to work in the sanitation department.

Nevertheless, when Saldana expressed his concerns, with his co-workers, Respondent demanded a medical note for the first time, although Saldana did precisely what he had done since April 2012, when Terrones urged him to raise any issues if he was carrying out a job that he could not do so that the company could accommodate him. (Tr. 110, 657, 802) As such, the Respondent cannot show by a preponderance of the evidence that it would have required a doctor's note from Saldana justifying his medical restrictions, absent his membership in the Committee. *Peter Vitalie Co., Inc.*, 310 NLRB 865, 871 (1993) (an employer must not only establish a legitimate reason for its action, but must persuade by a preponderance of the evidence that it would have taken the same actions even absent the employee's protected activity). The

General Counsel submits that the ALJ erred by failing to find a Section 8(a)(3) violation, and respectfully requests that the Board find this conduct to violate the Act as alleged. *Bannon Mills, Inc.*, 146 NLRB at 632; *Rose Co.*, 154 NLRB at 240.

b. Analysis of Saldana's suspension in December

The ALJ erred by not finding that Respondent's requiring Saldana to produce a second doctor's note in December was a violation. (ALJD at 19) As noted, the General Counsel has met his *Wright Line* burden regarding the Respondent's doctor's note requirement. (ALJD at 13) However, the ALJ found that there was nothing wrong in refusing to allow Saldana to work until he produced a new doctor's note, because he was undergoing a "different segment of his treatment regimen," and that it was not improper to require this note be in the name of Jesus Saldana, instead of Luis Juarez. (ALJD at 19) The ALJ's reasoning is flawed.

After Respondent fired Galaviz and Bruno, Saldana signed and even delivered the Committee's August 21 and October 6 letters to Respondent. (Tr. 622) As such, Terrones' repeated demand for a medical note in November/December, as a condition to accommodate Saldana's schedule while he attended the second phase of his chemotherapy treatment, was clearly illegally motivated, as was Respondent's demand the note be in the name of Jesus Saldana, since it knew since 2011 that Saldana was also known as Luis Juarez (ALJD at 19)

The record establishes that Respondent would not have demanded a medical note from Saldana in August and again in November absent his Committee activity. Contrary to the ALJ's finding that "Saldana had himself created" an issue by presenting a note addressed to Luis Juarez, it was Respondent's unlawfully motivated demands that created the issue. The ALJ ignored the pretextual nature of Respondent's claim that it was concerned about health risks that existed from Saldana working on the production floor while wearing a medical device.

Respondent's excuse is contradicted by the fact that it ultimately allowed Saldana back to work on December 19, even though he was still wearing the device, and only after providing him with a warning that he faced termination because of the issue involving his name. (GC 21).

Moreover, Respondent's claim that Saldana's note addressed to Juarez created an obligation "to be sure it was carefully complying with immigration law" is irreconcilable with the record evidence. It is un rebutted that Terrones and de la Mora had known since at least 2011 that Saldana was also known as Luis Juarez. (ALJD at 13; Tr. 647-50, 673). In fact, in 2011 and 2012, well before the Committee letters, Saldana specifically discussed with Terrones changing his name to Luis Juarez on multiple occasions. (Tr. 651-53) Saldana's name was never an issue until after the Committee was formed.

Notwithstanding that Respondent knew, and tolerated, the fact Saldana used the name Luis Juarez (ALJD at 19), on December 3, the same day Respondent received another Committee letter signed by Saldana, Terrones rejected the note from Saldana's doctor regarding his medical conditions because it contained the name Luis Juarez. (Tr. 56-7, 634; GC 19) The fact that Saldana was also known as Luis Juarez only became alarming to Respondent after the Committee, and is evidence of pretext; Respondent's true motive of demanding a medical note from Saldana is unlawful, his involvement with the Committee.

As for the ALJ's statement that Respondent was required "to be sure it was carefully complying with immigration laws," the evidence shows that this was never a concern before the Committee was formed. It is un rebutted that Respondent had known that Saldana, along with other workers in the factory, had alternate names. In 2011, Mora told Saldana that "everybody here has a very artistic name," meaning that the workers had names different than the one they used at work. (Tr. 647-48) In fact, the uncontroverted testimony establishes that Respondent

actively tried to help Saldana change his name before his Committee involvement. Towards the end of 2011, Saldana told Terrones he wanted to change his name so that he could open a bank account, and Terrones told Saldana he would lend him money so that he could change his name to Luis Alberto Juarez. (Tr. 650-51) Again in early 2012, Saldana spoke with Terrones about changing his name to Luis Juarez within the company. (Tr. 653) Terrones explained that if Saldana changed his name, the company could pay his vacation time, but would not pay the sick day he had accrued, and that he would “lose the amount of time that [he had] been working [for SFTC] from 2010 until 2012.” (Tr. 653-64)

Based on the foregoing, the General Counsel requests that the Board reverse the ALJ’s conclusions and find that the newly imposed medical note requirement in August and December were motivated by Saldana’s protected activity, and that the evidence establishes Respondent would not have requested the notes absent Saldana’s involvement with the Committee in violation of Section 8(a)(1) and (3) of the Act.

3. Respondent suspended Saldana for five days without pay in October

On October 9, Saldana hand delivered the Committee’s October 8 letter to Kalfin, in his office, requesting a meeting with Kalfin to discuss the safety risks the workers were experiencing while operating the machinery in the factory. (Tr. 622, 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. (ALJD at 16; 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, 8, 23) Terrones admitted that Saldana is the first employee Respondent has suspended for five days without pay for either insubordination or a packaging violation. (Tr. 768) In fact, workers regularly use one hand to seal packages when the packages move on the conveyer belt rapidly,

and employees testified 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, where he was suspended for five days. (Tr. 623, 645, GC 23) Saldana protested, 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 –25) Saldana attempted to explain that the belt was moving too fast, but it did not matter to Terrones. (Tr. 624 -25)

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 and ensuring that the printer marked the tortilla packages with production and expiration dates, and also sealing the packages by sliding them through the sealing machine. (Tr. 625-28; GC 15, p. 1) As he worked the sealing station, the packages traveled 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, one on top of the other. (Tr. 626–27, 629-30) By doing so, he was able to properly seal the packages with one hand; the result was that none of the bags he sealed that day required resealing. (Tr. 630) Saldana was approached by Mora 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 on the flour line. Saldana obeyed her instruction and moved to the new line. (Tr. 845–46, 646-47)

Respondent asserted different justifications for issuing Saldana a five-day suspension. At hearing, Mora testified that one of the reasons for suspending Saldana because the 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 – because he had raised his voice when he spoke to her the morning 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. 845–47) However, contrary to Mora's testimony, the disciplinary document she wrote only says 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. 692-93; GC 23) Nowhere does it state that Saldana raised his voice, or that his tortilla bags were not fitting properly in the boxes.

a. Overwhelming evidence supports a violation

In a conclusory statement the ALJ dismissed the overwhelming evidence submitted by the General Counsel (ALJD at 17); his ruling was in error as the record shows that Respondent's five-day suspension of Saldana beginning October 18, was motivated by his Committee activities. Saldana's known on-going Committee activities, 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. The ALJ disregarded the all the foregoing evidence, instead claiming Saldana engaged in "brazen insubordination." (ALJD at 17) The facts do not support such a claim. The ALJ erred by omitting the fact that Saldana was responsible for both sealing packages, and overseeing the printer on the right hand side of his station to mark the packages. In addition, the ALJ erred by omitting Mora's testimony that Saldana actually moved to a different work station when she instructed him to do so. (Tr. 845–46, 646-47) Instead of "brazen insubordination," the facts show that Respondent would not have suspended Saldana's for five days absent his protected activity.

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. Respondent's evolving defenses further prove its 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). Here, 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) She added two additional reasons for the discipline in her cross examination: 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. 692-93; GC 23) The fact that employees who were not Committee organizers received far less discipline for similar, or worse transgressions supports a finding that Respondent's conduct was a violation.

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 reasons for Saldana's suspension, which are not included in the 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))

Next, the timing cannot be ignored, Respondent suspended Saldana eight days being subjected to an inspection by OSHA, and nine days after Saldana personally hand-delivered the

October 8 letter to Kalfin. (ALJD at 16) The fact that Saldana hand-delivered the letter stating the Committee was “concerned about the safety of our members” a day before the OSHA inspection, supports a finding that the Respondent knew, or at the very least suspected, Saldana and/or the Committee orchestrated OSHA’s visit. (Tr. 622, GC 2, 6, 13) The proximity of the suspension in relation to Saldana’s protected activity 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. 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 layoff of employee 9 days after complaining about 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).

Further evidence of pretext is shown by the disparate treatment Saldana received when compared to other employees who had engaged in similar conduct. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 950-51 (2003). Here, there is evidence that many other employees received write-ups for improperly sealing packages, or ignoring their supervisor, but none of them were suspended. (GC 36-49, 50-53; Tr. 744-68) When confronted with a chain of documents showing that other employees disciplined 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) 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 disciplines were either verbal warnings or written warnings. (Tr. 772 –73)

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 occasions had a "mess" in her area. (Tr. 747) Despite Dominguez having a prior incident on file, her misconduct only netted her a verbal warning. (Tr. 746–47, GC 38) In June, Respondent spent its time having to reseal bags that had been "badly sealed" by Marta Leon, who also created a mess in the packaging area; however, Respondent only gave her a verbal warning. (Tr. 742-44, 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. 759–60) She too was 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 only a written warning. (Tr. 753–54; GC 42) Respondent also invested time reprinting expiration dates on bags that Alfredo Alvarez put in eight boxes; he only received a verbal warning for his conduct. (Tr. 754–55, 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 only gave him a verbal warning. (Tr. 474–78, GC 39) Felix Suarez did not follow directions to notify a supervisor when he was to start on a last pallet of tortillas for a customer, 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. 764-65, 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 shown above, the evidence presented by the General Counsel supports a conclusion that Respondent’s reasons for issuing Saldana a five-day suspension are pretext, and the real reason for the 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). 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.

B. Discrimination of Yolanda Rivera

The ALJ properly found the General Counsel met its initial *Wright Line* burden that the September 29 suspension of Yolanda Rivera was unlawfully motivated. (ALJD at 16) However, the ALJ erred in dismissing the allegation and failing to consider the evidence showing the pretextual nature of Respondent's justification for its actions. Rivera worked for Respondent since 2007, and had been absent from work five other times during her employment. (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 actually sick. (Tr. 492) During the summer of 2012, Rivera's daughter notified the supervisor's assistant that Rivera would be absent from work that same day. (Tr. 490 –91) Respondent did not ask Rivera for a doctor's note to prove she was actually in the hospital. (Tr. 491) Similarly, in about August 2011, Bruno notified her supervisor, the same day she was scheduled to work at 5:00 p.m. that she was going to be absent. (Tr. 404) Her supervisor did not ask her to prove that she was in the hospital with her son. (Tr. 405) Bruno followed the same steps in calling in sick the next day. (Tr. 405) Again, the supervisor did not request a note from Bruno, and she was not written up. (Tr. 405-06)

Contrary to the ALJ's finding, the circumstances prove that Respondent's justifications for Rivera's September 29 write up are mere pretext. Rivera followed the same lenient call in procedures for a sick day that she and other employees had followed in the past. However, now that Rivera was a Committee member, Respondent imposed more stringent requirements for taking a sick day contrary to its past procedures, and disciplined her even though she took the same measures to call in sick. Under these circumstances, the reasoning behind Rivera's write-up is pretext. See, *Toll Mfg. Co.*, 341 NLRB 832, 833-34, 847 (2004) (disparate enforcement of "call-in" procedures against union activist violates 8(a)(3)). Furthermore, the ALJ erred in his

indolent dismissal of the evidence proving that Respondent's written warning to Rivera in November was a violation. (ALJD at 19) The ALJ did not consider the timing of Rivera's ongoing activity in relation to the discipline, and the evidence of disparate treatment that establishes Respondent would not have issued Rivera a warning absent her protected activity.

The timing of the write up in relation to the Rivera's protected activity also 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) Two days before OSHA inspected the property, the Committee complained that Campos instructed Rivera to clean out tortillas stuck in the machinery. (GC 6) In this regard, Rivera was on Respondent's radar screen, and the written warning for the innocuous act of wearing a sweater during the winter indicated Respondent considered her Committee activity intolerable.

The evidence of disparate treatment also supports Respondent's animus underlying its motivation for issuing Rivera the November write up. The record reveals employees regularly wore long sleeves to work during the winter season, however, Respondent only targeted Rivera. 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 -41)

The ALJ further erred in accounting the surrounding circumstances of the comparator discipline offered by Respondent. All the comparator write-ups introduced by Respondent on

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 on the October 6; the first Committee letter she had signed. (GC 6; R2) As for the other document, Piche had been wearing long sleeves since January 2013, yet Respondent did not give her a write up until Rivera's 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, but Respondent trumped up violations against Rivera, finding she committed three violations, whereas Piche was only cited for one. (Tr. 499; GC 17) Piche received 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) Accordingly, the record supports a finding that Respondent's violated Section 8(a)(1) and (3) of the Act by suspending Rivera in August and November because she engaged in Committee activities.

VI. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board reverse the ALJ's erroneous rulings as set forth above, and find that Respondent committed additional violations of Sections 8(a)(1) and (3) as discussed above.

Dated at Albuquerque, New Mexico, this 6th day of August 2013.

/s/ Sophia Alonso

Sophia Alonso

Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
421 Gold Avenue, Suite 310; PO Box 567
Albuquerque, NM 87103
Phone: (505) 248 – 5128
Fax: (505) 248 - 5134
Email: Sophia.Alonso@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS EXCEPTIONS and COUNSEL FOR THE ACTING GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in SFTC, LLC d/b/a SANTA FE TORTILLA COMPANY, Cases 28-CA-087842, et al. was served by E-Gov, E-Filing, and E-Mail on this 6th day of August 2013, on the following:

Via E-Gov, E-Filing:

Gary W. Shinnars, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via E-Mail:

Danny W. Jarrett, Attorney at Law
Jackson Lewis LLP
4300 San Mateo Boulevard NE, Suite B260
Albuquerque, NM 87110-1289
Email: jarrettd@jacksonlewis.com

Jeffery W. Toppel, Attorney at Law
Jackson Lewis LLP
2398 East Camelback Road, Suite 1060
Phoenix, AZ 85016-9009
Email: toppelj@jacksonlewis.com

Ms. Yolanda Galaviz
4650 Airport Road, Apt. 205
Santa Fe, NM 87507-2864
Email: alma@somosunpueblounido.org

/s/ Sophia Alonso

Sophia Alonso
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
421 Gold Avenue, Suite 310
PO Box 567
Albuquerque, NM 87103
Phone: (505) 248 – 5128
Fax: (505) 248 - 5134
Email: Sophia.Alonso@nlrb.gov