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

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF

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I. INTRODUCTION

In this case, involving workers forming a home-grown labor organization to improve the unsafe working conditions in their factory, and ask for a pay raise, Respondent's Exceptions to the Decision (ALJD) of Administrative Law Judge William G. Kocol (ALJ) are without merit and not supported by the record evidence.[1] The ALJ's findings that Respondent violated Section 8(a)(1) and (3) of the Act by: transferring Yolanda Rivera and Lilian Lopez from the flour line to the corn line, and firing Yolanda Galaviz and Delfina Bruno, because of their protected concerted activities and their activities on behalf of "Comité de Trabajadores de Santa Fe Tortilla" [the Committee of the Workers of Santa Fe Tortilla] (the Committee), are fully supported by the record and must be sustained. It is clear from a review of the entire record that, having been caught blatantly violating Federal labor law, Respondent is now desperately reaching for any means possible to escape responsibility. As the foregoing brief shows, Respondent's arguments are meritless; the Board should adopt the ALJ's findings of fact, conclusions of law, and recommended order as they relate to Respondent's Exceptions.

II. QUESTIONS INVOLVED

1. Whether the ALJ erred in finding that Respondent transferred Yolanda Rivera from the flour production line to the corn production line because of her Committee and concerted activities, in violation of Section 8(a)(1) and (3) of the Act. (Resp't Br. at 1 - 10) (ALJD at 10-11)

2. Whether the ALJ erred in finding that Respondent transferred Lilian Lopez from the flour production line to the corn production line because of her Committee and concerted activities, in violation of Section 8(a)(1) and (3) of the Act. (Resp't Br. at 1 - 10) (ALJD at 10-11)

[1] SFTC, LLC d/b/a Santa Fe Tortilla Company is referred to as "Respondent." References to the hearing transcript are designated as (Tr.) with the appropriate page citation. References to the hearing exhibits of the Acting General Counsel and Respondent are referred to as (GC.) and (R.) respectively, with the appropriate exbhibit number. All dates are in 2012 unless otherwise stated.

3. Whether the ALJ erred in finding that Respondent fired Yolanda Galaviz because of her Committee and concerted activities, in violation of Section 8(a)(1) and (3) of the Act. (Resp't Br. at 10-20) (ALJD at 13-15)

4. Whether the ALJ erred in finding that Respondent fired Delfina Bruno because of her Committee and concerted activities, in violation of Section 8(a)(1) and (3) of the Act. (Resp't Br. at 10-20) (ALJD at 13-15)

III. PROCEDURAL HISTORY

The hearing in this matter was conducted before Administrative Law Judge William G. Kocol (ALJ) on February 26 - 28, and March 1 and 5, 2013, in Santa Fe, New Mexico. (ALJD at 1) In his decision, dated June 25, 2013, ALJ Kocol properly found that Respondent violated Section 8(a)(1) and (3) by: (a) transferring Yolanda Rivera from the flour tortilla production line to the corn tortilla production line; (b) transferring Lilian Lopez from the flour tortilla production line to the corn tortilla production line; (c) firing Delfina Bruno; and (d) firing Yolanda Galaviz, all because these employees were involved with the Committee and otherwise engaged protected concerted activities.

On July 23, 2013, Respondent filed 29 exceptions to the ALJD, and a supporting brief.[2] Notably, Respondent did not take exceptions to the ALJ's finding that the Committee is a labor organization as defined in Section 2(5) of the Act. (ALJD at 2) Accordingly, the Board should adopt these findings. See, *Kings Electronics Co., Inc.,* 109 NLRB 1324, 1324 (1954) (upon respondent's failure to file exceptions, the Board abides by Section 102.48 and adopts the ALJ's findings, conclusions, and recommendations); BOARD'S RULES AND REGS., § 102.46 (b)(2).

IV. BACKGROUND

A. Respondent's operations.

Respondent operates a tortilla factory in Santa Fe, New Mexico. (ALJD at 2) The tortilla factory is operated twenty four hours a day, generally Monday through Friday. (Tr. 212 - 213)

[2] The Acting General Counsel has filed Cross Exceptions and a Supporting Brief, filed contemporaneously herewith.

(ALJD at 2) Respondent produces flour and corn tortillas from its facility, which are produced on their respective production lines. (ALJD at 2)

B. Management hierarchy.

Respondent's President is Kenny Kalfin (Kalfin); overseeing the day-to-day operations of the factory is Plant Manager Gustavo Terrones (Terrones), who is assisted by Assistant Plant Manager Alfredo Jasso (Jasso). (ALJD at 2) Helping Terrones and Jasso with the supervision of the plant are Supervisors Mariela Campos (Campos) and Arlette De la Mora (De la Mora).

C. The fledging Committee's efforts to organize the tortilla workers

On August 6, 2012 seven tortilla workers, Jesus Saldana, Juan Lopez, Gustavo Abel, Bruno, Yolanda Galaviz (Galaviz), Yolanda Rivera (Rivera), and Lilian Lopez, met at a local worker's center where they discussed and shared their concerns about working at Respondent's factory. These included the velocity of the machines they operated on the production lines and the physical injuries they suffered at work. (Tr. 314 – 316, 425, 525, 571, 604, 605 – 606) The workers also complained about the hostility they were experiencing at the hands of Supervisors Mora and Campos, and discussed asking the company for a pay raise. (Tr. 472, 314 -315). At this initial meeting, Gustavo Abel shared his opinions about supervisors pressuring employees at work, and that he was interested in a raise. (Tr. 701 – 702)

The group wanted a collective voice to defend the rights of the tortilla workers; Galaviz and Bruno believed that having a larger group of workers would give them a stronger voice in their workplace. (Tr. 321, 427) The employees therefore decided to form a "workers' committee" that they named "Comité de Trabajadores de Santa Fe Tortilla" [the Committee of the Workers of Santa Fe Tortilla] for the purpose of trying to improve their working conditions. (Tr. 470, 472, 473, 315 – 316, 427, 525, 605 – 606) When his colleagues discussed forming a

group, Gustavo Abel told them, "yes, it's okay to talk about this because we're talking about problems at work." (Tr. 702)

1. The Committee announces its existence and voice their work concerns

On August 7, the Committee held a meeting at the worker's center. Rivera jotted down some of the concerns that the Committee wanted to address with the Respondent, including production line staffing, and preferential treatment in the workplace which they believed to be unfair. (ALJD at 2-3; Tr. 477; GC 16) During the meeting the Committee wrote a letter to Respondent, addressed specifically to Kaflin, identifying the concerns of its members. (Tr. 427 – 429, 473 – 476, 317 – 319, 526 – 527, 606 – 607, 317 – 318, GC 2, 14) The members shared with each other the complaints they experienced working in the factory, and voted on the complaints they would include in a letter they drafted to Kalfin. (Tr. 427 – 429, 473 – 476, 317 – 319, 526 – 527, 606 - 607) The letter was created in Spanish, reviewed by the members, and then translated to English to submit to the company. (ALJD at 2 – 3; Tr. 317 – 318, GC 14) The members signed the August 7 letter, identifying themselves to the company as activists and leaders of the Committee, noting that the "workers of Santa Fe Tortilla have decided to form a workers committee" and through the letter were "informing [Kalfin] of some of the concerns [the Committee members] were having with [their] working conditions." (GC 2)

The Committee members signed the letter stating that the "workers of Santa Fe Tortilla have decided to form a workers committee" and through the letter were "informing [Kalfin] of some of the concerns [the Committee members] were having with [their] working conditions." (GC 2) The Committee ended the letter asking to meet with Kaflin as soon as possible. (GC 2)

On August 8, Galaviz and Juan Lopez hand-delivered the Committee's August 7 letter to Kalfin in his office at the factory. (ALJD at 3; Tr. 320, 573; GC. 2) The Committee highlighted

in the letter that "[b]y way of this letter we would like to inform you of some concerns we have with our working conditions" and requested a meeting with Kalfin to discuss those concerns. (ALJD at 3; GC 2) Specifically, the Committee voiced their concerns about the unsafe equipment at the factory, noting that they "never received training in how to handle the [tortilla] machines, yet [were] pressured to use them, exposing [themselves] to accidents," and asked Kalfin to repair the machines to prevent future accidents that Bruno and Rivera had previously experienced while operating the machinery. In addition to describing their various workplace complaints and concerns, the Committee asked for a pay raise. (GC. 2)

After Galaviz delivered the first letter to President Kalfin, she was determined to increase the size to the Committee and began soliciting her co-workers for signatures on a Committee membership petition she created. (Tr. 322, 320 – 324, 328 - 331; GC 11) Galaviz showed her co-workers the petition and explained to them that the Committee would have a stronger voice if it were larger. (Tr. 321; GC 11) Her organizing efforts caught Terrones'attention; at hearing he admitted knowing she was involving other workers to ask for a pay raise. (Tr. 193, 339 - 340)

D. Respondent's scheme to disband the Committee

President Kalfin and Plant Manager Terrones testified they did not believe in meeting with employees in groups. (Tr. 65 – 66, 152 – 153) Consistent with Respondent's philosophy, in response to the first letter that Galaviz and Juan Lopez handed to Kalfin, the company divided up the Committee and retaliated against its members as a means to diminish it. (Tr. 320, 573; GC. 2) On August 8, Kalfin distributed a copy of the Committee's initial letter to his management team, and instructed Terrones and Jasso to meet with every employee that had signed the August 7 letter. (Tr. 217, 37 – 41) Although the Committee had asked to meet with Kalfin as a group, Kalfin instructed Terrones to meet with each Committee member individually because he did not

"believe in" group meetings and because he wanted to separate the Committee members, and have Terrones "talk to them individually and address their individual concerns." (Tr. 65 – 66) Terrones complied with Kalfin's directive, and immediately set up individual meetings with the employees who signed the August 7 letter. (Tr. 115 – 16, 119)

E. Respondent moves Yolanda Rivera and Lilian Lopez to the difficult corn tortilla production line

Yolanda Rivera has worked for Respondent as a tortilla maker since 2007, and Lilian Lopez began working as a tortilla maker since April. (ALJD at 7; GC 57, p. 1) Both worked on the flour line until the Committee delivered its August 7 Committee letter to Respondent, and Terrones started questioning the Committee members in his office. (ALJD at 10) After their Committee activities, Respondent moved them from the flour tortilla production line to the corn tortilla production line, a more difficult position. (ALJD at 10-11; Tr. 482 - 483; 530 - 531) Specifically, Lilian Lopez testified that, before the Committee letters, Respondent assigned her to the flour line Monday through Thursday. (Tr. 530, 544 - 545) After the Committee letter was given to Respondent, Lilian Lopez was assigned to work the corn line where she only worked two and a half days a week. (Tr. 531, 544 - 545) Respondent continued to assign Lilian Lopez to the corn line until December. (Tr. 560 - 561) Yolanda Rivera testified that before she began her activity with the Committee she worked the flour production line, and then was moved to the corn line after the Committee letters were given to Respondent. (Tr. 482 - 483)

The testimony of Rivera and Lopez is corroborated by the weekly work schedules created by Respondent for the period of January 2012 to February 2013. (GC 26, 27) These weekly work hour schedules show that Respondent assigned Lilian Lopez to work the flour line from May 2012 to August 10, 2012. (GC 27) With respect to Rivera, Respondent consistently assigned her to work the flour line from January 2012 to August 16, 2012. (GC 26) Respondent

continued to assign Rivera to work the corn line every day until January 13, 2013, about a month after the company stopped receiving letters from the Committee.

As the ALJ properly found, the corn production line differed from the flour production line, making it more difficult for employees. (ALJD at 10-11) Deflina Bruno testified that it was a drastic change for her to work the corn line after years of working the flour line because the corn line runs faster than the flour line. (Tr. 389) Yolanda Rivera also testified that the corn line operates faster than to flour line. (Tr. 483) Similarly, Lilian Lopez found it more difficult to work the corn line because of the different speeds and she had not been trained on the corn line. (Tr. 531-32) Also, packaging the corn tortillas differed from the flour tortillas, making it more difficult to work the corn line. Delfina Bruno testified that the corn tortillas were packaged in small bags, and that it was much more difficult to put the product inside those bags because of their size. (Tr. 389-90) Bruno explained that it was easier to package bags at the flour line because the flour tortilla bags were far more generous in size. (Tr. 390) The sealing procedures on the corn line also differed from the flour line; sealing the corn packages were more difficult than sealing flour packages because of the speed of the machines and the equipment the workers operated on the corn line. (Tr. 394, 390, 392-93). Also, Rivera testified that the corn packages were tied by hand, whereas the flour packets were sealed by machine. (Tr. 484)

F. The Committee presents the concerns of its members in letters to Kalfin and requests to meet with him to deal with the Committee's concerns

The Committee met again on August 15 and wrote another letter to Respondent setting forth the concerns of its members.[3] (ALJD at 13; Tr. 496 – 497, 434 – 437, 621 – 622; GC 5, 6, 7) The August 15 letter objected to the way Respondent divided up the Committee for interviews, asserting that they felt intimidated when Terrones called them into his office one-by-

[3] The Committee similarly wrote letters to Kalfin on August 21, October 8, and December 3.

one; the Committee stated that "once again the members of the [Committee] want to manifest [their] concerns about the treatment [they] receive at work." (Tr. 436; GC 4)

G. Respondent Fires Yolanda Galaviz

Yolanda Galaviz worked at Respondent's factory making tortillas for nine years until she was fired on August 17. (ALJD at 13-14; Tr. 309 – 310) On August 17, Supervisor De la Mora approached Galaviz while she was working and told her to go see Terrones. (Tr. 343) Galaviz went to an office on the first floor, where the surveillance monitors are kept, and waited for Terrones, Jasso, and De la Mora to arrive. (Tr. 343 – 344) After all three arrived, without explanation or paperwork, Terrones fired Galaviz on the spot. (Tr. 185, 197, 344) De la Mora then escorted her off the property; Galaviz was never contacted by the company again. (Tr. 344) Terrones admitted Respondent never gave Galaviz the opportunity to rebut any of the alleged reasons for her discharge – or ask her for her version of what occurred. (ALJD at 15; Tr. 187)

From the date Galaviz handed the August 7 letter to Respondent, until she was fired, it was clear that Galaviz was one of the Committee ring leaders. A day before she was fired, Galaviz handed Terrones the Committee's August 15 letter while in a hallway at the factory. (Tr. 334, 335, 379, 340 – 342; GC 4, GC 14, p. 4) Nine days before she was fired, on August 8, during her lunch break, Galaviz walked to the second floor of the factory with Juan Lopez, and personally delivered the first Committee letter to Kalfin.[4] (ALJD at 3; Tr. 319 – 321, 355, 573)

About a half-hour after delivering the August 7 letter, Galaviz went to the factory dining room and solicited signatures on the Committee petition she had created which stated that a group of workers were seeking respect and an increase in wages, and that she needed signatures

[4] Galaviz participated in the formation of the Committee during the August 6 Committee meeting, where she specifically complained about mistreatment by Supervisors Campos and Mora, who repeatedly called her a "big headed donkey" and said she was good for nothing. (Tr. 312, 314 – 315) She was also present at the Committee's August 7 meeting, and her shared complaints about mistreatment are in the August 7 letter. (GC2) Galaviz continued to attend future Committee meetings and signed the Committee letters. (Tr. 312, 316, 317, GC 2)

to support the group's purpose. (ALJD at 8-9, 14-15; Tr. 321 – 322, 325; GC 11) Galaviz spoke with Edgar Lopez (Edgar) in the dining room and explained to him that the purpose of the Committee was to ask Respondent to listen to them. (ALJD at 8-9; Tr. 321) She told Edgar that the Committee would be stronger if it was larger, showed him the petition, and invited him to join. (Tr. 321 – 322) Edgar signed his name on the petition. (Tr. 322; GC 11) Later, Galaviz saw Edgar walk down from the second floor, where Terrones' office is located, and he approached her and said that he wanted his "signature back." (Tr. 327) Galaviz jokingly said that his signature was upstairs, and he asked her where so that he could get it back. (Tr. 327) Galaviz saw that Edgar looked scared, so to calm him, she told Edgar to meet her in the dining room. There, she gave Edgar the petition and watched as he scratched off his name.[5] (ALJD at 8; Tr. 327; GC 11) Galaviz saw Edgar clock out so she asked him why he was leaving. Edgar responded that Galaviz had gotten him into trouble because of his signature. (Tr. 327 – 328)

While in the dining room, Galaviz also asked an employee named Josue if he wanted to be a part of the Committee and showed him the petition, which he read and signed. (Tr. 322, GC 11) While speaking with Josue, another worker, Armando, arrived and Galaviz also solicited his membership in the Committee. (Tr. 323) Later, Galaviz followed up with Josue by inviting him to attend the Committee's August 8 meeting. (Tr. 331) Galaviz continued to solicit her co-workers to sign the Committee membership petition. (Tr. 324, 325, 329; GC 11)

Some workers told Galaviz that they perceived their association with the Committee as a threat to their job security. (Tr. 329-31) When Galaviz showed Orbelina Perez (Perez) the petition, and asked if she wanted to be a part of the Committee, Perez said that she did not want to get into any problems and that she did not want to lose her job. (ALJD at 14-15; Tr. 330)

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

On about August 9, the day after Galaviz handed the letter to Kalfin, she was summoned out of a training course to meet with Plant Manager Terrones in his second floor office where both Terrones and Assistant Plant Manager Jasso were waiting.[6] (ALJD at 8-9; Tr. 333 – 334) Terrones told Galaviz to sit down because he was giving her the meeting the Committee had requested. (Tr. 334, 378) Galaviz objected, asserting that all of the Committee members needed to be present. (Tr. 334, 378 – 379) Instead, the meeting continued, with Terrones saying that Galaviz signed the Committee letter "for everyone," but that if she got into any problems nobody would help her. (ALJD at 9; Tr. 334, 379) Before leaving, Terrones told Galaviz that someone informed him that she was going around gathering signatures to get him fired. (ALJD at 9; Tr. 339, 381) Galaviz denied the accusation, requesting that Terrones bring that person forward because it was untrue. (Tr. 339, 381) In her defense, she took the petition out of her back pocket and showed it to Terrones. (ALJD at 9; Tr. 339) He asked if he could read it out loud, and took the petition from Galaviz. (Tr. 340; GC 11) Terrones read the petition – which asked for respect and an increase in wages – aloud, and then returned it to her. (Tr. 340) Terrones ended the meeting by telling Galaviz that he was promising things were going to change. (Tr. 337, 383)

H. Respondent Fires Delfina Bruno

Delfina Bruno had an unblemished disciplinary record; nevertheless she was fired on August 17, the same day as Galaviz, ending her three year employment with Respondent. (ALJD at 13, 15; Tr. 385) Bruno, a founding member of the Committee, had signed all the letters delivered to Kalfin before her termination. (Tr. 427 – 428, 435 – 436 ;GC 2, 3, 4, 5, 6) In the August 7 letter, the Committee asked Respondent to repair the machinery at the factory, in part, because Bruno had hurt her finger while cleaning out tortillas that were stuck in a machine

[6] The General Counsel's Cross Exceptions address the errors in the ALJ's factual findings and conclusions of law with respect to the individual meetings Terrones and Jasso had with the Committee members.

that had been causing problems for a long time. (GC 2) Bruno also helped write the Committee's August 15 letter to Kalfin, which she personally handed to him at the factory the next day. (Tr. 435 – 437, GC 4)

On August 17, at about 9:00 a.m., Bruno was working when Supervisor De la Mora instructed her to report to the office because Terrones wanted to speak with her. (Tr. 437 – 438) Bruno went to an office where Jasso, Terrones, and Mora were present. (Tr. 438 – 439) When Bruno entered, Terrones told her that he sent for her "because as of this moment, you no longer work for" the company; he asked her to leave her uniform and key card with De la Mora who would accompany her to Bruno's locker. (Tr. 439) Respondent never explained to Bruno the reason for her termination, never told Bruno that she had been accused of any misconduct, and never asked her if she had harassed or pressured co-workers into signing documents. (ALJD at 13, 15; Tr. 339 – 441) Respondent admitted never asking Bruno's for her side of the story during its investigation. (Tr. 182)

Before firing Bruno, on August 9, a day after the Committee delivered its first letter to Kalfin, Plant Manager Terrones called Bruno away from production line to speak with her in his office.[7] (Tr. 431) Bruno arrived at the office where she met with Terrones and Assistant Plant Manager Jasso behind closed door. (Tr. 432) Terrones had the August 7 letter with him, immediately asking Bruno if she believed that the allegations in the letter were true; Bruno said "yes." (ALJD at 7; Tr. 432) Terrones concluded the meeting by telling Bruno that, to demonstrate his good faith, he was inviting her to work with his team on the corn production line. (ALJD at 8; Tr. 435)

I. Respondent's inconsistent claims for firing Galaviz and Bruno

[7] This meeting is discussed in more detail in the General Counsel's Cross Exceptions Brief.

At the administrative hearing, President Kalfin testified that he made the decision to fire both Galaviz and Bruno after receiving the Committee's August 15 letter, and he instructed Terrones to carry out his decision. (ALJD at 13; Tr. 51, 72, 103, GC 4) Kalfin testified that the only reason he fired Bruno was because Respondent believed that she and Galaviz were "intimidating and harassing workers" at the factory. (ALJD at 15; Tr. 93) Kalfin confirmed that he did not have any other reason for firing Bruno, and affirmatively stated that he did not believe Bruno had forged any documents. (Tr. 93) However, Kalfin's testimony contradicts Respondent's previous justifications for firing Bruno. During the underlying investigation of this matter, Respondent submitted a position statement saying that Respondent "terminated Galaviz and Bruno because it received numerous complaints about them from co-workers regarding harassment and other inappropriate behavior, including requests to sign blanks sheets of paper and forgery of signatures." (GC. 9, p. 1) The position statement also states that both Galaviz and Bruno were fired for "attempting to deceive several of their co-workers [in]to signing the [Committee] letter, . . . under false pretenses, such as claiming the letter was for the sole purpose of seeking a raise," and for "harassing and pressuring employees and submitting documents [Committee letters] containing at least one forged signature." (GC 9, p. 7) Notwithstanding Kalfin's testimony to the contrary, during the District Court injunction proceeding in this matter Respondent again insisted that Bruno engaged in misconduct by "forging the signature of a co-worker." See Exhibit A.[8]

[8] The established rule is that prior pleadings may be considered as adverse evidentiary admissions in subsequent proceedings. See *Sunkyong Int'l, Inc. v. Anderson Land & Livestock Co.*, 828 F.2d 1245, 1249 n. 3 (8th Cir.1987) (admitting into evidence defendant's first answer to complaint in which defendant had admitted involvement in business operation although amended answer denied involvement); *Williams v. Union Carbide Corp.*, 790 F.2d 552, 555–56 (6th Cir.), cert. denied, 479 U.S. 992, 107 S.Ct. 591, 93 L.Ed.2d 592 (1986) (finding reversible error for trial court's exclusion of allegations made in an earlier complaint in which plaintiff had alleged that his injuries were received someplace other than defendant's chemical plant)

Also contradictory is the fact that, in the position statement, Respondent asserts that the August 7 letter contains two signatures from former employees (GC. 9, p. 7 fn. 3), while Kalfin testified at hearing that the signatures on the Committee letters he received before firing Bruno and Galaviz were those of current employees. (Tr. 32 – 34, 37, 41 – 43; GC 2, 3, 4)

As for the justifications for firing Galaviz, Kalfin initially testified that he fired Galaviz because: (1) she had forged somebody's signature on the Committee letter; (2) she was intimidating her coworkers; and (3) she was lying to her coworkers. (ALJD at 14; Tr. 72) He later added other reason, "harassing employees, asking them to sign blank documents and misrepresenting what the content of the document would be when it would be completed," (ALJD at 14; Tr. 73 – 74) and forcing workers to sign documents under false pretenses. (Tr. 80) Kalfin explained that he considered Galaviz's conduct to involve false pretenses because she was lying by telling Edgar that she gave his signature to Kalfin. (Tr. 79 – 81, 85 – 86) All these reasons involve the solicitation of signatures, either on Committee letters or the petition, in which employees were engaged in protected, concerted activities. (GC. 2, 4, 11)

J. Company officials admitted they knew Galaviz and Bruno were soliciting coworkers to sign Committee documents

The administrative record shows that the Galaviz's solicitation of signatures on behalf of the Committee was well known throughout the factory. Terrones admitted knowing Galaviz was behind an effort to seek a pay raise, and knowing that she was trying to get other workers involved. (Tr. 195) Within days of the first Committee letter, Terrones learned from other supervisors and employees that Galaviz and Bruno were soliciting membership in the Committee. (Tr. 188, 85 – 88, GC 9, p.14, 16, 18) Night Shift Supervisor Edith Mendoza reported to Terrones that both Galaviz and Bruno had been asking night shift employees to sign a letter. (Tr. 173 – 174) Terrones also received a report from Armando Salas (Salas) that

suggested Bruno and Galaviz were actively trying to increase the Committee's membership. (Tr. 179; GC 11) Salas told Terrones that Bruno and Galaviz asked him to sign a piece of paper to ask for a raise. (Tr. 179; GC 11) Terrones channeled these reports about Galaviz and Bruno directly to President Kalfin. (Tr. 73, 93)

Of the various reports Respondent was gathering about the organizing efforts of Galaviz and Bruno, three employees documented what happened, at Terrones' instruction. (GC 9, Exhibit p. 14, 16, 18) Terrones testified that he instructed Orbelina Perez Barco (Perez) to write down exactly what happened regarding Galaviz's efforts to solicit Perez to support the Committee.[9] (Tr. 174 – 175; GC 9, p. 16) Interestingly, her written statement does not accuse Galaviz of harassment or intimidation. (ALJD at 14; GC 9, p. 16; 90 – 91) Instead, Perez's written statement confirms that Galaviz asked her a single time to join the Committee because they were asking for a raise, and after Perez refused, Galaviz never asked her again. (ALJD at 14; Tr. 90 – 91; GC 9, p. 16) Similarly, in her written statement, Marilyn Pineda (Pineda) confirms that Galaviz solicited her signature on a document in order to talk to managers about a pay increase. (ALJD at 15; Tr. 91) Pineda does not accuse Galaviz of harassment or intimidation, nor does she claim that Galaviz asked for her signature more than once. (ALJD at 15; Tr. 91; GC 9, p. 18) Finally, in his written statement Edgar Lopez (Edgar) writes that Galaviz asked him to sign a document for a raise, but that he later found out that the document "was so that we could go to my supervisor," which he didn't agree too, and he asked Galaviz to erase his signature. (ALJD at 14) Edgar confirmed in his statement that Galaviz allowed him to remove his signature from the petition, as noted earlier. (ALJD at 8, 14-15; Tr. 89 – 90; GC. 9,

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

p. 14) As with the others, Lopez does not accuse Galaviz of harassment or intimidation. Before Galaviz was fired, Terrones translated these written statements from Spanish to English to Kalfin. (Tr. 176 – 77, 185, 172; GC 9, p. 14, 16, 18)

Even though Kalfin claims he relied upon the statements of Orbelina Perez and Marilyn Pineda as evidence to fire Galaviz, at hearing Kalfin testified that he could not recall the content of those statements. (Tr. 86 –91; GC 9, p. 14, 16) Similarly, when asked what conduct Terrones reported to him involving Bruno, Kalfin testified that he could not "recall the specific conversations, other than the fact that she was a party to intimidating other workers." (Tr. 93 – 94) Kalfin did not ask Terrones to investigate the allegations any further, to secure written statements, or to meet with the employees involved. (Tr. 93 – 94)

In fact, Kalfin never asked Terrones to meet with either Galaviz or Bruno to ask them about any of the allegations, including the claim that the pair was pressuring or harassing co-workers to sign letters. (ALJD at 15; Tr. 182, 197 – 198) Equally important, Respondent failed to assert any company policy or rule that Bruno or Galaviz had allegedly violated, and further failed to provide any examples of having fired employees for the same or similar reason in the past. Instead, the disciplinary records of other employees reveal that Respondent has investigated claims of harassment or intimidation in other instances, but has never fired anyone for these reasons. (ALJD at 15; GC 30 – 34; Tr. 727 – 735)

K. Respondent admits nobody had accused Galaviz of committing forgery

Kalfin admitted that nobody had accused Galaviz of forging their signature. (Tr. 72, 73, 92) Instead, it was Kalfin who made the accusation, testifying that he believed Galaviz was the perpetrator of forgery and "counterfeiting documents," by signing Gustavo Abel Lopez's name on the August 7 letter. (Tr. 72, 73, GC 2) To make his determination, Kalfin reviewed a

statement that Gustavo Abel created when he was confronted by Terrones and Jasso with questions about the August 7 letter. (ALJD at 14) However, Gustavo Abel's statement merely said that he did not sign the August 7 letter, and did not accuse Galaviz of writing his name.[10] (ALJD at 14; Tr. 147 – 148, 74 – 77, 80) Terrones also admitted that he did not know who wrote Gustavo Abel's name on the letter, testifying that he did not have "the slightest clue" as to who wrote it. (Tr. 178, 195, 197)

Although it was unclear to Respondent who had written Gustavo Abel's name on the letter, Respondent never further investigated the matter further. Respondent never asked Galaviz about the alleged forgery and, although Terrones asked the Committee members a multitude of questions, he never asked any of them if they wrote Gustavo Abel's name on the letter. (Tr. 187, 197 – 198) In fact, Kalfin couldn't really say why he held Galaviz responsible for writing Gustavo Abel's name on the August 7 letter.[11] (Tr. 75 – 76, 92) Moreover, Kalfin was unable to independently recognize the signatures on the August 7 letter, or other Committee letters the company received before firing Galaviz. (Tr. 32 – 34, 37, 42; GC 2, 3, 4) Significantly, Respondent never explained Kalfin's following testimony:

> Q: BY MS. ALONSO: Now, Gustavo Abel Lopez' statement, did he accuse Yolanda Galaviz of forging his signature?
>
> A: No, I don't believe it said her name specifically.
>
> . . .
>
> Q: So why did you decide that it was Yolanda Galaviz who had committed the forgery?
>
> A: Umm, I can't really say. I guess some statements from other workers.
>
> Q: You didn't have any accusation that she was the one who had committed forgery, correct?
>
> A I don't believe so. (Tr. 78)

[10] The statement allegedly written by Gustavo Abel was never produced at trial. (ALJD at 14)
[11] Kalfin has no training in analyzing signatures, and didn't hire anybody to analyze the handwriting. (Tr. 92)

V. ARGUMENT

A. The ALJ properly found Respondent violated Section 8(a)(1) and (3) by transferring Lilian Lopez and Yolanda Rivera to the corn-tortilla line.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980) enf'd. 662 F.2d 899 (1st Cir. 1981), the General Counsel has the burden of establishing that an employee's protected activity was a motivating factor for an adverse employment action. The ALJ correctly found that the General Counsel met this burden in connection with the transfer of Yolanda Rivera and Lilian Lopez, who both signed the August 7 Committee letter, voicing their complaints about the mistreatment they personally experienced at the hands of Supervisor Arlette De la Mora. (ALJD at 10) Respondent knew of their Union and concerted activity, harbored animus against them for engaging in those activities, and Respondent's respective reasons for transferring Rivera and Lopez from the flour to the corn production line are pretext. (ALJD at 10) Respondent has not shown, and cannot show, that it would have otherwise assigned Rivera and Lopez to the corn line, absent their involvement with the Committee. Therefore, the General Counsel requests that the Board adopt the ALJ's finding that the General Counsel has met its burden in establishing that the transfer of Lopez and Rivera, coming just days after learning of their protected activity, was in violation of Section 8(a)(3) of the Act. (ALJD at 10)

a. <u>The ALJ correctly found the General Counsel met its burden</u>

The record amply supports the ALJ's finding that Respondent obviously knew of Lopez and Rivera's Committee and concerted activity. (ALJD at 10). Lopez and Rivera complained with their co-workers about the conditions in the factory, and signed the Committee's first letter to Kalfin on August 7, which specifically complained about mistreatment by De la Mora. (GC. 2) In exceptions 6, 7 and 11, Respondent argues that De la Mora was not aware of the content of the letter, and further argues in the brief that the ALJ erred in finding that De la Mora knew of

Rivera's and Lopez's protected activity – claiming that De la Mora had "limited knowledge" of the Committee. (Resp't Br. at 5 -7, 9).

However, Respondent's arguments are a glaring disregard of the record. Mora admitted knowing about the August 7 Committee letter. (Tr. 295-96) Also, it is undisputed that Respondent's management team consists of Plant Manager Terrones, Assistant Plant Manager Jasso, and Production Supervisors De La Mora and Mariela Campos (ALJD at 2; Tr. 214, 793); Jasso testified that, after the Committee delivered the August 7 letter with Rivera and Lopez's signature to Respondent, "[w]e all received a copy from Mr. Kenny Kalfin." (Tr. 217) Notwithstanding, in footnote 4 of its exceptions brief, Respondent argues that De la Mora "was not told of any specific criticisms or even that there was a committee." (Resp't Br. at 7). A review of De la Mora's testimony shows the contrary. She specifically testified that Jasso told her "there was a letter that had been issued by a group of employees and expressing their disappointment." (Tr. 296) In fact, her mistreatment of the Committee members was a significant topic of the August 7 letter. (ALJD at 3; GC 2) And Jasso testified that after receiving the letter, he and Terrones investigated the allegations against De la Mora and Campos. (Tr. 241-42) Finally, dispelling any doubt as to whether De la Mora knew exactly who was involved in the Committee, and was closely involved in Respondent's response to the Committee and its activists, is shown by the fact that she was one of the few people present when Respondent fired both Galaviz and Bruno (Tr. 343-44; 439) Therefore, Respondent's exceptions based on its obfuscation that De la Mora did not know of Rivera's or Lopez's protected activity should be denied . The ALJ properly found knowledge, and the General Counsel requests that this finding be adopted by the Board.

In addition to finding that Respondent knew of Rivera and Lopez's protected activity, the ALJ properly found that the timing of the transfers in relation to their known activity established animus. (ALJD at 10) Respondent's argument that no evidence in the record to support that Respondent was hostile to Lopez and Rivera is entirely without merit and inconsistent with the law. (Exceptions 8 – 9; Resp't Br. at 8) It is well settled that the timing of an employer's action in relation to known protected activity can supply reliable and competent evidence of unlawful motivation. *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (timing of layoffs, coming one day after union rally and the same day employer received a union petition, supports a finding of unlawful motivation); *ABC Specialty Foods, Inc.*, 234 NLRB 475, 479 (1978) (timing of discharges and reprimand, occurring the same day the union made its initial contact, is evidence of animus). Here, Lopez was moved from the flour line to the corn line two days after the Committee handed Respondent the first letter; similarly, Respondent moved Rivera from the flour line to the corn line within a week after the first Committee letter; timing alone supports a finding that Respondent's discriminatory animus was a motivating factor in their transfers.[12] Therefore, the General Counsel submits Respondent's exceptions have no merit and requests that the Board adopt the ALJ's finding that Rivera and Lopez's work line transfer, coming just days after the Committee detailed complaints to President Kalfin about De la Mora's behavior as described in the August 7 letter, and considered in the context of the hostile environment that Respondent created by firing two other Committee activists, established the General Counsel's burden for establishing these Section 8(a)(3) violations. (ALJD at 10-11)

[12] The subsequent discharges of Bruno and Galaviz also clearly establish Respondent's animus against employees engaged in activities supporting the Committee.

1. Respondent's claims for moving Lopez and Rivera to the corn line are pretext.

Respondent argues in its exceptions that it would have moved Lopez to the corn line absent her protected activity because she was experiencing performance issues on the flour line. However, the circumstances here prove the pretextual nature of Respondent's claim. First, the ALJ properly found that Respondent failed to substantiate its assertion that Lilian Lopez had been experiencing performance issues on the flour line since April. (ALJD at 10) Second, as discussed above, the timing of Respondent's actions demonstrate Respondent's purported justification is pretext. (ALJD at 10) During cross examination by the General Counsel, De la Mora testified that Lilian Lopez had performance difficulties working the flour production line since she began working the line in April 2012. (Tr. 843) Thus, even if the ALJ had found that Lilian Lopez experienced performance issues working the flour line, the fact that Respondent waited until after it received the Committee letter to move Lilian Lopez to the more difficult corn line, where she was not trained to work, reveals its true and unlawful motive.

As for its justifications for transferring Rivera, Respondent argues it transferred her to the corn line because there were people who left the corn line and De la Mora needed help. (ALJD at 11) However, the ALJ properly dismissed this claim on objective grounds that are fully supported by the record. Respondent failed to produce any business records to substantiate this claim. (ALJD at 11) Respondent's failure to produce any business records showing employees left the corn line, or testimony from workers who allegedly left the corn line, reveals Respondent's true motive for transferring Rivera was her protected activity. *Galesburg Construction*, 267 NLRB 551, 552 (1983) (Board approved the trial judge's observation that he, "infer[red] from Respondent's failure to produce documents in its control and which were vital to prove its defense that the records did not support Respondent's position."); *Cooke's Landing*,

289 NLRB 1100, fn. 8 (1988) (party's failure to produce documents led to inference that "such evidence would be harmful to its case"); *Teddi of California*, 338 NLRB 1032 (2003) (rejection of testimony where party failed to produce documentation to support that account).

Equally without merit is Respondent's claims that the ALJ erred in discrediting De la Mora's testimony as to the reasons for moving Rivera and Lopez from the flour to the corn line. (Resp't Br. at 9; Exception 10, 12). In *Standard Dry Wall Products*, 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951) the Board held that a credibility resolution will not be disturbed unless the clear preponderance of all relevant evidence shows that it was incorrect. Here, the entire record supports the ALJ's decision to discredit De la Mora testimony; the ALJ specifically found that De la Mora had an "unconvincing demeanor" (ALJD at 10), which he considered in the context of Respondent lack of business records to substantiate her claims that Lilian Lopez had experienced performance issues on the flour line before August, and that Rivera was transferred because other employees left. See *Shen Lincoln-Mercury-Mitsubishi, Inc.,* 321 NLRB 586, 589 (1996) (in addition to demeanor, credibility resolutions can also be based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole). In fact, the ALJ specifically considered the surrounding circumstance to find the inherent improbability that De la Mora would want to assist Lopez on the heels of the criticism about De la Mora in the Committee's letter, which she admitted Jasso discussed with her. (ALJD at 10-11; GC 2) Respondent cannot, and did not, explain these changes based on business needs, or chance, because these changes were motivated by Respondent's anti-union animus and, as such, contrary to Respondent's exceptions, the evidence establishes that Respondent violated Section 8(a)(3) of the Act by transferring these employees to a different production line.

2. Respondent's claim that it regularly moved tortilla workers between production lines is unsupported by the record

Respondent obfuscates the record evidence by claiming that the record is replete with evidence that production employees were regularly moved between the flour and corn production lines. (RB at 5; Exception 1, 2) Respondent argues that "at least one witness (Galaviz) [] testified that she worked on both lines on the same day on multiple occasions;" (RB at 5). However, Galaviz's actual testimony on this issue is quoted below:

Q: BY MR. TOPPEL: Sure. When you were hired to work at Santa Fe Tortilla Company, you were not hired to work on a specific line, such as the corn line, correct?
A No.
Q And during your employment, you also worked on the flour line?
A Sometimes.

(Tr. 355:13-19)

Contrary to Respondents assertion that it regularly and constantly moved employees between the corn and flour line, Bruno testified that she consistently worked the flour line from the time she started working in 2009 until she became an assistant to the supervisors in 2012. (Tr. 386 – 87, 449) In fact, Bruno explained that while she was working on the flour line she momentarily covered workers on the corn line who were on fifteen minute breaks, however, she was not assigned to work the flour line until July 2012. (Tr. 449) Testimony on this issue at hearing went as follows:

Q: BY MR. TOPPEL: Do during your employment there were some weeks in which you were assigned to the corn tortilla line, is that right?
A Well never, I was always on the flour line.
Q But you testified that you worked on both lines, both the corn and tortilla [sic] line, isn't that what you just testified to?
A Yes.
Q So you did work on the corn line?
A Yes, when they switched me over to the corn.
Q And when did they switch you over to corn?
A The 17th of July.

(Tr. 448)

Q: BY MR. TOPPEL: And prior to July 17th, had you worked on the corn line at all?
A No.
Q At no other time during your employment you had worked on, you had not worked on the corn line -- let me start that over, that was a little confusing, I apologize. At no time prior to July 17th had you ever worked on the corn line?
. . .
[AGC objection and ALJ ruling omitted]

A The entire time that I worked on the corn line was when I was covering somebody else's break, so if they would cover, I would, somebody was going to break for 15 minutes, then I would cover, move over and cover for those 15 minutes.
Q So you moved back and forth between the corn and flour lines?
A Yes.

(Tr. 449)

Reviewing the testimony cited by Respondent indicates that the ALJ properly dismissed it as immaterial to the issue of whether transfer of Rivera and Lopez was illegally motivated. Because Respondent relies on tenuous evidence in support of its argument, the Board should sustain the ALJ's factual findings.

Moreover, it is especially telling that, and Respondent does not dispute or take exceptions to the factual finding, that Lilian Lopez had not worked the corn line and had not been assigned to work on the corn line before the August 10. The record shows that Respondent did not assign Lopez and Rivera to work on the corn line **until after** they engaged in their protected activity. (GC 26, 27) The record evidence corroborates the testimony of both Rivera and Lopez that they did not start working the corn line **until after** the Committee submitted its first letter to Respondent. More specifically, at hearing, the General Counsel offered a summary of the weekly work schedules that had been created by Respondent for the period of January 2012 to February 2013. (GC 26, 27) These weekly work hour schedules showed that Respondent assigned Lilian Lopez to work the flour line from May 2012 to August 10, 2012. (GC 27) The

records further showed that Respondent consistently assigned Rivera to work the flour line from January 2012 to August 16, 2012. (GC 26) After the Committee letters, both were assigned to the corn line, and Respondent continued to assign Rivera to work the corn line every day until January 13, 2013. (GC 26)

Finally, the ALJ properly dismissed claims that Rivera had worked on the corn line at the start of her employment in 2007; the evidence shows that although Rivera worked the corn line for a brief stint, it was over 5 years before her illegal transfer here, and Respondent had since changed the equipment in the corn line. Such evidence does not negate Rivera's testimony, supported by the record, that she consistently worked the flour line until she was transferred to the corn line after signing the Committee letters.

b. ALJ properly credited the testimony of the employees over the testimony of De la Mora regarding the difficulty of the corn line

In resolving the conflicting testimony as to the difficulty of the corn line compared to the flour line, the ALJ specifically considered the demeanor he observed when Rivera, Lopez, and Bruno testified, and compared it to De la Mora's demeanor in her testimony. (ALJD at10) The ALJ dismissed De la Mora's testimony that it was easier to work the corn line than the flour line finding her demeanor "entirely unconvincing." (ALJD at 10). *Standard Dry Wall Products*, 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951). Therefore, the ALJ's credibility determinations are supported by the record and the Board should sustain these credibility determinations and find that Respondent's Exceptions 3 through 5 have no merit. (ALJD at 10)

c. The evidence supports the remedy ordered by the ALJ

The ALJ's decision to order a make whole remedy is fully supported by the record evidence. In addition to the testimony from Rivera and Lopez, that they worked fewer hours when they were transferred, President Kalfin testified that in August 2012, the corn line was

operated less frequently, at times shut down, during the construction of the corn chip line, whereas the flour line continued to operate with less disruption. (Tr. 785, 787) By moving Rivera and Lopez to the corn line, which was being operated less frequently, Respondent found a means for reducing Lilian Lopez' and Yolanda Rivera's work hours, and in turn the amount of time they spent in the factory. As discussed above, Respondent failed to prove it would have moved Rivera and Lopez from the flour line to the corn line absent their Committee and concerted activity. Accordingly, Respondent's exceptions 14 through 16 should be dismissed, and the Board should adopt his findings of fact, and conclusions of law, and find that Respondent violated Section 8(a)(1) and (3) by transferring Rivera and Lopez to the corn production line. (ALJD at 10-11)

B. The record contains overwhelming evidence to support the ALJ's conclusion that Respondent fired Galaviz and Bruno in violation Section 8(a)(1) and (3) of the Act

In *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), the Fifth Circuit had refused to enforce a Board order reinstating two union activists because the company had a good faith and honest belief that the activists said the "union would use dynamite to get in," based on a statement of an employee who claimed the activists said this while soliciting him for membership in the union. Id. at 21-22. The Supreme Court held that that the company could not rely on its good faith belief to shield itself of liability under the Act. Id. at 22-23. The court affirmed that "[o]ver and again the Board had ruled that § 8(a)(1) is violated if an employee is discharged for misconduct arising out of protected activity, when it is shown that misconduct never occurred." Id. at 23.

The ALJ's conclusion that there is no credible evidence that Galaviz and Bruno engaged in disqualifying misconduct in the process of their protected activity that would take them out of

the protection of the Act is supported by overwhelming evidence, discussed below. (ALJD at 15)[13] More specifically, Kalfin testified that he fired Galaviz for her protected activity because he believed that: (1) she had she had forged somebody's signature on the Committee letter; (2) she was intimidating her coworkers; and (3) she was lying to her coworkers about the Committee. (ALJD at 13 – 14; Tr. 72) As for the reason for firing Bruno, Kalfin testified that the only reason he fired her is that he believed she was a party to Galaviz harassing co-workers into signing Committee documents. (Tr. 93-94) Although Respondent's argues that the testimony of Gustavo Terrones and Kenny Kalfin established a good faith belief that Galaviz and Bruno engaged in misconduct, the evidence shows otherwise. (Resp't Br. at 18) A review of the entire record proves that Respondent's claims that the activists committing forgery, harassment or false pretenses are baseless. (ALJD at 15)

Further, the ALJ correctly found that Kalfin admitted that Respondent fired Galaviz and Bruno because they engaged in union and other protected concerted activity. (ALJD at 15) In this regard, Respondent's exception 25, alleging that the ALJ erred in finding Kalfin made this admission, and argument that "there is no basis" for this finding is entirely without merit, and should be dismissed. (Resp't Br. at 10) In order to overturn the ALJ's credibility resolutions, Respondent would need to show that that "the clear preponderance of all the relevant evidence" that the ALJ's credibility resolutions were incorrect. *Standard Drywall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). This is a "high standard", and is one that Respondent cannot meet. *Fantasia Fresh Juice Co.,* 339 NLRB 928, 928 (2003). Respondent argues that

[13] Respondent excepts to the ALJ's failure to specifically identify the analytical framework he applied and failure to fully provide his analysis. (Exception 24) However, it is clear that the ALJ analyzed the case under *NLRB v. Burnup & Sims, Inc.,* 379 U.S. 21 (1964) despite not explicitly citing the case; he concluded that the activists did not engage in disqualifying conduct in the process of their protected activity, and that there is no evidence that SFTC even had a good faith but mistaken belief that Galaviz and Bruno had engaged in disqualifying conduct. (ALJD at 15) As discussed below, the record amply supports the ALJ's factual findings and legal conclusions as to Respondent firing Galaviz and Bruno. Thus, Respondent's exceptions 18 through 24 should be dismissed.

Kalfin's testimony that he welcomed people joining committees and bare denial that he considered the protected activity of Galaviz and Bruno in firing them is simply unconvincing. In the context of the overwhelming evidence to the contrary, including the entirety of Kalfin's testimony, Terrones' testimony, the record evidence, the few statements of Kalfin cited in Respondent's brief do not merit any weight, and fail to establish Respondent's high burden overturning the ALJ's factual finding. (Resp't Br. at 10 -14) It is undisputed that all the reasons Kalfin relied upon to fire Galaviz and Bruno involve the solicitation of signatures, on either the Committee letter or the petition, complaints about working conditions or a request for higher wages for all employees – activities that are protected under the Act (GC. 2, 4, 11) – and the ALJ's conclusion as to Kalfin's admission is valid, and should be sustained.

1. <u>Galaviz did not commit forgery</u>

As for Respondent's claim that Gustavo Abel's name on the letter was an act of criminal forgery is clearly frivolous, and the ALJ properly found that there was no credible evidence to support a claim that Galaviz engaged in this conduct. (ALJD at 14 -15; Resp't Br. at 17) In *Johnston-Tombigbee Furniture Co.,* 243 NLRB 116 (1979) the Board dismissed a company's defense of forgery for firing three union activists who, actually, forged signatures on union dues check off cards; the Board found the company's claim of forgery to be mere pretext. The Board also affirmed an administrative law judge dismissal of an employer's claim of forgery in *Gurabo Lace Mills, Inc.*, 265 NLRB 355, 262(1982). In that case a worker named Diaz reported that another worker Paniagua forged his name on a union authorization card. Far from misconduct, the ALJ found the claim of forgery to be evidence that the company knew of Paniagua's union activity.

Here, Respondent simply had no evidence that even accused or implicated Galaviz; moreover, as noted below, the ALJ properly found that Gustavo Abel Lopez actually signed the letter. In addition to Galaviz's testimony that she did not write Gustavo Abel Lopez's name on the August 7 letter, the company officials involved in the decision to fire her *admitted* they did not know who wrote Abel's name on Committee letter, and Respondent didn't investigate the matter. Kalfin admitted that nobody had accused Galaviz of forging their signature and, other than his personal suspicion that Galaviz was responsible, he didn't know who wrote Gustavo Abel's name on the letter. (ALJD at 14; Tr. 72, 73, 78, 92) Kalfin further testified that the statement allegedly written by Gustavo Abel, which was never introduced at trial, did not specifically name Galaviz as the person who wrote his name. (ALJD at 14) Plant Manager Terrones also admitted that he did not know if it was Galaviz who wrote Gustavo Abel's name on the letter, testifying that he did not have "the slightest clue" as to who was responsible for writing the name. (Tr. 178, 195, 197) Significantly, Respondent never asked Galaviz if she wrote Gustavo Abel's name on the letter and she never admitted doing so . (ALJD at 15; Tr. 187, 197-198)

The ALJ's decision is further supported by the testimony of Gustavo Abel Lopez. Gustavo Abel's conversation with Terrones establishes that Respondent knew Galaviz did not write his name on the letter; Abel testified that he never told Terrones that he thought it was Galaviz who wrote his name. (ALJD at 14; Tr. 707) Even a cursory review of the signatures on the August 7 letter shows that Galaviz did not write Gustavo Abel's name. (GC 2) The capital "G" in her signatures bears no similarity to the capital "G" of Gustavo Abel Lopez's name on the August 7 letter. (GC 2, 4, 5, 6, 7) Quite simply, there is absolutely no evidence that Galaviz was responsible for writing Gustavo Abel's name on the Committee letter.

The situation here is similar to that in *Shattuck Denn Mining Corp.*, 151 NLRB 1328, 1339 (1965) enfd. 362 F.2d 466 (9th Cir. 1966) where an employee was fired for allegedly threatening a non-striking coworker during a strike. The employer's General Manager concluded that the employee had threatened non-strikers, based upon conversations relayed to him, but he made no effort to interview the employee in question, or otherwise probe into the matter; instead the employee was discharged for the alleged misconduct. The Board affirmed the administrative law judge who, relying upon *Burnup & Sims,* found the termination to be a violation. Id. The ALJ found "there was no evidence whatsoever in the record of misconduct by [the striker]," and "there appears to be no reasonable basis for [the General Manager] reaching the conclusion that [the striker] had, in fact, threatened" anyone. Id. Citing *Burnup & Sims,* the Ninth Circuit enforced the Board's finding that the termination was a violation of the Act. *Shattuck Denn Min. Corp. v. NLRB* 362 F.2d 466, 471 (9th Cir. 1966). See also, *Shamrock Foods Co., v. NLRB,* 346 F.3d 1130 (DC. Cir. 2003).

Here, the ALJ properly concluded there was no credible evidence of that Galaviz wrote the name of Gustavo Abel Lopez on the August 7 letter, and that there was no evidence to support a good faith but mistaken belief of forgery because there is simply no evidence that Galaviz or Bruno engaged in any misconduct, including forgery, and Kalfin's determinations otherwise were based "on his own conclusions rather than a recital" of what witnesses told him. *Shattuck Denn Mining Corp.,* 151 NLRB at 1339. Of course, Kalfin could not have made his decision based upon witness interviews, as he didn't interview anybody.

a. The entire record supports the ALJ's credibility determinations regarding Gustavo Abel Lopez's signature on the August 7 letter

Respondent's exceptions 18 - 20, that the ALJ committed reversible error in his decision to credit Galaviz's testimony and finding that Gustavo Abel wrote his name on the August 7

letter are meritless, and should be dismissed. (Resp't Br. at 14 - 16) The ALJ properly found that Galaviz credibly denied that she wrote Gustavo Abel's name on the August 7 letter. (ALJD at 14) See *Standard Dry Wall Products,* 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951) (a credibility resolution will not be disturbed unless the clear preponderance of all relevant evidence shows that it was incorrect). Further, the ALJ also considered the surrounding circumstances, including that Kalfin admitted that Gustavo Abel Lopez did not accuse Galaviz of writing his name on the letter. (ALJD at 14; Tr. 358) Significantly, the ALJ noted that Gustavo Abel Lopez testified that he did not accuse any specific person of writing his name on the letter. (ALJD at 14) Respondent's argument that the ALJ's discredited limited portions of Galaviz's testimony as to statements by Terrones in the meeting on August 9 is not a ground to overturn the ALJ's decision of Galaviz's testimony entirely unrelated to her meeting with Terrones on August 9. In fact, the testimony cited by Respondent shows Galaviz saw Gustavo Abel Lopez personally sign the letter, and amply supports the ALJ's finding that Gustavo Abel who his own name on the letter, not Galaviz. (Resp't Br. at 15 – 16)

Similarly, Respondent has failed to meet its high burden of overturning the ALJ's decision not to credit Gustavo Abel Lopez testimony that he did not sign the August 7 letter. In exceptions 18 - 19, Respondent argues that the ALJ's decision not credit Gustavo Abel's denial of signing the letter is "unsupported by any evidence in the record" despite the overwhelming evidence underlying the ALJ's decision. (Exceptions at 4) The ALJ specifically considered the surrounding circumstances in his decision not to credit Gustavo Abel's denial. *Shen Lincoln-Mercury-Mitsubishi, Inc.,* 321 NLRB 586, 589 (1996) (in addition to demeanor, credibility resolutions can also be based on the weight of the respective evidence, established or admitted

facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole).

Here, the ALJ noted that, Gustavo Abel testified that he went to the worker's center with his co-workers and he participated in their discussions about their working conditions. (ALJD at 14; Tr. 701-02) The ALJ's decision is further supported by Gustavo Abel's testimony that he agreed it was okay to talk about problems at work, and at the meeting with his coworkers Gustavo Abel shared his opinion about supervisors pressuring employees at work, and that he was interested in a pay raise. (Tr.701-02) The ALJ's finding that Gustavo Abel was a newly hired employee who had second thoughts after he signed the letter is further supported by Gustavo Abel's testimony. Gustavo Abel testified that in Terrones' office, Terrones showed him the August 7 letter, asked if Gustavo Abel signed it, and then Terrones said that Gustavo Abel was getting himself into problems. (Tr. 704) It is clear from the record that Gustavo Abel had second thoughts about his Committee activity after Terrones told him that he was getting into problems. Although he had participated in the Committee after Terrones called him to the office Abel wanted nothing more to do with the Committee. (Tr. 700, 702-03, 705; GC 4, 5, 6, 7)

Based on the foregoing, the ALJ properly considered all the surrounding circumstances in his credibility findings relating to Galaviz and Gustavo Abel Lopez's testimony on this subject; Respondent's failed to establish the warrant to overturn these findings as required in *Standard Dry Wall Products*. Accordingly, the ALJ's credibility findings are valid, and should be sustained by the Board.

b. Galaviz and Bruno did not engage in conduct remotely similar to the cases cited in Respondent's brief.

Respondent's reliance on *UAW v. NLRB,* 514 F.3d 574, 579 (6th Cir. 2008) is misplaced and unavailing. (Resp't Br. at 17) There, three employees drafted an anonymous letter to the

company president letter complaining about a supervisor, who was an outspoken union opponent, trying to get him demoted. One employee, Leo Ahern, while visiting the FedEx service desk at Kinko's, wrote the name of an anti-union coworker on the return address label. Id. at 579. When interviewed by the company, the anti-union employee denied sending the letter, and the company reviewed the surveillance tape at Kinko's and determined Ahern sent the letter; Ahern was then discharged. Id. at 579-80. A divided panel upheld the Board's determination. Id. At the unfair labor practice hearing, Ahern admitted that he wrote the anti-union employee's name on the letter, and denied he was trying to get him fired. *Ogihara America Corp.*, 347 NLRB 110, 126 fn. 25 (2006)

In *UAW v. NLRB,* the employer had video tape evidence of who wrote the return address of the anti-union employee on the letter, and at hearing Ahern admitted to doing so. Moreover, there was no evidence that the anti-union employee had anytime agreed to the content of the letter. Here, Respondent presented *no* evidence that Galaviz wrote Gustavo Abel's name on the letter. Moreover, Gustavo Abel had agreed to many of the complaints in the letter, and the evidence shows that it was only until he was told he would have problems that he said he did not sign the letter.

Similarly unavailing is Respondent attempts to justify its behavior by citing *Paramount Mining Corp. v. NLRB,* 631 F.2d 346, 348 (4th Cir. 1980) and *NLRB v. Fansteel,* 306 U.S. 240 (1939), noting that employees are "not at liberty to intimidate or coerce other employees." (Resp't Br. at 16-17). Of course, Respondent neglects to describe the behavior at issue in those cases. In *Paramount Mining Corp.,* the employee engaged in "vulgar threats" and a "battery," and was properly fired. 631 F.2d at 349-50. In *Fansteel,* employees lost the protection of the Act because they engaged in an illegal strike, and committed "acts of violence against the employer's

property" by illegally seizing key "buildings in order to prevent their use by the employer in a lawful manner." 306 U.S. at 256. Reliance on these cases is unavailing.

Here, even if the ALJ had not found that Gustavo Abel wrote his name on the letter, the act of including Gustavo Abel's name on the Committee letter is not a crime of forgery, as Respondent claims. (Resp't Br. at 17) The August 7 Committee letter was a union letter created for the purpose of communicating employees' workplace concerns to the company. Gustavo Abel testified that he shared some of the concerns that are mentioned in the letter, and that during the August 6 Committee meeting, he complained about the supervisors at work and said that he also wanted a raise. (Tr. 701-702; GC 2) However, as discussed above, the ALJ's made a sound finding that he did, in fact, write his name on the letter. (ALJD at 14)

2. Neither Galaviz nor Bruno harassed or intimidated their co-workers

It is well settled law that union solicitations "do not lose their protection simply because a solicited employee rejects them and feels 'bothered' or 'harassed' or 'abused"' by them. *Frazier Industrial Co.,* 328 NLRB 717, 718-719 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000). Accord: *Consolidated Diesel,* 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001) (employees did not lose the protection of the Act where complaints about their union solicitations "manifested a purely subjective notion of harassment").

There is absolutely no evidence in the record that establishes Bruno or Galaviz ever intimidated or harassed their co-workers, and the ALJ correctly found that there is no credible evidence they engaged in such disqualifying misconduct. (ALJD at 15) In its brief Respondent claims it had at least four complaints to substantiate these allegations, and such evidence satisfies the burden of proving their honest belief the misconduct occurred. (Resp't Br. at 19) However, a review of these written statements reveal that Galaviz merely asked her co-workers to join the

Committee, and the ALJ was correct in finding that there was no evidence to warrant Respondent's belief that Bruno and Galaviz engaged in misconduct while soliciting coworkers to join the Committee or sign Committee documents. (ALJD at 14-15; GC 9, p.14, 16, 18) Similarly the discussions Terrones had with employees prove that Bruno or Galaviz never intimidated or harassed anyone, confirming the ALJ's decision. (ALJD at 15; Tr. 170) *Willamette Industries, Inc.,* 306 NLRB 1010, 1018 (1992) (the mere fact employees may not have wanted to discuss the union, or that they heard unsubstantiated rumors about how that might respond, is insufficient to elevate legitimate discussion of the union to the status of "harassment" or "intimidation.")

Furthermore, Terrones' testimony validated that there was no harassment or intimidation by Galaviz or Bruno, further substantiating the ALJ's decision. (ALJD at 15) Terrones testified that the employees did not report any conduct to him other than Galaviz and Bruno had simply asked them for their signature on the petition, conduct which can hardly be defined or construed as misconduct. (Tr. 180) Kalfin admitted at hearing that the employees who complained about Galaviz did not specifically say they felt intimidated or forced to sign documents. (Tr. 80) Significantly, Galaviz's testimony describing her solicitations shows there was no harassment or intimidation on her part. (Tr. 321 – 328) The law does not permit the Respondent to define the protected conduct of Galaviz and Bruno as unprotected harassment and punish it as such. See, e.g., *Consolidated Diesel Co.,* 332 NLRB at 1020; *Nor- Cal Beverage Co.,* 330 NLRB 610, 611 fn. 5 (2000).

Notwithstanding Kalfin's testimony that the only reason he fired Bruno was because she was a party to intimidating and harassing workers with Galaviz, in its brief Respondent argues the opposite; that testimony of Kalfin and Terrones demonstrates a good faith belief that both

Galaviz and Bruno forged a signature on the August 7 letter and obtained signatures under false pretenses. (Resp't Br. at 18; Tr. 93) The evidence proves the opposite. At hearing Kalfin could not recall any specific discussion with Terrones, or anyone else, about where he learned of the supposed allegations made against Bruno. (Tr. 93) Interestingly, the statements that Respondent claims as evidence of harassment by Bruno do not even reference her. (ALJD at 14-15; GC 9, p.14, 16, 18) From this, it is apparent that Kalfin fired Bruno simply for associating with the Committee, and Respondent did not care to inquire further into the purported claims made against her. (Tr. 93 - 94)

In exception 22, Respondent argues the ALJ did not credit testimony from Supervisor Arlette De la Mora that Marilyn Pineda complained that Bruno said the purpose of the letter was to fire the supervisors, and that Edgar Lopez complained to her that Bruno forged his signature on an document. (ALJD at 15) A review of De la Mora's testimony alongside the surrounding circumstances prove that De la Mora was willing to fabricate testimony to bolster Respondent's position. Specifically, the entire record undermines a claim Edgar Lopez accused Bruno of forgery; particularly Kalfin's testimony that he did not believe that Bruno had committed a forgery. (Tr. 93) Again, the unreliability of De la Mora's testimony is revealed in reviewing Marilyn Pineda's statement, which lacks any reference to Bruno. (ALJD at 15) Therefore, Respondent's exception 22 should be dismissed.

3. Galaviz did not misrepresent the purpose of the petition to anyone

As for Kalfin's claim that Galaviz misrepresented the purpose of the petition, Kalfin testified that he believed Galaviz engaged in false pretenses by telling Edgar that she "lied" about giving Kalfin the document with Edgar's signature. (Tr. 79 – 81, 85 - 86). In its brief, Respondent overextends a statement by Galaviz at hearing, that she was not going to use the

signatures, to argue that statement is an admission of having misled her co-workers to sign the Committee petition. (Resp't Br. at 18) A consideration of the surrounding circumstances prove that Galaviz never misrepresented the purpose of the Committee petition.

First, a review of the written employee statements prove that Galaviz never misrepresented the purpose of the petition or the Committee to anyone. (ALJD at 14-15; GC 9, p. 7) Edgar's statement verifies that Galaviz asked for his signature in order to ask for a raise. (ALJD at 14; Tr. 89, GC 9, p. 14) Marilyn Pineda also confirms that Galaviz asked her to sign the petition to go talk to the managers concerning a raise in salary. (ALJD at 15; Tr. 90, GC 9, p. 16) Pineda's statement is clear that Galaviz "was asking for signatures in order to go talk to the managers concerning a raise in salary." (ALJD at 15; Tr. 92, GC 9, p. 18) The statements of Edgar and Pineda do not claim that Galaviz later told them that she was seeking signatures for any other reason. Pineda notes that she did not even read the petition. (ALJD at 15) When accused by Terrones of seeking signatures to fire him, Galaviz denied it, and showed him the actual petition which clearly states the Committee was seeking a raise and respect in the workplace. (ALJD at 9; Tr. 339 – 340; GC 11)

Furthermore, Edgar's written statement confirms that he "erased" his signature from the document when Galaviz gave it back to him, and the petition itself shows that Edgar's signature is scratched out. (ALJD at 8, 14; Tr. 89 – 90; GC 9, p. 14; GC 11) Galaviz, in turn, testified that she told Edgar she was joking, when she initially told him about giving the petition to Kalfin. Whether Galaviz told Edgar that she was "joking" or whether she was "lying" is simply immaterial, as there is no evidence that Edgar's signature was secured under false pretenses, and Edgar was able to "erase" his signature from the petition. Galaviz also asked several other employees to sign the Committee membership petition. There is no evidence that the purpose of

the petition was for any reason other than increasing the membership of the Committee, asking for respect in the workplace, and asking for a wage increase, as the document itself states. (ALJD at 8, 14-15; Tr. 339 – 340; GC 11)

Also ineffectual is Respondent's claim that it was not targeting members of the Committee, relying upon the fact that, other than Galaviz and Bruno, no other Committee members were fired. (Resp't Br. at 16) The Board and courts have long noted an "employer's failure to discriminate against every union supporter does not disprove a conclusion that it discriminated against one of them. *Handicabs, Inc.*, 318 NLRB 890, 898 (1995) (citing *NLRB v. Challenge- Cook Bros. of Ohio, Inc.*, 374 F.2d 147, 152 (6th Cir. 1967) among other cases). "[A] piece of fruit may well be bruised without being rotten to the core." Id. (internal quotation omitted). By making an example of just one employee, the discharge "of a single dissident may have – and may be intended to have – an in terrorem effect on others." Id. (internal quotation omitted). Here, the record contains ample evidence to support the ALJ's conclusion that Respondent fired unlawfully fired Galaviz and Bruno.

In sum, Respondent's exceptions 18 through 28 should be dismissed in their entirety. There is ample evidence in support of the ALJ's finding that Respondent fired Committee activists Yolanda Galaviz and Delfina Bruno in violation of Section 8(a)(1) and (3) of the Act under the legal standard in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). There is simply no evidence that Respondent had a good faith belief that Galaviz committed forgery of a signature on the Committee letter or that she lied to her coworkers about the Committee, contrary to Respondent's bare claims. Similarly, the evidence simply fails to show that Galaviz and Bruno intimidated or harassed their co-workers. Instead, the record supports the finding that Galaviz and Bruno never engaged in disqualifying misconduct, and Respondent fired them for

their protected activity. Respondent cannot "rely on its good faith belief to shield itself of liability under the Act." Id. at 22-23. "Over and again the Board had ruled that [the Act] is violated if an employee is discharged for misconduct arising out of protected activity, when it is shown that misconduct never occurred," as in this case. Id. at 23. As such, the ALJ's factual findings and legal conclusions are sound, valid and should be sustained by the Board.

C. The evidence further establishes violations under *Wright Line*

A *Wright Line* analysis is not appropriate where, as here, the only dispute is about the protected or unprotected nature of the conduct motivating the discipline. See *St. Joseph's Hospital*, 337 NLRB 94, 95 (2001). In any event the evidence shows that, under the *Wright-Line* burden-shifting analysis, Respondent violated Section 8(a)(1) and (3) of the Act by terminating Galaviz and Bruno. *Wright Line*, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To establish a violation, the government must prove, by a preponderance of the evidence, that the employee's protected activities were a motivating factor in the employer's decision to take the adverse action. *Wright Line*, 251 NLRB 1083 (1980). In meeting its burden of persuasion, the General Counsel must establish that the Galaviz and Bruno engaged in protected activity, that the Respondent had knowledge of this activity, and that the protected activity was a motivating factor in the adverse employment actions. Once that is established, the burden of persuasion shifts to the employer to prove, by a preponderance of the evidence, that it would have taken the same action even in the absence of protected activities. Id.

A discriminatory motive or animus may be established by: (1) the timing of the employer's adverse action in relationship to the employee's protected activity; (2) the presence of other unfair labor practices;[14] (3) statements and actions showing the employer's general and

[14] *See Mid-Mountain Foods, Inc*., 332 NLRB 251, (2000) enf'd 11 Fed.Appx. 372 (4th Cir. 2001) N.2, 260 (2000), enf'd mem., 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534, 534 (1993).

specific animus;[15] (4) the disparate treatment of the discriminatees;[16] (5) departure from past practice;[17] (6) failing to adequately investigate whether the discriminatee engaged in the alleged misconduct; and (7) evidence demonstrating that an employer's proffered explanation for the adverse action is a pretext.[18] The Board will infer an unlawful motive or animus where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive."[19]

Here, it is undisputed that Respondent knew both Galaviz and Bruno played a key role in the Committee's efforts to organize its workforce. Respondent admits it learned that Bruno and Galaviz had been asking non-Committee members to sign Committee letters, through reports it began receiving from workers in the factory as early as August 9. (GC 9, p. 14, 18) Terrones knew that Galaviz was responsible for attempting to organize the workforce at the company as he took the Committee petition from her and read it the day he subjected her to interrogation. (ALJD at 9; Tr. 339 – 340) Similarly, Bruno personally delivered a Committee letter directly to Kalfin.[20] Finally, knowledge is clearly established by the fact that both Galaviz and Bruno signed the Committee letters. (ALJD at 3, 13; GC 2, 4)

As for animus against employees who engage in protected conduct, Respondent's numerous 8(a)(1) violations, as argued in the General Counsel's cross-exceptions, standing alone, are sufficient to establish its unlawful animus; similarly the unlawful transfer of Lopez

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[15] *See Affiliated Foods, Inc*., 328 NLRB 1107, 1107 (1999) (statements, even if lawful, serve as background evidence of animus);
[16] *See Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).
[17] *See JAMCO*, 294 NLRB 896, 905 (1989), aff'd mem., 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991).
[18] *See, e.g., Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25. 26 (1998).
[19] *J.S. Troup Elec.*, 344 NLRB 1009 (2005) citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995) enf'd. 97 F.3d 1448 (4th Cir. 1996) (table); *ADS Elec. Co*., 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).
[20] That Respondent had no legitimate reason to fire Bruno is further shown by the fact that Terrones acknowledged that none of the written employee complaints reference Bruno. (Tr. 177) Trying to deflect the lack of evidence, Terrones claimed he did not know the reason Bruno was fired. (Tr. 177)

and Rivera establish animus. *See Avondale Industries, Inc.*, 329 NLRB 1064, 1071 n. 4 (1999). Also, Respondent's numerous statements that it does not address employee complaints in groups, but instead does it in one-on-one meetings are further evidence of animus.[21] *Downtown Hartford YMCA*, 349 NLRB 960, 965, 981 (2007) (manager's statement that he was not interested in meeting with a group of union workers is evidence of animus). Accordingly, the evidence establishes that Bruno's and Galaviz' protected activities were the motivating factor in Respondent's decision to fire them. As such, the burden shifts to Respondent to demonstrate that it would have fired both absent their protected conduct. Id. at 1065. Respondent cannot do so.

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

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

Respondent's argument that the other employees who signed the Committee letters were not disciplined or discharged does not invalidate its true motive for firing Bruno and Galaviz. (Resp't Br. at 10, 16) It is well settled that a discriminatory motive involving the discharge of some employees is not disposed of by a showing that the employer did not discriminate against others, "or failed to weed out every union adherent." *Golden State Foods Corp.* 340 NLRB 382, 395 -396 (2003) citing *Waterways Harbor Investment Co.*, 179 NLRB 452, 459 (1969) enf'd 430 F.2d 1313 (6th Cir. 1970). Also, Respondent acknowledged that Bruno and Galaviz were actively attempting to organize the workforce; Respondent's review of the three statements written by non-Committee employees, and the fact both Galaviz and Bruno hand-delivered the Committee letters, support a finding that Respondent believed that Galaviz and Bruno were spearheading the organizing effort of the Committee. (ALJD at 14 -15; GC 9, p. 14, 16, 18)

The shifting justifications for firing Galaviz and Bruno also prove Respondent's true and unlawful motive. At hearing, when Kalfin was questioned as to why he fired Bruno, he testified that he fired her for being a party to intimidation and harassment; he specifically testified that he did not believe she had committed forgery. (Tr. 93 – 94) Kalfin's testimony contradicts the justifications proffered in Respondent's initial position statement, which made a blanket assertion that Respondent "terminated Galaviz and Bruno because it received numerous complaints about them from co-workers regarding harassment and other inappropriate behavior, including requests to sign blanks sheets of paper and forgery of signatures." (GC. 9, p. 1) In its brief Respondent continues to insist on this blanket assertion notwithstanding that Kalfin clearly testified to the contrary. (Resp't Br. at 18) Similarly, the justifications for Galaviz's termination offered at hearing shifted from Respondent's prior assertions in its position statement. In footnote three of the position statement, Respondent gave a detailed description that "of the

signatures presented, one was forged and two were from former employees, one who had not worked for the company since July of 2009" as a reason for firing Bruno and Galaviz. (GC 9, p. 7, fn. 3) The testimony proves that Respondent had previously exaggerated the justifications for firing Galaviz; Kalfin confirmed that the letters the company received before firing Galaviz and Bruno contained signatures of current employees. Notably, Respondent could not keep a consistent justification as to why Galaviz and Bruno were fired.

Also, Respondent's nonexistent investigation into the allegations against both Galaviz and Bruno also proves Respondent's unlawful motive. See, *Firestone Textile Co.*, 203 NLRB 89, 95 (1973); *Burger King Corp.*, 279 NLRB 227, 239 (1986) (virtually non-existent investigation into the matter also supports a conclusion of improper motive). Respondent fired Galaviz without asking Galaviz for her side of the story regarding the allegations made against her (Tr. 197), and similarly fired Bruno without bothering to give Bruno an opportunity to address the her alleged misconduct. (Tr. 182-83) The fact that Respondent fired both Galaviz and Bruno after conducting only a limited investigation, and without allowing giving either an opportunity to explain the allegations against them, supports a conclusion that the discharges were discriminatorily motivated. (ALJD at 15) *Alstyle Apparel*, 351 NLRB 1287, 1287-1288 (2007). (Board found that employer's limited investigation into allegations of misconduct, and its decision to discharge employees before giving them an opportunity to explain the allegations against them support the conclusion that the discharges were discriminatorily motivated and not, as the employer asserted, based upon a reasonable belief of misconduct).

Respondent's disparate treatment, compared to other employees who had engaged in harassment or intimidation further proves its unlawful motive. For example, the employee complaints that Respondent received against Galaviz and Bruno were not even comparable to the

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

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

on a union authorization card was far from misconduct, and proved knowledge that Paniagua's discharge violated 8(a)(3)).

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

VI. CONCLUSION

Based on the foregoing, and the entire record evidence, the General Counsel respectfully submits that the ALJ properly found that Respondent violated Section 8(a)(1) and (3) of the Act, as set forth in the ALJD, and Respondent's exceptions should be rejected. The Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order. It is further requested that the Board order whatever other additional relief it deems just and necessary to remedy Respondent's numerous violations of the Act.

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

Respectfully submitted,

/s/ Sophia Alonso

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF in, Cases 28-CA-87842 and 28-CA-095332. 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:
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her co-workers. As Mr. Kalfin testified, SFTC also received information that Bruno had been engaging in this conduct along with Galaviz. [Ex. 1 at 93:2-4]

In light of the testimony above, there should be no question that Galaviz and Bruno were terminated for conduct that went beyond the protections of Section 7 of the NLRA. Therefore, the Board has failed to satisfy its threshold burden of establishing that Galaviz and Bruno had engaged in protected activity and that the disciplinary action resulted from conduct associated with that activity. In the instant case, Galaviz and Bruno's terminations were based on conduct that clearly lost the protections of the Act.

There is also substantial evidence in the record to establish that SFTC had an honest belief that Galaviz and Bruno engaged in misconduct by forging the signature of a co-worker on the August 7, 2012, obtaining signatures under false pretenses, and otherwise unlawfully coercing their co-workers. The Board has attempted to discredit SFTC's reasons for the Galaviz and Bruno terminations by questioning the adequacy of SFTC's investigation into their misconduct. However, the Board's efforts misses the point since all that is required to satisfy SFTC's burden is that it present some evidence that it had a "reasonable basis to believe" that misconduct occurred. *See, e.g., NLRB v. Plastic Applicators, Inc.*, 369 F.2d 495, 498 (5th Cir. 1966)(report of employee to company provides basis for "honest belief" which is entitled to "*prima facie*" validity by Board); *Marshall Eng'd Prods. Co.,* 351 N.L.R.B. 767 (2007)("honest belief" based upon preliminary investigation); *Contempra Fabrics, Inc.,* 341 N.L.R.B. 851, 852 (2005)("Although the employee's report to management may have been a subjective response, it gave the Respondent a reasonable basis for believing that a threat had