

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

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

and

YOLANDA GALAVIZ, an Individual.

and

COMITÉ DE TRABAJADORES DE
SANTA FE TORTILLA

Case Nos. 28-CA-087842
28-CA-095332

**REPLY BRIEF IN SUPPORT OF RESPONDENT SFTC, LLC'S
LIMITED EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

Respondent SFTC, LLC d/b/a Santa Fe Tortilla Company (hereinafter referred to as “SFTC”) submits the following Reply Brief in support of its Limited Exceptions to Administrative Law Judge William Kocol’s (“ALJ Kocol”) Decision in the above-captioned matter. The Acting General Counsel’s (“General Counsel”) Answering Brief is replete with misstatements of the factual record, misunderstanding of SFTC’s arguments and inaccurate or misleading statements of the relevant case law.

ARGUMENT

I. AS A MATTER OF LAW, THE ALJ ERRED IN FINDING THAT SFTC AS AN INSTITUTION, HAD KNOWLEDGE OF RIVERA AND LOPEZ’S PROTECTED CONCERTED ACTIVITIES, DESPITE THE FACT THAT THE UNDISPUTED DECISION-MAKER FOR THEIR ALLEGED TRANSFERS HAD NO SUCH KNOWLEDGE.

As she acknowledges in her Answering Brief, under *Wright Line*, the Counsel for the General Counsel has the burden of establishing that *an employee’s protected activity* was a motivating factor for an adverse employment action. 251 NLRB 1083, 1089 (1980), *enf’d*. 662 F.2d 899 (1st Circ. 1981). Of course, the only way to satisfy this burden is to demonstrate – through admissible evidence – that the *individual* who made the decision to take the adverse employment action was *actually aware* of the protected, concerted activity *of the employee* who was subject to the adverse action. Significantly, despite submitting a forty-four page Answering Brief, the Counsel for the General Counsel still fails to demonstrate that the undisputed decision-maker, Arlette de la Mora (“de la Mora”), had the required knowledge that Yolanda Rivera (“Rivera”) or Lillian Lopez (“Lopez”) engaged in any protected, concerted activity *prior* to the decision to move these two employees to the corn tortilla line. Instead, the Counsel for the General Counsel continues to seek to rely on the “institutional knowledge” of SFTC, as illustrated by statements such as “*Respondent* obviously knew of Lopez and Rivera’s Committee and concerted activity.” [Answering Brief at p. 17 (citing ALJD at p. 10 (emphasis added))]

In her failed attempt to overcome this clear deficiency, the Counsel for the General Counsel accuses SFTC of a “glaring disregard of the record.” [Answering Brief at 18]

However, it is the Counsel for the General Counsel who plays fast and loose with the record in order to create a revisionist history of what actually occurred. It is undisputed that de la Mora was the individual who made the decision to move Rivera and Lopez to the corn line, but there is no evidence in the record to demonstrate that she was aware of their involvement in the Comité de Trabajadores de Santa Fe Tortilla (“Comité”) or of their participation in any other protected, concerted activity. Counsel for the General Counsel asks the Board to plainly ignore de la Mora’s specific testimony concerning her lack of any specific knowledge of Comité activity:

Q: (Counsel for the AGC): And Mr. Jasso told you that the Company had received letters from Comité de Trabajadores de Santa Fe Tortilla, correct?

A: I can’t say yes. That is, I mean, they told me but they didn’t explain to me, *they just said that there was a letter that had been issued by a group of employees and expressing their disappointment, but they didn’t tell me if it was a committee or something.*

[TR 296:5-12 (emphasis added)] Although Counsel for the General Counsel attempts to twist this testimony to her advantage, this evidence does not establish any of the following: that de la Mora was aware that either Rivera or Lopez were members of the Comité or participated in the drafting of the letter, or that they engaged in some other protected, concerted activity. Furthermore, while Counsel for the General Counsel argues that criticism of de la Mora in the August 7 letter served as the motivation for de la Mora to make the decision to move Rivera and Lopez to the corn line, she conveniently overlooks the fact that there is no evidence in the record to establish that de

la Mora was aware of that criticism (see the quoted testimony above) or that de la Mora knew the source of that criticism.

The Board and the courts have consistently held that “institutional knowledge” of protected, concerted activity is not sufficient to establish a *prima facie* case under *Wright Line*. To allow Counsel for the General Counsel to simply establish that some manager – any manager – was aware of protected, concerted activity without evidence that the actual decision-maker knew about the specific employee’s protected, concerted activity would completely undermine the burden established by the Board with the *Wright Line* test. As the Seventh Circuit Court of Appeals explained in denying enforcement of a Board order:

[R]egarding imputation, courts have generally rejected the NLRB’s attempts to simply attribute a foreman or supervisor’s knowledge of an employee’s union activities to the company. *Automatically imputing such knowledge to a company improperly removes the General Counsel’s burden of proving knowledge.*

Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB, 219 F.3d 677, 685 (7th Cir. 1985)(emphasis added) (citing numerous court of appeals decisions on point). Finally, Counsel for the General Counsel’s attempt, on page 18 of its Answering Brief, to establish that de la Mora had the requisite knowledge of Lopez and Rivera’s protected, activity based on entirely circumstantial evidence -- such as a stray comment by another supervisor that “we all received” the Comité letter or de la Mora’s subsequent attendance at the termination of other employees – should be rejected. This evidence does not establish that de la Mora was aware of Lopez and Rivera’s protected activity in the days following the formation of the Comité.

With respect to Counsel for the General Counsel’s argument that the “timing of the transfers in relation to their known activity established animus,” this argument, of course, only succeeds if, as a prerequisite, de la Mora was aware of Lopez and Rivera’s protected, concerted activities. Because there is no evidence in the record demonstrating that she was aware of these activities, the timing of the move to the corn line is irrelevant. Moreover, Counsel for the General Counsel also has provided no explanation as to why SFTC *chose* to move only these two Comité members to the corn tortilla line when at least four other employees¹ signed the initial August 7, 2013 letter.

ALJ Kocol’s finding concerning the General Counsel’s allegation that SFTC unlawfully “transferred” employees, Lopez and Rivera, to the corn line should be reversed for all of the additional reasons asserted by SFTC in its Limited Exceptions and Brief in Support of Limited Exceptions.

II. THE ALJ ERRED IN CONCLUDING THAT SFTC TERMINATED EMPLOYEES GALAVIZ AND BRUNO FOR ENGAGING IN CONDUCT PROTECTED BY SECTION 7 OF THE NLRA.

As explained in detail in SFTC’s Brief in Support of its Limited Exceptions, ALJ Kocol also erred in concluding that SFTC terminated Yolanda Galaviz (“Galaviz”) and Delfina Bruno (“Bruno”) in violation of the National Labor Relations Act. As an initial point, there is no basis for ALJ Kocol’s finding that Mr. Kalfin “admitted that Santa Fe Tortilla discharged Galaviz and Bruno because they engaged in union and other

¹ As SFTC argues in its Limited Exceptions, the ALJ erred in discrediting Gustavo Abel Lopez’s testimony that he did not sign the August 7, 2012 letter. Contrary to the ALJ’s findings, Mr. Abel Lopez – a former employee with little motivation to lie under oath – credibly denied signing the August 7, 2012 letter from the Comité .

concerted activity.” [ALJD at p. 15] Far from an admission, the relevant testimony from Mr. Kalfin included an emphatic denial:

Q: Did you ever consider the fact that Yolanda Galaviz was a member of the Committee in your decision to terminate her employment?

A: Not at all. I welcome people joining committees and forming organizations and talking about their concerns.

Q: Did you ever consider the fact that Delfina Bruno was a member of the Committee in your decision to terminate her employment?

A: No.

[TR 102:25-103:8] In light of the fact that ALJ Kocol credited Mr. Kalfin’s testimony on at least one other point in his decision [*see* ALJD at p.12], his failure to consider this testimony should serve as a basis for reversal.

Moreover, ALJ Kocol’s finding regarding the purported admission is also inconsistent with the undisputed facts surrounding Mr. Kalfin’s response to the August 7, 2012 letter. As ALJ Kocol found in his decision, upon receipt of the letter, Mr. Kalfin directed his Plant Manager, Gustavo Terrones, “to meet with employees individually and assess the concerns they raised.” [ALJD at p. 3] Contrary to the conclusion that Mr. Kalfin immediately created a scheme to get rid of the Comité, Mr. Kalfin did exactly what the Comité asked for: he developed a plan to address the concerns expressed by the Comité. As ALJ Kocol noted in properly dismissing the General Counsel’s allegations regarding the allegedly unlawful solicitations:

...this is a case where the employees outwardly expressed their concerns and asked that they be addressed and the employer asked about those concerns and promised to rectify them if appropriate. *The employees*

cannot voice concerns and ask that they be rectified and then complain when an employer does just that.

[ALJD at p. 4 (emphasis added)] In light of SFTC's entirely appropriate response to the Comité letters, done at Mr. Kalfin's direction, the General Counsel's theory is contingent on Mr. Kalfin having suddenly decided to change course and, instead of trying to resolve employee concerns, developing a scheme to rid SFTC of Comité members. However, there is absolutely no evidence in the record to establish when this seismic shift in SFTC's position towards the Comité occurred or, more importantly, an explanation as to why it occurred. Despite 308 pages of "meandering 6(11)(c) interrogation of Santa Fe Tortilla supervisors by the General Counsel," Counsel for the General Counsel failed to obtain a single admission from any of SFTC's managers indicating that the Company had a negative animus towards the Comité or its members or that there existed a plan to target Galaviz or Bruno for termination because of their participation in the Comité.

In addition to the foregoing, the Board should grant SFTC's exceptions relating to the terminations of Galaviz and Bruno for all of the reasons asserted in SFTC's Brief in Support of its Limited Exceptions.

CONCLUSION

For the reasons explained in SFTC's Brief in support of its Limited Exceptions, as well as above, the Board should sustain Respondent's Limited Exceptions to Administrative Law Judge Kocol's Decision. The Complaint should be dismissed as to Galaviz and Bruno's terminations, as well as to the transfer of Rivera and Lopez.

DATED: August 20, 2013.

JACKSON LEWIS LLP

By /s/ Jeffrey W. Toppel

Danny W. Jarrett
4300 San Mateo Blvd. NE
Suite B-260
Albuquerque, NM 87110

Jeffrey W. Toppel
2398 E. Camelback Rd., Suite 1060
Phoenix, Arizona 85016

Attorneys for SFTC, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **REPLY BRIEF IN SUPPORT OF RESPONDENT SFTC, LLC'S LIMITED EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** in Cases 28-CA-087842 and 28-CA-095332 was served by **E-Gov, E-Filing, E-mail and U.S., Mail on August 20, 2013 as follows:**

Via E-Gov, E-Filing to:

Gary Shinnars, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board 28
1099 14th Street NW, Room 11602
Washington, DC 20570-0001

Via U.S. Mail to:

Yolanda Galaviz
4650 Airport Road, Apt. 205
Santa Fe, NM 87507-2850

Comité de Trabajadores de Santa Fe Tortilla
2000 Hopewell Street, Apt. 103
Santa Fe, NM 87505-3545

Via Electronic mail to:

Sophia Alonso
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
421 Gold Avenue, SW, Suite 310
Albuquerque, New Mexico 87103-0567

/s/Debbie Mattatall