UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FARM FRESH COMPANY
TARGET ONE, LLC

and **Case 28-CA-100434**

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 99, AFL-CIO

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

Sandra L. Lyons
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Telephone: (602) 640-2133
Facsimile: (602) 640-2178
E-mail: Sandra.Lyons@nlrb.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FARM FRESH COMPANY
TARGET ONE, LLC

and **Case 28-CA-100434**

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 99, AFL-CIO

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

By its exceptions, Farm Fresh Company Target One, LLC (Respondent)[1] seeks to have the Board ignore the record evidence establishing that Respondent engaged in numerous unfair labor practices as part of an extensive and pervasive campaign to effectively "nip in the bud" the efforts of its employees to self-organize in violation of Section 8(a)(1) and (3) of the Act. Instead of the allowing its employees the ability to freely choose whether or not they wanted a union, Respondent spied on employees, interrogated them, and threatened them. Finally, Respondent summarily fired four union supporters, who had a combined 54 years of experience working for the company; by firing 10% of its workforce, Respondent sent a clear message to the remaining employees regarding the consequences of trying to unionize. Respondent would have the Board ignore the well-reasoned findings of fact, conclusions of law, and credibility determinations made by Administrative Law Judge Geoffrey Carter (the ALJ). Respondent's attempt to overturn the ALJ's findings, and well reasoned decision, is unpersuasive.

[1] Farm Fresh Target One, LLC is referred to as Respondent. United Food and Commercial Workers Union, Local No. 99, AFL-CIO is referred to as Union. References to the ALJD show the applicable page number. "Tr.__" refers to pages of the transcript from the hearing held June 11-14, 2013. "GCX__" refers to exhibits introduced by the Acting General Counsel at the hearing. "RX__" refers to exhibits introduced by Respondent at the hearing.

The ALJ properly found that Respondent committed numerous and serious unfair labor practices, in violation of Section 8(a)(1) of the Act, by unlawfully including discharging Maria Morales (Morales) for engaging in protected, concerted activities as well as numerous other Section 8(a)(1) violations. The ALJ additionally found that Respondent violated Section 8(a)(3) of the Act by discharging three active union supporters—Martha Aguirre (Aguirre), Silvia Romero (Romero) and Roberto Pena (Pena). (ALJD at 24-25; 27) Respondent's exceptions are without merit and should be denied. Except as otherwise set forth in the Acting General Counsel's Cross-Exceptions, the Board should adopt the ALJ's findings of fact, conclusions of law, and recommended order as they relate to Respondent's Exceptions.[2]

I. PROCEDURAL HISTORY

A hearing in this matter was conducted before ALJ Geoffrey Carter on June 11 through June 14, 2013,[3] in Phoenix, Arizona, based upon allegations contained in the Complaint dated April 29. (The Complaint) (GCX 1(c)) The ALJ issued his decision (ALJD) on August 8, properly finding that Respondent engaged in numerous violations of Section 8(a)(1) of the Act by: threatening employees with discharge for their union activities; creating the impression of surveillance of Union and concerted activities; engaging in surveillance of employees engaged in Union and concerted activities; interrogating employees about their Union and concerted activities; threatening to refuse to assist employees if their supported the Union; threatening employees that they could be permanently replaced if they

[2] On September 19, the General Counsel filed Exceptions asking that the Board find Respondent additionally violated the Act by: discharging Maria Morales in violation of Section 8(a)(3) of the Act; instituting E-Verify because of the employees' Union and concerted activities; soliciting grievances and making promises to employees if they ceased their Union and concerted activities; and discharging Blas Virelas in violation of Section 8(a)(3) of the Act.

[3] All dates are in 2013 unless otherwise noted.

supported the Union and went on strike – regardless of the reason for the strike; and discharging employee Morales for engaging in protected, concerted activities. Finally, the ALJ found that Respondent violated Section 8(a)(3) of the Act by terminating employees Aguirre, Romero and Pena for their Union and concerted activities.

On September 19, Respondent filed with the Board four exceptions to the ALJD and a supporting brief. In its exceptions, Respondent generally excepts to the ALJ's findings enumerated above with regard to the discharge allegations, argues that the ALJ erred in barring certain evidence from the proceeding, that the Board and the Acting General Counsel did not have the authority to issue the Complaint, and that the ALJ erred in ordering reinstatement and backpay for three of the discriminatees. Moreover, Respondent objects to the ALJ's credibility determinations. Respondent does not except to the ALJ's findings regarding numerous Section 8(a)(1) violations of unlawful threats, interrogations and surveillance or employees' union activities.

II. QUESTIONS INVOLVED

Respondent contends that the ALJ erred by finding that: (1) the Board and the Acting General Counsel had authority to issue the Complaint and Notice of hearing; (2) Respondent was precluded from asking discriminatees about their immigration status and authorization to work in the United States; (3) Respondent's discharge of four discriminatees was in violation of the Act; and (4) the proper remedy for the unlawful discharges of the discriminatees is reinstatement and backpay. Respondent also objects to certain of the ALJ's credibility determinations involving the various violations.

As demonstrated below, Respondent's exceptions are without merit and should be rejected. The ALJ's findings of fact and conclusions of law regarding the meritorious unfair labor practices are firmly grounded in Board law and, therefore, should be adopted. Similarly, the Board should adopt the ALJ's credibility resolutions, as they are fully supported by the record evidence.

III. FACTUAL BACKGROUND

A. Respondent's Operations

Respondent packages produce that is then sold to customers for sale in retail stores. (Tr. 45; ALJD at 3) The business has been in existence since 1972, and is based in Phoenix, Arizona. (Tr. 130; ALJD at 4) Since its inception, the Respondent's owners were the David Prince family. (Tr. 130; ALJD at 4) Sometime in 2012 David Prince (Prince) decided to sell the company to his general manager, Gary Schrum (Schrum). (Tr. 162; ALJD at 4) Schrum had worked for Respondent in a supervisory capacity since 1998. (Tr. 44; ALJD at 4) The purchase was consummated on February 28, with the signing of an asset purchase agreement. (Tr. 162; GCX 2; ALJD at 4; 7)

Schrum took over the morning of March 1, and continued the business operations unchanged, retaining all employees, and keeping the same work schedules, wages, supervisors, customers, suppliers, and the location of Respondent's facility. (Tr. 72; ALJD at 8-9) The supervisors who existed before and after the sale were Schrum, who changed titles from General Manager to Owner; Production Supervisor Jesus "Martin" Loya (Loya); and Arturo Sousa (Sousa), who changed title from Office Manager to Operations Manager. (Tr. 44, 193, 237; ALJD at 4) There are approximately 48 production employees who work at Respondent's facility. (Tr. 135-136; ALJD at 4)

B. Employees' Union Activities

Employees had serious and numerous concerns about their wages and working conditions, and especially were concerned about how they were treated by Production Supervisor Loya. (Tr. 299-300; 480-481; ALJD at 4-5) As the ALJ properly found, Loya was verbally abusive to employees, especially to the older ones. (Tr. 332; 336; 480-481; ALJD at 4-5)

Fed up with the treatment they were receiving at the hands of Loya, Aguirre and Romero approached the United Food and Commercial Workers Union, Local 99 (the Union), and the Union held several meetings at the homes of Aguirre and Romero.[4] (Tr. 306; 380; 520; 560; ALJD at7; 9) The first meeting was held on February 26, and was chaired by the Union's Organizing Director Martin Hernandez (Hernandez). (Tr. 518; ALJD at 7) At this meeting, Hernandez directed Aguirre and Romero to return to work the next day and begin speaking to their fellow employees to determine whether there was sufficient interest in union representation, inviting them to a Union meeting at Aguirre's home on March 2. (Tr. 308; 521-522; 561; ALJD at 7)

Aguirre and Romero did as instructed (Tr. 308; 383; ALJD at 7), and immediately began talking to their coworkers about the Union, inviting them to the meeting at their home on March 2. (Tr. 308-309; 383-384; ALJD at 7) These discussions occurred on the production floor, directly in front of the supervisor's office. (Tr. 204; 309; 383-384; ALJD at 7) By March 6, Aguirre, Romero, Morales, and Pena had all been terminated by Respondent.

[4] Romero is Aguirre's daughter-in-law. (ALJD at 7, fn. 11)

IV. DISCUSSION AND ANALYSIS

A. The Board and the Acting General Counsel had Authority to Issue the Complaint and Notice of Hearing

Respondents' challenges to the Board's composition at the time the Complaint and Notice of Hearing issued are without merit. It is correct that, contrary to *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. Jan. 25, 2013) (petition for certiorari filed April 25, 2013), Presidential Recess Appointees Griffin and Block, Board Members at the time of the decision, serving alongside Chairman Pearce, were not appointed during an intersession recess. However, Respondent's reliance on *Noel Canning* is misplaced. The Board has filed a petition for certiorari with the United States Supreme Court seeking review of the D.C. Circuit's decision. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, supra with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus, in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until such time as it is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act."[5] The Board's conclusion is equally applicable here. Therefore, Respondent's Exception is without merit and should be overruled.

[5] The Third Circuit's decision in *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203, 2013 WL 2099742 (3d Cir. May 16, 2013), should not change this result. As noted above, there still remains a split in the circuits as three other circuits have found intrasession recess appointments valid.

B. The ALJ Properly Excluded Evidence Regarding the Discriminatee's Employment Authorization

1. The ALJ's Findings

At the outset of the hearing, the General Counsel made a Motion in Limine, asking that the ALJ preclude Respondent from asking discriminatees questions regarding their authorization to work in the United States. The ALJ granted that Motion for the following reasons: a balancing of the probative value of the questions against the prejudicial value weights in favor of the prejudicial value; his ruling does not preclude Respondent from presenting evidence through its own witnesses regarding a discriminatees' statements regarding their immigration status and/or employment authorization; and because the questions would have a chilling effect on witnesses being willing to come forward in cases such as the case at hand, the public interest lies in favor of witnesses coming forward. (Tr. 27-32; ALJD at 2-3) Respondent argues in its exception that the ALJ erred in not allowing it to delve into the employment authorization status of certain witnesses by questioning those witnesses, arguing that it was part of Respondent's defense to the Complaint.

2. The Record Evidence

Respondent's defense to the discharges of four of the five discriminatees was that they resigned their employment because Respondent decided to conduct an E-verify examination of all employees. The evidence supporting this defense was presented through Production Supervisor Loya and Owner Schrum. (Tr. 669-670) Loya testified that three of the discriminatees told him they were quitting their employment because they were afraid they would not pass E-Verify and one discriminate, Virelas, quit after receiving a no-match letter regarding his social security number. (Tr. 669-670; ALJD at 11; 14; 16) Schrum further

testified that he did not fire the three discriminatees but understood from Loya that they had quit because of E-Verify. (Tr. 708; ALJD at 11; 14; 16)

The ALJ considered this testimony in his decision and found that it was not credible. (ALJD at 14, fn. 24) The ALJ carefully and fully explained his reasons as to why the testimony was not credible and rejected Respondent's defense regarding the discharges of Morales, Romero, and Pena. The ALJ properly stated that "Loya gave inconsistent and often conflicting accounts regarding the resignation, including the dates and locations of where the conversations regarding resignation occurred. Loya also only gave vague descriptions about what Morales, Pena and Romero said when they resigned and only gave more detailed but strikingly similar descriptions of the resignations when recalled later to testify." (ALJD at 14, fn. 24) Therefore, Respondent was given the opportunity to fully present evidence concerning its defense as to what the discriminatees told Respondent—its evidence was simply not credible.[6]

3. Legal Analysis

The ALJ was correct in barring Respondent from exploring the discriminatees' employment authorization. Despite Respondent's contentions, Respondent had a full opportunity to present its defense and the ALJ simply did not believe Loya's testimony, a fact that would not have changed even if the discriminatees were probed about their immigration status and employment authorization – topics the Board has found to be irrelevant during the liability phase, except in very rare circumstances.

As a matter of agency policy, the National Labor Relations Board has stated that "[t]ypically, an individual's immigration status is irrelevant to respondent's liability under the Act. " *Tuv Taam Corp.*, 340 NLRB 756, 760 (2003). The Board has also expressed concerns

[6] The ALJ did credit Respondent's version of the resignation of discriminatee Virelas. (ALJD at ALJD at 27)

that "subjecting every employee whose rights have been violated to such an intrusive inquiry [into employees' immigration status] . . . contravenes the purposes of the NLRA." *Flaum Appetizing Corp.*, 357 NLRB No. 162 slip op. at 7 (2011). A situation where such an inquiry is relevant to an alleged unfair labor practice is extremely rare, such as where "an unlawful failure to hire an applicant is alleged, and is defended on the basis of the applicant's immigration status. In such cases, it would be appropriate . . . for the Board to determine **both** the liability of the employer for the unfair labor practice and the ineligibility of an undocumented worker to receive backpay that he would otherwise be due. *Tuv Taam Corp.*, 340 NLRB at 761 (emphasis added). Such is not the case here, where Respondent asserts that the majority of the alleged discriminatees resigned their employment. (GCX 1(e) at ¶ 5(c).

As the precedent shows, absent rare circumstances not present here, as a matter of policy the Board does not allow into evidence matters concerning an employee's immigration status during the liability stage of an unfair labor practice proceeding. "It is the duty of an Administrative Law Judge to follow and apply established Board precedent, regardless of his personal views," until such precedent reversed by the Supreme Court. *Fred Jones Manufacturing Company*, 239 NLRB 54, 54 (1978); *Ford, Co.*, 230 NLRB 716, 718 n.12 (1977). Therefore, the ALJ, in accordance with established Board precedent, properly precluded Respondent from inquiring into the discriminatees' immigration status or work authorization.

Case law favors the exclusion of evidence related to a charging party's or witness' immigration status. *Tuv Taam Corp.*, 340 NLRB 756, 760 (2003). The Ninth Circuit has firmly addressed the issue of employers inquiring into their employees' immigration status during workplace law enforcement proceedings by stating that such inquiries are generally

inappropriate because "[g]ranting employers the right to inquire into workers' immigration status in [such] cases . . . would allow [employers] to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices."[7] *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004), rehearing and rehearing en banc denied 384 F.3d 822 (9th Cir. 2004), cert. denied 544 US 905 (2005) (district court properly precluded discovery process to inquire into plaintiffs' immigration status where plaintiffs alleged national origin discrimination).

The Eighth Circuit had concerns in *Almeida-Perez,* 549 F. 3d 1162, 1174 (8th Cir., 2008) about the possible widespread use of immigration-related evidence to impeach testifying witnesses' credibility. According to the Court:

> the use of [evidence related to immigration status] is fraught with the danger of prejudice to a defendant by introducing the possibility of invidious discrimination on the basis of alienage. . . . Moreover, the relevance of an immigration violation to character for truthfulness is at the least debatable and would depend on the facts of the particular violation since many immigration violations do not involve a false statement.[8]

Thus, the ALJ properly exercised his discretion, granting the General Counsel's Motion, and holding that the discriminatees' immigration status is not relevant to their credibility or character for truthfulness in this unfair labor practice proceeding. Indeed, the ALJ's decision to bar such questioning was appropriate and reduced the risk that "threat[s] of

---

[7] See also *United States v. Almeida-Perez*, 549 F.3d 1162, 1174 (8th Cir. 2008) ("the use of [evidence related to immigration status] is fraught with the danger of prejudice to a defendant by introducing the possibility of invidious discrimination on the basis of alienage. . . . Moreover, the relevance of an immigration violation to character for truthfulness is at the least debatable and would depend on the facts of the particular violation since many immigration violations do not involve a false statement"); *Figueroa v. I.N.S*, 886 F.2d 76, 79 (4th Cir.1989) ("An individual's status as an alien, legal or otherwise, does not entitle the [Board of Immigration Appeals] to brand him a liar."); *EEOC v. First Wireless Group, Inc.* 2007 WL 586720, at *3 (EDNY 2007) (quoting *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir.2004) ("[T]he Defendant cannot 'ignore immigration laws at the time of hiring but insist upon their enforcement when [its] employees complain.'"); *Mischalski v. Ford Motor Co.*, 935 F. Supp. 203, 207-08 (E.D.N.Y. 1996) ("the court is aware of [no authority] to support the conclusion that the status of being an illegal alien impugns one's credibility. Thus, by itself, such evidence is not admissible for impeachment purposes.").

[8] *Almeida-Perez,* 549 F.3d at 1174.

deportation and criminal prosecution [will arise] every time a worker, documented or undocumented, reports illegal practices." *Rivera v. NIBCO, Inc.*, 364 F.3d at 1065. The ALJ also properly excluded the evidence because any probative value that the discriminatees' immigration status or immigration-related acts may have had in regards to their credibility as witnesses was substantially outweighed by possible chilling effect such questions would have on future witnesses' willingness to testify in Board hearings. Respondent was authorized to present any admissions of the discriminatees regarding their employment authorization and immigration status as well as any other evidence it had regarding this issue. In fact, Respondent did present testimony regarding statements of the discriminatees and the "no-match" letter regarding Virelas. Precluding the questioning of the discriminatees regarding their immigration status in this case, is not an extraordinary circumstance, such as in a failure to hire case, where an applicant had to show their were able to be employed when they applied for a job. These were long-term, current employees who were terminated after engaging in Union and concerted activities. Any statements they made regarding their immigration status in this hearing were irrelevant to the merits of the allegations in the Complaint and Respondent was properly precluded from questioning them in this regard.

C. Respondent's Section 8(a)(1) and (3) Discharges of Aguirre, Morales, Romero, and Pena

1. The ALJ's Findings

The ALJ found that Respondent violated Section 8(a)(1) of the Act when it discharged discriminate Morales; and violated Section 8(a)(3) of the Act when it discharged Aguirre, Romero, and Pena. Respondent argues that the ALJ was incorrect in his finding because he did not credit evidence presented by Respondent. In fact, Respondent's entire argument rests

on the ALJ's credibility determinations. The ALJ believed the testimony of Morales, Aguirre, Romero, and Pena, and did not believe the testimony of Loya and Schrum, Respondent's witnesses. Respondent's exceptions have no merit and should be rejected.

2. The Record Evidence

a. Protected, Concerted Activities of Morales

Morales had worked for Respondent since 2003. (Tr. 476; ALJD at 11) Morales worked as a production worker and often worked with Aguirre. (Tr. 476-477; ALJD at 6-7) Morales was subjected to constant verbal abuse from Loya that consisted of him telling her she was an idiot hag, she was a "ball of Indians underneath the Sierra mountains," she was a clown and a fool, and that she should be replaced with younger workers. (Tr. 478-479; ALJD at 4-5)

On or about February 10, Morales and Aguirre along with other employees were working at the celery table, cutting and packaging celery. (Tr. 482; ALJD at 6) Loya came up to the table and started to measure the length of the celery. (Tr. 483; ALJD at 6) Dissatisfied with the length of the celery, Loya threw a piece of celery in the face of Morales. (Tr. 483; ALJD at 6) Morales told Loya that the next time he threw celery in her face, she would throw it back at him. (Tr. 483; ALJD at 6) Loya stated "I'm gonna see you on the 1st of March to see if it is true, if you're gonna throw that celery back in my face." (Tr. 483; ALJD at 6)

On February 16, Morales and Aguirre were again at the celery table. (Tr. 302; 376; 483; ALJD at 6) A large load of celery had to be processed that day and the truck to pick up the order was already at Respondent's facility. (Tr. 484; ALJD at 6) Loya was incredibly abusive that day, yelling at the employees, pounding on the table, calling them names, telling

them to "hurry, hurry." (Tr. 303-304; 484; ALJD at 6) Loya told the employees that "I told you that you were old hags and I'm gonna change you out for new people, younger people." (Tr. 485; ALJD at 6) Loya told three employees—Morales, Aguirre, and Doris, all older employees, that they would no longer cut the celery but would be the only ones to reach into a large barrel and bring out the heavy load of celery. (Tr. 303; 377; ALJD at 6) This is a task that is normally shared among all of the employees working at the celery table because it is a very heavy and difficult job. (Tr. 303; 377) At this point, Morales spoke up and told him that "all you need now is just a whip in your hands so you can whip our asses." (Tr. 304; 485; ALJD at 6) Loya said "Here with me, you will obey orders, rules and policies, because I'm the one who is in charge here." (Tr. 378; 485; ALJD at 6) Morales then said "Perhaps inside here, there are no rules, there's no laws, there's no rules and there is no opportunities for work for you here, or for us here, but outside of here, I will find laws, rules and opportunities for work outside of here and for you." (Tr. 485; ALJD at 6) Loya said that they were going to do what he was telling them because, if not, the doors were open, they were very large and they could walk right out. (Tr. 378) Aguirre told Loya that he would have to accept the consequences. (Tr. 304; 378; ALJD at 6) Loya said nothing but walked away. (Tr. 304)

b. Maria Morales' Discharge

On March 5, Morales informed Loya that she had to leave work early to attend a meeting at her daughter's school. (Tr. 494; ALJD at 11) Loya told her it was fine. (Tr. 495; ALJD at 11) However, after Morales went to her locker to obtain her personal items to leave for the day, Loya approached her and fired her, stating there was no more work for her. (Tr. 494; ALJD at 11) Morales was fired on the spot, despite having worked for Respondent for ten years.

The ALJ found that Morales was fired because she engaged in protected, concerted activities on two occasions in February.[9] (ALJD at 6) Respondent has alleged that Morales resigned her employment and relies upon the discredited testimony of Loya.[10]

c. Union and Concerted Activities of Martha Aguirre, Silvia Romero, and Roberto Pena

Aguirre was very upset when she went home on February 16 after her confrontation with Loya. (Tr. 304; 378-379) Romero is married to Aguirre's son, Ricardo Aguirre (Ricardo) and they live in the same home. (Tr. 305; 555; 557) When Romero and Aguirre were picked up by Ricardo after work that day, they told Ricardo what had happened. (Tr. 305; 559) Ricardo had enough of the poor treatment his mother and wife were experiencing and called an attorney, Isaac Hernandez, who referred him to Martin Hernandez (Hernandez), Organizing Director of the United Food and Commercial Workers Union, Local No. 99 (the Union). (Tr. 305; 380; 518; 559) Hernandez called Ricardo, listened to the issues the employees were having, and asked if he could meet with Ricardo and his family. (Tr. 306; 520; 560) Ricardo agreed and Hernandez came to the Aguirre home on February 26. (Tr. 306; 380; 520; 560)

Hernandez listened to the concerns of Aguirre and Romero and informed them that he believed the Union could be of assistance but that the Union needed to know if there was enough interest amongst employees for Union representation. (Tr. 306-07; 383; 521) Hernandez instructed Aguirre and Romero to return to work the next day and begin speaking to their fellow employees, invite them to a Union meeting on March 2, at the Aguirre's home, and see if there was sufficient interest in union representation. (Tr. 308; 521-522; 561)

[9] General Counsel has excepted to the ALJ's determination that Morales was not also discharged for engaging in union activities under Section 8(a)(3).

[10] Despite Respondent's numerous statements that Loya's testimony regarding the resignations is uncontradicted, Morales, Romero, and Pena all contradicted Loya's testimony and they were credited by the ALJ.

Aguirre and Romero did exactly as instructed by Hernandez. (Tr. 308; 383) They talked to the majority of the employees while working on the production floor. (Tr. 309; 383-384) They did not hide their discussions but engaged in them openly at work. The celery table at which both Aguirre and Romero work is directly in front of the administration office where the supervisors work. (Tr. 204) The administration office has windows all around that look onto the production floor; the celery work station is directly to the left of the office door to the office and the carrot work station directly to the right. (Tr. 203-204) This is the office where Prince, Schrum, Loya, and Sousa work. Loya admits that it is his job to walk the production floor, see what the production employees are doing, make sure they are working, and instruct them to get back to work if they are talking. (Tr. 237-239) If the door to the administration office is open, conversation from the production floor can, in some instances, be heard by the individuals in the office. (Tr. 203)

Aguirre and Romero also invited employees to their home on March 2, for a meeting with Hernandez and Union Organizer Efrain Sanchez (Sanchez). (Tr. 313; 385; 522-523; 561; 592) This meeting took place at approximately 5:00 - 6:00 p.m. (Tr. 314; 385) Morales attended this meeting along with other employees. (Tr. 489; 523; 562) At this meeting, Hernandez and Sanchez again listened to the issues and concerns that the employees raised—abusive treatment by Loya and his wife Rosa, who also worked for Respondent, low wages, and no benefits. (Tr. 314; 386; 490; 523; 592) Employees signed union authorization cards and agreed to speak to their fellow employees about the union campaign and to try to get other employees to sign union authorization cards. (Tr. 314-315; 386-387; 490; 524-525; 593-595)

Aguirre, Romero, and Morales went to work on March 4, armed with union authorization cards and the drive to obtain as much support for union representation as they could. (Tr. 316-317; 491-492) All three talked to as many employees as possible about the union campaign while on the production floor, asking them to support the union campaign and sign authorization cards. (Tr. 316-317; 457; 492) They also invited employees to another union meeting at the Union Hall in Phoenix that afternoon. (Tr. 317; 457; 493-494) All three of these employees attended the Union meeting on March 4. (Tr. 317-318; 494; 596)

d. Aguirre's Discharge

Aguirre had worked for Respondent for almost 24 years with no record of any disciplinary actions taken against her. (Tr. 297) She worked on the production floor at just over minimum wage, for over 40 hours a week, six days a week. (Tr. 298) She arrived at work at 3:30 a.m. and worked until released by her immediate supervisor, Loya. (Tr. 298)

On February 16, Aguirre and Morales confronted Loya and informed him that he should beware of the consequences of his behavior and that he might be the law in Respondent's facility but he was not the law outside the facility. (Tr. 304; ALJD at 6) Deciding to approach the Union after this conversation, and spearheading the union campaign, Aguirre talked to her coworkers and solicited union support the remaining week she was employed. (Tr. 306-321)

Arriving at work on March 6, the day after her son Ricardo was in front of the facility with her, and the two Union representatives, Aguirre was unceremoniously fired at the time clock by Loya, who simply told her that because of the new rules, he had to stop her from working. (Tr. 322-323).

Despite Respondent's argument in its Exceptions that Respondent terminated Aguirre for her attendance record, Respondent's reasons for terminating Aguirre contradict Respondent's own records and make no sense. Schrum states that he made the decision in February, when he became the owner, that Aguirre would be fired. (Tr. 84) He stated he made that decision because she had 6 no-call, no-shows in February and had 15 tardies during an unknown time frame. (Tr. 84) He also testified that he intended to fire Lorena Torres, Modesto Torres, and Irma Ruiz as soon as he became the owner on March 1. (Tr. 729) In fact, Schrum had personally gone to Prince to fire Lorena Torres earlier because she cursed at him and Prince said no. (Tr. 175-176) Yet, when Schrum finally had the power to fire Lorena Torres, he did not. (Tr. 700) Of all the individuals he stated he intended to fire, only Aguirre, a union supporter, was fired. (Tr. 730) The remaining non union supporters continue to be employed by Respondent to this day. (Tr. 729-730)

Schrum's testimony is also contradicted by Respondent's own records. Aguirre's absentee records, GCX 3, show only one possible day in February when Loya put the notation "unknown" that could have indicated a no-call, no-show, not six days. (ALJD at 12; GCX 3) All other days missed in February show that Aguirre was "sick". [11] (GCX 3) Despite this evidence, Respondent continues to argue in its Exceptions that Aguirre was a no-call, no-show six days in February, a notion discredited by the ALJ and Respondent's own records. (ALJD at 12)

[11] Loya states that he does not put the "sick" notation unless that person is sick and has provided either a phone call or a doctor's note to let him know. In fact, even for the one day, February 18, where Loya put "unknown," Respondent's records contained a doctor's note excusing her from work on February 18. (GCX 10)

Schrum also testified that Aguirre was tardy numerous times. (Tr. 84) However, Schrum also testified that others were tardy and they continue to be employed. Further evidence indicates that there were numerous employees who were tardy often and none had been disciplined or discharged. (Tr. 326; 516-517)

Schrum states that he reviewed the absentee calendar when he made his decision to terminate Aguirre but looked at no one else's attendance records. (Tr. 89) When the records did not coincide with what Loya told him about Aguirre, Schrum chose to believe Loya and disregard the actual records. (Tr. 736) Schrum also did not speak to Aguirre and did not look through his records to determine whether she had legitimate medical excuses for her absences. Aguirre was very ill and was hospitalized at one point during the month of February. (Tr. 324-325) Prince corroborates her illness, remembering that she was very sick during February. (Tr. 176) Schrum, on the other hand, callously did not care about her illness because she was involved with the Union and he wanted her gone.

Finally, Loya's statements were incredible regarding Aguirre, as pointed out by the ALJ. (ALJD at 12, fn. 20) Although he is the official that completes the absentee calendar, he indicated initially that when the calendar did not have a notation on a particular day it indicated that the employee was not at work. (Tr. 263) Loya's testimony regarding Aguirre's absentee record (GCX 3), and her time clock records (GCX 11), completely contradict each other and are, as pointed out by the ALJ, riddled with errors. (Tr. 263; ALJD at 12, fn. 20) Loya's excuse is that he was busy and just did not fill it out. (Tr. 262) Later, when Respondent attempted to use these absentee records to establish when employees allegedly quit, the records did not support his testimony.

e. Silvia Romero's Discharge

Romero had worked for Respondent since 2006; she is Ricardo's wife and the daughter-in-law of Aguirre. (Tr. 367; 376) Romero worked on the production floor and also cleaned the bathroom and offices, where she was subjected to abusive and sexually harassing behavior from Loya. (Tr. 368; 369-371) Romero also observed Loya's abusive treatment of other employees, including her mother-in-law Aguirre.

Romero was involved in spearheading the Union campaign with Aguirre. (Tr. 380) Romero was at the initial Union meeting at her home on February 26, and attended the March 2 and March 4 Union meetings. (Tr. 380; 385; 389; ALJD at 7) Romero also engaged in open Union activities by speaking to her coworkers after February 26, on the production floor and after work outside the facility. (Tr. 380-390; ALJD at 7) Additionally, it was well known by Respondent that Romero was married to Ricardo who was seen on March 5, engaging in union activities and solicitation with employees in front of Respondent's facility. (Tr. 564-565; ALJD at 10-11)

On Romero's last day of work, March 5, she became ill and asked to leave early, a request that was granted by Loya. (Tr. 390) Romero returned to Respondent's facility, however, with her husband, Ricardo and was outside Respondent's facility with her husband and the two union representatives as they solicited employees to sign union authorization cards as well as support the Union. (Tr. 391-394; 563-563) The ALJ determined that March 5 was the date Respondent learned of the discriminatees' union activities due to their appearance outside the facility on that day. (ALJD at 11)

On March 6, Romero received a phone call at home as she was getting ready for work from Aguirre, who told her she had just been fired.[12] (Tr. 394; 571; ALJD at 14) Aguirre advised Romero to call Loya before she came to work to see if she still had a job. (Tr. 394; 571; ALJD at 14) Romero did as Aguirre advised and called Loya. (Tr. 394; 571; ALJD at 14) Romero told Loya that she knew Aguirre had been fired and she wanted to know if she still had a job. (Tr. 394; 571; ALJD at 14) Loya told Romero that she was fired because of the new rules. (Tr. 394; 571; ALJD at 14) Loya did not explain what the new rules were, merely telling Romero to come in on Friday to pick up her last paycheck. (Tr. 571)

Respondent presented Loya as the only witness to its story that Romero quit her job. Loya could not remember when or where it happened until questioned by the ALJ, and then explained the exact same scenario that he used when explaining Morales' alleged resignation. (Tr. 668-669)[13] The ALJ did not credit Loya's testimony. (ALJD at 14, fn. 24)

f. Roberto Pena's Discharge

Pena had worked for Respondent since 2001, as a production worker. (Tr. 449; ALJD at 16) Pena had been subjected to physical harassment from Loya's wife Rosa, as well as hearing verbal abuses by Loya. Pena complained about Rosa at one point and was promptly sent home, although it does not show up anywhere on the absentee calendar.[14] (RX 8)

[12] Aguirre's shift starts at 3:30 a.m. and Romero starts at 5:00 a.m. which is why Romero was still at home when Aguirre was fired. (Tr. 368; 576)

[13] Respondent is expected to argue that Romero's entire testimony cannot be believed because she did not recall Schrum telling employees on March 1 that they had to be run through E-Verify. (Tr. 397) Romero's testimony was sincere and credible. Because she did not hear something at a meeting with over 50 people should not cause her entire testimony to be discounted. Credibility findings need not be all-or-nothing propositions—indeed, it is common in many judicial decisions that some, but not all, of a witness' testimony is believed. *Daikichi Sushi*, 335 NLRB 622 (2001).

[14] Respondent points to this incident, arguing in its exceptions, that because Pena went to Schrum and complained after he was sent home at some point prior to his discharge and Schrum remedied the suspension and brought Pena back to work, Pena would have done the same thing on March 13 and the ALJ was in error not to discuss this incident in his decision. First, as stated above, the records do not indicate that Pena was fired, sent home, or suspended. Second, the ALJ didn't merely credit Pena's version of what occurred on March 13, but

Pena left work at closing time on March 5, and went outside to his car. (Tr. 459) While outside, he talked to Union representatives Sanchez and Leobaldo Hernandez. (Tr. 438-459) While talking to the two Union representatives, Sousa and Loya came out of Respondent's facility and watched. (ALJD at 10-11) Pena signed a Union authorization card in front of Respondent's facility on March 5. (Tr. 459-460; ALJD at 10)

The next day, March 6, Pena was at work when he was told by Rosa to go to the large walk-in cooler to obtain a cart. (Tr. 461; ALJD at 15) When Pena went into the cooler, Loya was in the cooler. (Tr. 461; ALJD at 15) Loya approached Pena in the cooler and told Pena that he had been informed that Pena had signed a Union card. (Tr. 461; ALJD at 15) Pena denied that he had signed a card and left the cooler. (Tr. 462; ALJD at 15) Several days later, Pena was at work peeling carrots, toward the end of the day, when Loya approached him and told him it was his last day of work. (Tr. 462; ALJD at 16) Pena thanked him and went outside Respondent's facility. (Tr. 463; ALJD at 16) Pena saw that the Union representatives were there and approached Sanchez and informed Sanchez that he had just been fired. (Tr. 463; ALJD at 16) Respondent's story regarding Pena is the same as it is for Morales and Romero—that Pena quit his employment because he was afraid of E-Verify, a version discredited by the ALJ. (Tr. 671; ALJD at 14, fn. 24)

g. Respondent's Defense

Loya stated that Morales, Romero, and Pena all told him on March 1 that they were going to quit, something all three deny and the ALJ discredited. (Tr. 669-670; ALJD at 14, fn. 24) Additionally, Respondent's records contradict Loya's testimony—RX 8 shows Pena worked until March 13, RX 7 shows Morales worked until March 2, and RX 6 shows that

---

found that it was corroborated by Sanchez. (ALJD at 16) Finally, the ALJ did discuss the incident in his findings of fact and, therefore, did consider this in his decision. (ALJD at 5, fn. 5)

Romero worked until March 6. Loya testified that Morales worked a few more weeks after March 1, yet her records show her last day as March 2. (Tr. 672; RX 7)

3. Legal Analysis

a. Morales' Discharge for PCA

It is well established that Section 7 of the Act provides workers "the right to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising her right to engage in protected concerted activity. Id. at 17; *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001). Here, the evidence adduced at trial demonstrates that, but for the fact that the employee Morales had concerns and voiced those concerns along with Aguirre, to Loya, Respondent would not have terminated her on March 6.

b. The Legal Standard

The General Counsel has the initial burden of establishing a prima facie case. To establish that an employer has retaliated against an employee for exercising her right to engage in protected concerted activity, the following four elements must be established: (1) the employee engaged in concerted activities; (2) the employer knew of the concerted nature of the activities; (3) the concerted activities were protected by the Act; and (4) the adverse action taken against the employee was motivated by the activities. *Triangle Electric Co.*, supra; *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984).

Once a prima facie unlawful motivation is shown, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation*

Management Corp., 462 U.S. 393 (1983); *NLRB v. Mini-Togs, Inc*., 980 F. 2d 1027, 1032-1033 (5th Cir. 1993). To carry its burden, Respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the employee's protected activity. See *GSX Corp. v. NLRB*, 918 F. 2d 1351, 1357 (8th Cir. 1990) ("[b]y assessing a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.") Moreover, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason. *Aero Metal Forms*, 310 NLRB 397, 399 n. 14 (1993). A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F. 2d 799 (6th Cir. 1982).

c. The General Counsel Has Established a Prima Facie Case

(i) Morales' Complaints Were Protected.

Morales engaged in protected activity when she spoke, along with other employees, to Loya about the way he was treating them. By speaking up, she encouraged other employees to speak up as well.

(ii) The Complaints Were Concerted.

Respondent is unable to argue that the complaints were not concerted as all the evidence shows that Production Supervisor Loya directly received Morales' and Aguirre's complaints about the way he was treating the entire celery table. In *Meyers Industries*,

(Meyers I), the Board explained that activity is concerted if engaged in, with, or on the authority of, other employees, and not solely by and on behalf of the employee himself. 268 NLRB at 497. In *Meyers Industries*, (Meyers II), supra. the Board stated that for individual activity to be concerted it must be designed to initiate or induce or to prepare for group action or must concern *truly group complaints*. The Board has long held, with court approval, that concerted activity may consist solely of a speaker and a listener, so long as the speaker is seeking to induce group action. This is so because such activity is viewed as an indispensable first step to employee group activity. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964).

Morales' complaints in the presence of other employees and joined in by Aguirre, were concerted activity. See *Salt River Valley Water Users' Assn. v. NLRB*, 206 F.2d 325 (9th Cir. 1953), enfd. 99 NLRB 849 (1952).

(iii) Respondent Knew of the Morales' Protected Concerted Activities.

There is no doubt in this case that Respondent knew of Morales' protected, concerted activities as Morales and other employees made those concerted complaints directing to Production Supervisor Loya.

(iv) Respondent Was Motivated By Morales' Protected Concerted Activities.

Morales had worked for Respondent for ten years and had a stellar performance record. When she and other employees had finally had enough of the mistreatment at the hands of Loya, she spoke up to him in the presence of other employees. Her protected statements encouraged other employees to speak up and Aguirre joined in her complaints to Loya. Within two weeks, Morales and Aguirre were both terminated.

d. Aguirre's, Romero's, and Pena's Discharge for Union and Concerted Activities

Under *Wright Line,* the General Counsel has the initial burden of persuasion and must present evidence "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line,* 251 NLRB 1083, 1089 (1980). In meeting the initial burden of persuasion, General Counsel must establish four elements: (1) the alleged discriminate engaged in protected activity; (2) the employer had knowledge of that protected activity; (3) animus on the part of the employer; and (4) an adverse employment action because of the employee's protected activity. *Roadway Express, Inc.*, 327 NLRB 25, 26 (1998). The *Wright Line* "burden of proof imposed upon the General Counsel may be sustained with evidence short of direct evidence of motivation. For example, inferential evidence arising from a variety of circumstances such as animus, timing and pretext." Id.

Once the General Counsel makes the required, initial showing, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line,* 251 NLRB at 1089. If the employer presents such evidence, then General Counsel must rebut the defense by demonstrating that the employer would not have taken the action in the absence of the employee's protected activities. *Operating Engineers Local Union No. 3,* 324 NLRB 1183, 1188 (1997).

Finally, "where an administrative law judge has evaluated the employer's explanation for its action and concluded that the reasons advanced by the employer were pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.,* 705 F. 2d 799 (6th Cir. 1982).

Here, it is undisputed that Respondent knew that Aguirre and Romero were the instigators of the union campaign as well as that they engaged in protected, concerted activities. Aguirre was outspoken in her and other employees' complaints about Loya on February 16, confronting him about his abusive behavior, informing him that there would be consequences for his behavior and telling him that he was not the law outside of Respondent's facility. Further, Aguirre and Romero were spearheading the union campaign—contacting the Union, having the Union conduct meetings at their homes, and talking to as many employees as they could right under the noses of Loya and other management officials. Furthermore, Ricardo (Aguirre's son and Romero's husband), was outside Respondent's facility engaging in union activities when observed by Sousa and Loya. Pena was also observed talking to the Union representatives at this same time. As Loya asked Pena the very next day whether he signed a union authorization, it is clear that Respondent was aware of his union activities. Respondent had full knowledge of the employees' union activities.

As for animus against employees who engage in protected conduct, Respondent's numerous 8(a)(1) violations found by the ALJ and not excepted to by Respondent, standing alone, are sufficient to establish its unlawful animus. *Avondale Industries, Inc.*, 329 NLRB 1064, 1071 n. 4 (1999). Accordingly, the evidence establishes that the employees' protected activities were the motivating factor in Respondent's decision to fire them. As such, the burden shifts to Respondent to demonstrate that it would have fired both even in the absence of their protected conduct. Id. at 1065. Respondent cannot do so.

The timing of the discharges – less than a week in Romero's and Aguirre's case and less than two weeks after Respondent learns of the union organizing campaign in Pena's case – proves that Respondent fired the employees 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 day after Ricardo is seen outside Respondent's facility assisting union representatives, his mother, Aguirre, and his wife, Romero, are fired. A week after Pena signs a union authorization card and is interrogated about signing the card, he is fired.

The shifting justifications for firing Aguirre also prove Respondent's true and unlawful motive. First, Respondent states that Aguirre had six no-calls, no-shows for the month of February.[15] However, Respondent's records clearly show that she may have had, at most, one no-call, no-show for which she provided a doctor's note the next day. Respondent also argues that it was the tardiness that caused her to be discharged. But Prince testified that he had no reports from Loya that Aguirre had a tardiness or attendance issue, and even if she did, he would have given her a second chance. Respondent also stated that it had gone to Prince to obtain his approval to fire Aguirre, yet Prince denies this happened.

Furthermore, Respondent's nonexistent investigation into the attendance record of Aguirre 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 Aguirre without talking to her or even determining why she was missing work in February and why the absentee record contradicted Aguirre's time cards. Further, there is no

[15] Respondent continued to argue in its Exceptions that Aguirre had six no-calls, no-shows, despite record evidence that contradicts this assertion.

evidence that this decision was made in February, especially given Prince's testimony that neither Schrum nor Loya came to him in February asking that Aguirre be fired. Respondent fired Aguirre after conducting only a limited investigation, and without allowing her an opportunity to explain the allegations against her, support a conclusion that the discharge was discriminatorily motivated. *Alstyle Apparel*, 351 NLRB 1287, 1287-1288 (2007) (Board found that employer's limited investigation into allegations of misconduct, and its decision to discharge employees before giving them an opportunity to explain the allegations against them support the conclusion that the discharges were discriminatorily motivated and not, as the employer asserted, based upon a reasonable belief of misconduct); *Toll Mfg. Co.*, 341 NLRB 832, 851 (2004) (employer's claim that it discharged employee for failing to call in to report absences caused by medical condition, where employer previously knew of the medical condition which was explained by a doctor's note tends to support an inference of discrimination).

Respondent's disparate treatment towards these employees also proves its unlawful motive. For example, Schrum and Loya had a list of employees they wanted to fire as soon as Schrum became the owner. Yet, Aguirre was the only one fired despite Lorena Torres cursing at Schrum and Loya stating that Lorena and Modesta Torres, along with Irma Ruiz, were not good employees. (Tr. 700) All of them continue to work for Respondent. (Tr. 729) Schrum's statements that he did not fire them because he did not know so many employees would quit or that he was afraid to do anything because of the NLRB charge are incredible and were found as such by the ALJ. (Tr. 716; ALJD at 13, fn. 23) Schrum hired 5-10 employees within two weeks after he became the owner and the NLRB charge was not filed until March 15, two weeks after he became the owner as well. (Tr. 734; ALJD at 13, fn. 23)

Not only could he have fired the employees he wanted to but he also hired enough employees to replace them well before the NLRB charge. (ALJD at 13, fn. 23)

The pretextual nature of Respondent's justification is evidence of its true motive for firing Aguirre as well as Romero and Pena. A finding of pretext defeats any attempt by Respondent to show it would have fired Aguirre or the others absent their Union activities. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.* 255 NLRB 722 (1981) enfd 705 F.2d 799 (6th Cir. 1982); *Sanderson Farms, Inc.*, 340 NLRB 402 (2003) enf'd 112 Fed. Appx. 976 (5th Cir. 2004).

These circumstances, coupled with overwhelming independent statements of animus found by the ALJ, prove that Respondent's proffered defense for Aguirre and its fabricated defense of employees resigning are mere pretext, and that the true reason for their discharges was their Union activity. The evidence establishes that Respondent perceived Aguirre and Romero to be spearheading the union's efforts to organize and fired them to permanently banish them from the workplace, in violation of Section 8(a)(1) and (3) of the Act. Respondent learned that Pena had signed a union authorization card and fired him as well in violation of Section 8(a)(1) and (3) of the Act.

D. The ALJ's Ordered Remedy for the Unlawful Discharges of Aguirre, Morales, Romero and Pena

1. The ALJ's Findings

After having found that Morales, Romero and Pena were terminated by Respondent in violation of Section 8(a)(1) and (3) of the Act, the ALJ ordered the standard Board remedy of reinstatement and backpay for those employees. (ALJD at 35) Respondent filed an exception to this remedy, arguing that reinstatement and backpay cannot be ordered for discriminatees who are unauthorized to work in the United States. (Respondent's Exception Brief, page 14)

Not only is Respondent's exception premature, but it is not supported by any record evidence and should be dismissed.

2. Legal Analysis

Respondent argues that Romero, Morales, and Pena must be required to show they are authorized to work in the United States before the ALJ can order a reinstatement and backpay remedy. Claiming the discriminatees have not shown their work authorization, Respondent asserts the ALJ's remedy was incorrect. Respondent is mistaken in the application of precedent regarding this stated remedy.

Whether an individual is an undocumented worker is irrelevant as to whether they are considered employees under the Act. *Hoffman Plastics Compounds v. NLRB*, 535 U.S. 137 (2002). Accordingly, it is unassailable that all statutory employees, including undocumented workers, enjoy protections from unfair labor practices. See *County Window Cleaning Co.*, 328 NLRB 190 n. 2 (1999). Therefore, a discriminatee's employment authorization and immigration status is irrelevant at this stage of the case.

Questions concerning a discriminatee's employment authorization and immigration status are left for the compliance stage except in extremely limited circumstances, as has been discussed earlier. Questions concerning the employee's status and its effect on the remedy are left for determination at the compliance stage of a case. *Tuv Taam Corp.*, 340 NLRB 756, 760 (2003). "An individual's work authorization status is irrelevant to a respondent's liability

under the Act and questions concerning that status should be left for the compliance stage of the case." Id. at 761. Therefore, the ALJ was correct in ordering the remedy at the unfair labor practice stage of the proceeding.

Therefore, Respondent's exception regarding the ordered remedy is a question for compliance and should be disregarded.

E. Credibility Determinations of the ALJ

1. The ALJ's Findings

The ALJ made certain credibility findings throughout his decision, some that have been discussed above. To summarize, the ALJ generally credited the testimony of former employees that testified but found many of the statements made by Respondent's witnesses with substantial justification, to be not credible, especially the testimony of Loya.

2. Legal Analysis

Respondent wants nothing more than to convince the Board to ignore the ALJ's careful, well-supported determinations, ignore the credibly testimony, and instead credit its own witnesses' version of events. The Board should firmly decline because Respondent has not provided any concrete examples where the ALJ's credibility findings were erroneous. See *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951) (Board will not overrule an administrative law judge's credibility resolutions absent clear preponderance of the evidence dictates that the resolutions are incorrect); *Painters and Allied Trades District Council No. 51 (Manganaro Corporation, Maryland)*, 321 NLRB 158 (1996). Rather, Respondent provides no argument as to why the ALJ's credibility determinations are incorrect. The facts are that the ALJ credited the witnesses he did due to appropriate observations, and discredited other witnesses for the same appropriate and legitimate reasons.

V. 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. Moreover, the ALJ properly excluded evidence regarding the discriminatee's authorization to work in the United States. Finally, the Board and the Acting General Counsel had authority to issue the Complaint and Notice of Hearing. Except for the General Counsel's limited exceptions which are filed under separate cover, the Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order in all respects. It is further requested that the Board order whatever other additional relief it deems appropriate to remedy Respondent's numerous and serious violations of the Act.

Dated at Phoenix, Arizona, this 21st day of October 2013.

Respectfully submitted,

/s/ Sandra L. Lyons
Sandra L. Lyons
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Telephone: (602) 640-2133
Facsimile: (602) 640-2178
E-mail: Sandra.Lyons@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF in Farm Fresh Company Target One, LLC, Case 28-CA-100434 were served by E-Gov, E-Filing and by E-mail, on this 21st day of October 2013, on the following:

Via E-Gov, E-Filing

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

Via Electronic Mail

Thomas M. Stanek, Attorney at Law
Christopher J. Meister, Attorney at Law
Ogletree, Deakins, Nash, Smoak &
Stewart, P.C.
2415 East Camelback Road, Suite 800
Phoenix, AZ 85016-9291
E-mail: thomas.stanek@odnss.com
E-mail: christopher.meister@odnss.com

Elizabeth Q. Hinckle, Attorney at Law
Davis Cowell & Bowe, LLP
595 Market St, Ste 1400
San Francisco, CA 94105-2821
Email: eqh@dcbsf.com

/s/ Sandra L. Lyons
Sandra L. Lyons
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Telephone: (602) 640-2133
Facsimile: (602) 640-2178
Sandra.Lyons@nlrb.gov