

**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**

GENERAL COUNSEL'S REPLY BRIEF

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Counsel for the General Counsel (General Counsel), pursuant to Section 102.46(h) of the Board's Rules and Regulations, submits the following Reply Brief to the Answering Brief filed by Farm Fresh Company Target One, LLC (Respondent).¹ For the reasons described below, the matters asserted by Respondent in its Answering Brief are without merit, and the Board should grant the General Counsel's Exceptions.

I. INTRODUCTION

On September 19, 2013,² the General Counsel filed Exceptions to the decision issued by Administrative Law Judge Geoffrey Carter (ALJ) on August 8, 2013 (ALJD) in this matter, along with a Brief in Support. On October 21, 2013, Respondent filed an Answering Brief to the General Counsel's Exceptions arguing: (a) the ALJ was correct in his rulings regarding the date Respondent gained knowledge that its employees were involved in union activities; (b) Respondent's requiring its long-term employees be E-Verified was not a result of the union organizing campaign; (c) the discharge of employee Blas Virelas was actually a

¹ Farm Fresh Company, Target One, LLC., is referred to as Respondent. United Food and Commercial Workers Union, Local No. 99 (UFCW), 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.

² All dates 2013 unless otherwise noted.

resignation; (d) the ALJ properly did not find violations regarding several allegations involving soliciting of grievances and making promises to employees of benefits; and (e) the ALJ's failure to order two remedies requested by General Counsel was clearly appropriate in this case. Respondent's assertions are baseless, not supported by the law, and should be rejected by the Board.

II. THE GENERAL COUNSEL EXCEPTIONS AND RESPONDENT'S ARGUMENTS

A. Knowledge of Union Activity by Respondent

The General Counsel asserts that the ALJ erred by failing to find that Maria Morales (Morales) was terminated for engaging in union activities.³ This exception is based on the ALJ's failure to analyze the record evidence of Morales' open union activities at Respondent's facility in his decision. Respondent argues that the ALJ did consider Morales' union activities solely because the ALJ mentions them in his factual findings, despite the ALJ's failing to properly consider those factual findings in his decision. Respondent, in its Answering brief, also mischaracterizes the evidence presented at the hearing, ignoring Morales' open support of the Union prior to March 4.

Respondent argues that the only evidence presented at hearing was Morales' own supposition that Respondent would learn of her union activities from another employee. Respondent is incorrect. (See ALJD at 9; Tr. 491-492) In finding that Respondent was unaware of Morales' union activities, the ALJ did not discuss the evidence presented that showed employees, and specifically Morales, were involved in union activities prior to March 5, and Respondent was aware of those activities prior to March 5. (ALJD at 25) Morales was fully engaged in union activities prior to her termination on March 4, in full view

³ The ALJ did find that Morales was terminated unlawful because of her protected, concerted activities in violation of Section 8(a)(1) of the Act.

of Respondent's supervisors and managers, and the ALJ erred when he failed to analyze these activities in his decision. (Tr. at 491-492) Specifically, the ALJ failed to analyze Respondent's knowledge of union activity under the timing of the union activity to the discharge of Morales as well as under the "small plant doctrine."⁴ Knowledge of the employees' union activity can be implied from the Board's small plant doctrine. The small plant doctrine may be applied where the facility is small and open, the work force is small, the employees made no great effort to conceal their union conversations, and management personnel are located in the immediate vicinity of the protected activity. *Health Care Logistics*, 784 F. 2d 232 (6th Cir. 1986). There are approximately 48 employees who work at Respondent's facility, all at various stations throughout the facility, working with specific produce on an open production floor. (ALJD at 4; Tr. at 45-49, 139-136). Morales, along with Martha Aguirre (Aguirre) and Silvia Romero (Romero), worked at the celery table that was located directly to the left of the supervisor's office, an office with windows all around. (ALJD at 9; Tr. at 203-204; 316-317; 457; 491-492) Production Supervisor Jesus Loya (Loya) constantly walked the production floor where these employees were working, observing and directing them. (Tr. at 237-239)

"It has been well established that direct evidence is not necessary to support a finding of knowledge but that such knowledge may be inferred by the Board from the record as a whole." *Texas Industries, Inc.*, 156 NLRB 423 (1965). This includes the timing of the discharge in relation to the union activity. See *E. Mishan & Sons, Inc.*, 242 NLRB 1344 (1979) (discharge coincided with union's demand for recognition despite no direct knowledge of discriminatee's union activity. Moreover, Respondent operated a small plant and Morales

⁴ *Hadley Manufacturing Corp.*, 108 NLRB 1641, 1659 (1954) (where union activities were carried on in such a manner or at times that, in the normal course of events, an employer must have noticed them, employer knowledge of union activities may be inferred in a small plant setting. Plant had 80 employees).

and the other two union leaders, Aguirre and Romero, worked immediately in front of the supervisor's office when they were discussing the union and inviting employees to support the union. (ALJD at 9; Tr. 316-317, 352, 386-387, 456-457, 491-492) "In a small plant...it is a reasonable inference that information (concerning employees' organizing activities) came to the notice of management." *NLRB v. Abbot Worsted Mills, Inc.*, 127 F. 2d 438, 440 (CA 1). See also *Coral Gables Convalescent Home, Inc.* 234 NLRB 1198 (1978); *Galar Industries, Inc.*, 239 NLRB 28 (1979).

B. E-Verify of Existing Employees

General Counsel filed an exception over the ALJs failure to find that Respondent's decision to E-Verify all existing employees was done in violation of Section 8(a)(1) and (3) of the Act. Respondent argues that the ALJ was correct in his decision because Respondent considered the employees to be new hires after the ownership of Respondent changed hands on March 1. Respondent also misstates the law regarding a successor's obligations concerning E-Verify involving existing employees.

The Immigration Reform and Control Act does not require that a successor employer reverify employees where the successor has maintained the previous employer's records and I-9 forms. See CFR Section 274a.2(b), (1)(viii), (A), (7).⁵ Respondent seems to argue that, because it made the determination to treat all existing employees as new hires, no one can find that the decision and subsequent implementation of the reverification process might violate Section 8(a)(1) and (3) of the Act. Respondent is incorrect. Although the tools of E-Verify are used legitimately by employers throughout the United States, the use of E-Verify in order to put a chill on employee rights and to discriminate against union supporters is strictly

⁵ For purposes of IRCA, a successor employer includes an employer who continues to employ some or all of the previous employer's workforce in cases involving a ...sale of assets. CFR Section 274a.2(b), (1)(viii)(A)(7)(ii).

prohibited and violates the Act. *Sure-Tan, Inc.*, 234 NLRB 1187 (1978) (constructive discharge of employees by calling Immigration and Naturalization Service to investigate their immigration status a violation); *National Livery Service*, 281 NLRB 698 (1986) (Board affirmed ALJ's ruling of a violation when employer called Immigration for the purpose of threatening and coercing employees who exercised their Section 7 rights). Respondent's argument that it was just following Federal and State law, and, therefore, there can be no violation of the Act, is incorrect and false.

Further, the ALJ failed to analyze the employees' union activities prior to March 1, that were open and in full view of Respondent's supervisors. Instead of noting that failure, Respondent concentrates on a February 26 meeting at one of the discriminatee's homes that Respondent claims was secret. There is no evidence that this meeting was secret and Respondent leaves out of its Answering brief the outward union activities of those employees the following days at Respondent's facility. Respondent follows the pattern of the ALJ—ignoring record evidence establishing open and outward union activity on the part of the discriminatees prior to Respondent's decision to E-Verify all existing employees on March 1. The "small plant doctrine" applies here as well. See *Lawson-United Feldspar & Mineral Co.*, 189 NLRB 350, 356-357 (1971). By March 1, Aguirre and Romero were actively meeting with union representatives and soliciting support for the union on the floor of the plant, in full view of their supervisor. Immediately after their open union discussions in Respondent's plant, Respondent announces all existing employees would have to submit to E-Verify. The inference from all surrounding circumstances is that Respondent was fully aware of employees' organizing efforts and sought to "nip them in the bud" immediately.

Respondent argues that General Counsel cannot dispute Owner Gary Schrum's (Schrum) testimony that he made a call to the U.S. Department of Homeland Security in September 2012. Schrum's testimony about this phone call is self-serving, uncorroborated, and lacking in specificity thereby rendering his testimony not believable. Schrum did not know when specifically he made the phone call or to whom he spoke. General Counsel has pointed out the unsubstantiated nature of this testimony, and the ALJ simply failed to analyze the credibility of that phone call.

Given all the unsubstantiated, uncorroborated, and self-serving nature of Respondent's decision to E-Verify all existing employees after the start of the union campaign, the ALJ erred by dismissing this allegation.

C. Employee Blas Virelas' Discharge

General Counsel filed an exception over the ALJ's failure to find that Blas Virelas (Virelas) was either discharged, or was constructively discharged, due to his union and concerted activities. Respondent fails to address the main issue in General Counsel's exceptions—Respondent's threatening and interrogating Virelas, in violation of Section 8(a)(1), days before he was forced out of his job. This is a repeat of the problem the General Counsel has with the ALJ's determination—the ALJ's failure to address these facts when deciding that Virelas voluntarily resigned his employment.

The ALJ specifically found that on or about March 6, Virelas was interrogated and threatened about his union activities by Production Supervisor Loya. (ALJD at 28-29) At the same time, Virelas was approached by Schrum and Loya and told his social security number used for E-Verify did not match the social security administration records. This was a pattern of conduct by Respondent to rid itself of those employees who had signed union authorization

cards and been involved in union activities. The ALJ failed to appropriately take into account these Section 8(a)(1) statements made directly to Virelas by Loya when he dismissed the discharge allegation concerning Virelas.

D. One-on-One Meetings

General Counsel filed an exception over the ALJ's failure to find that Schrum's one-on-one meetings with employees immediately after Respondent learned of the ongoing union campaign, wherein employees were asked whether Schrum could do anything for them, was a violation of Section 8(a)(1). Respondent argues that these meetings predated Respondent's knowledge of the union campaign and that Schrum never gave employees a raise. This argument is unfounded and contradicts the record evidence.

Schrum specifically testified that he started these one-on-one meetings the week of March 4, the same week that the ALJ found that Respondent gained knowledge of the union campaign. (Tr. at 15) In fact, the ALJ specifically found that on March 5, Respondent knew about the employees' union activities. (ALJD at 10-11) Schrum had these meetings almost at the exact time the ALJ found that Respondent learned of the union campaign.

Further, Schrum specifically testified that all employees received raises—some as much as several dollars an hour increase, immediately after he held the one-on-one meetings with employees and immediately after the union campaign began. (Tr. at 740-741) Therefore, Respondent's incorrect statement that there is no evidence that raises were actually given is false and should be disregarded.

E. "Give me a Chance" Power Point Presentation

General Counsel filed exceptions over the ALJ's failure to find that portions of the anti-union PowerPoint presentation given to employees in the middle of an ongoing union

organizing campaign contained statements that violated the Act. Despite finding that certain statements in the PowerPoint constituted unlawful threats, the ALJ failed to find that the statement “give me a chance” violated the Act. This finding was in error as several prior Board cases have found that the exact same language used here is unlawful.

Respondent argues that the ALJ was correct in not finding a violation because the “give me a chance” language was not coupled with promises of better wages or other benefits and that the statement was simply “permissible campaign propaganda.” (Respondent’s Answering brief at page 9) Respondent and the ALJ improperly ignore the surrounding circumstances under which this statement was made. The statement “give me a chance” was uttered after Respondent had made unlawful threats to employees both outside the PowerPoint presentation and within the power point presentation. Employees had been subjected to unlawful interrogation and surveillance in the weeks prior to this statement along with the unlawful discharge of known union supporters and leaders. The statement cannot be looked at in a vacuum. The statement “give me a chance” was part of an unlawful course of conduct by Respondent. The Board looks at all the conduct surrounding such a statement in making the determination on whether it is a violation. See *Waste Management of Utah*, 310 NLRB 883 (1993) (the Board upheld the ALJ’s finding that the statement to employees to “hold off on signing anymore union cards and give us a chance to make things right” constituted a violation of the Act); *Acme Bus Co.*, 320 LRB 459 (1995) (employees were presented a proposed benefits package prior to an election and those employees were told that if they wanted the owner to instate a benefits package, they needed to give the owner a chance and not vote for the union); *Overnite Transportation Co.*, 329 NLRB 990, (1999), (employer had an anti-union campaign with the slogan “Give Jim a Chance,” referring to the owner, found to

be part of an overall unlawful scheme by Respondent); *Fisher-Haynes Corp of Georgia*, 262 NLRB 1274 (1982) (the Board overturned the ALJ's decision to dismiss the Section 8(a)(1) allegation where the supervisor asked employees to "give him a chance to make things better...and make employees happy", and found a violation, stating that it was an offer to increase wages if the employees abandoned the union campaign).

F. Extraordinary Remedies

General Counsel filed an exception over the ALJ's failure to order two specific remedies found appropriate in serious unfair labor practice cases—providing the Union names and addresses of employees and providing the Union access to a bulletin board at Respondent's facility.

General Counsel must first address the misleading comments of Respondent in its Answering brief. Respondent avers that it offered reinstatement to the discriminatees five months ago if they proved that they are lawfully authorized to work in the United States. This is irrelevant to this exception. As of today, Respondent has never offered unconditional reinstatement to any discriminate, has never offered to pay the backpay ordered, has never offered to post a Notice to Employees, and, therefore, has failed to offer any serious settlement of the allegations in this case. Be that as it may, the ALJ clearly felt that the violations in this case were serious enough to order a reading of the Notice to Employees by a responsible official of Respondent in the presence of a Board Agent. Despite ordering this remedy, the ALJ failed to provide any cogent reason for not ordering other special remedies, particularly given the pervasive nature of the violations committed against employees. Therefore, the ALJ erred in not ordering those specific special remedies and Respondent's arguments have no merit and should be disregarded.

III. CONCLUSION

It is respectfully requested that the Board accept the General Counsel's exceptions, affirm the ALJ in all other aspects, and order any other relief it deems necessary to effectuate the policies and purposes of the Act.

Dated at Phoenix, Arizona, this 4th day of November 2013.

/s/ Sandra L. Lyons

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S REPLY BRIEF in Farm Fresh Company Target One, LLC, Case 28-CA-100434 was served by E-Gov, E-Filing, and by E-mail, on this 4th day of November 2013, on the following:

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