Case 21-CA-129446

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNF WEST, INC.,
Respondent,

and

TEAMSTERS, CHAUFFERS, WAREHOUSEMAN, INDUSTRIAL AND ALLIED WORKERS OF AMERICA, LOCAL 166, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Petitioner.

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
UNF WEST, INC. A/K/A UNITED NATURAL FOODS, INC.,	)	
	)	Case Nos. 21-CA-129446
Respondent,	)	
	)	
and	)	
	)	
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, INDUSTRIAL AND ALLIED WORKERS OF AMERICA, LOCAL 166, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	)	
	)	
Charging Party.	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent UNF West, Inc. ("Respondent" or "UNF"), by its undersigned counsel and pursuant to Rule 102.46 of the Board's Rules and Regulations, submits this brief in support of its contemporaneously-filed Exceptions to the Decision of Administrative Law Judge John J. McCarrick (the "ALJ") dated August 3, 2015[1] filed in the above captioned matter. The ALJ erred by failing to consider, much less explain, the overwhelming evidence presented by Respondent at the hearing in this matter demonstrating the absence of any violation of the Act. The ALJ also misstated and either failed to apply or misapplied applicable law. Further, the ALJ made several prejudicial evidentiary rulings. As a result, the findings, conclusions of law,

[1] Citations to the Administrative Law Judge's decision will be referenced as "ALJD" followed by the appropriate page and line numbers. References to the hearing transcript will be referenced as "Tr." followed by the appropriate page number. General Counsel Exhibits are referred to as "GC" plus the exhibit number. Respondent Exhibits are referred to as "R" and the exhibit number.

remedies and order should be rejected. The Complaint should be dismissed in its entirety with prejudice.

I. STATEMENT OF THE CASE

This matter represents the latest effort by the Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters ("the Union") to deprive a group of UNF West, Inc. ("UNF" or "Respondent") warehouse workers of their right under the Act to decide for themselves, finally and by secret ballot, whether they want this Union to represent them. Just two days before the most recently scheduled representation election was to take place, the Union filed two blocking charges[2]. Of all the contentions raised by the Union in these charges, allegations relating only to three isolated incidents survived to a hearing. One claim involves an alleged threat of lost wages made at a meeting. This claim is directly refuted by, among other evidence, the contents of a slide presentation presented at that meeting stating that no one is authorized to make any such statement. The other two claims concern allegations related to unwitnessed "he said she said" conversations between two well-known union supporters and an experienced consultant who has never had to testify about his conduct in any of the over seventy union election campaigns in which he has participated. The allegations defy common sense and are conclusively contradicted by the record evidence when considered as a whole.

This case began on April 6, 2012, when the Union filed a petition for a representation election in Case No. 21-RC 078342 (the First Petition) seeking to represent a unit of warehouse employees at Respondent's Moreno Valley, California Distribution Center (the DC). GC 3 at 2

[2] In addition to filing the instant matter on May 27, 2014, which included claims that were dismissed or withdrawn, the Union filed Charge No. 21-CA-129444. That charge involved a series of allegations advanced by GC witness and former Respondent associate Armando Perez Aceves (Aceves). All of his claims were dismissed on July 31, 2014. The Board may take judicial notice of those proceedings.

and R 4. The Union lost the election conducted on May 17, 2012 by an overwhelming margin of 152 to 88 with 1 challenged ballot. GC 3 at 2.

It took exactly one year to the day from the date of the First Petition to complete the hearing on the Union's objections and the limited "he said she said" allegations remaining from eighteen groundless unfair labor practice charges filed by the Union[3]. *Id.* (noting that the hearing was held on April 4, 5 and 6, 2013)*; see also* R 4. It took almost another year to the day for the Union to withdraw its objections in their entirety and finally allow the results of the election in Case No. 21-RC-078342 to be certified. *See* R 5 (certifying the results of 21-RC-078342 on April 14, 2014)[4].

Two days after the results of the election generated by the First Petition were certified, the Union filed a second election petition for the same unit of employees. *Compare* R 4 (dated April 14, 2014) and GC 4 (Petition in Case No. 21-RC-126725 dated April 16, 2014). The election was scheduled for May 29, 2014. GC 5 at 1. Two days before this second election, the

[3] From April 24, 2012 through the filing of the Charge that generated this matter, the Union filed no fewer than eighteen separate unfair labor practice charges concerning actions it alleged occurred at the Moreno Valley facility: 21-CA-079406 (filed on or about April 24, 2012); 21-CA-081350 (filed on or about May 18, 2012); 21-CA-0083233 (filed on or about June 15, 2012); 21-CA-086754 (filed on or about August 6, 2012); 21-CA-089959 (filed on or about September 24, 2012); 21-CA-091178 (filed on or about September 26, 2012); 21-CA-091207 (filed on or about October 12, 2012); 21-CA-102693 (filed on or about April 12, 2013); 21-CA-106512 (filed on or about June 13, 2013); 21-CA-108797 (filed on or about July 9, 2013); 21-CA-110225 (filed on or about July 30, 2013); 21-CA-116052 (filed on or about October 30, 2013); 21-CA-119213 (filed on or about December 18, 2013); 21-CA-119448 (filed on or about December 20, 2013); 21-CA-126531 (filed on or about April 14, 2014); 21-CA-127692 (filed on or about April 30, 2014); 21-CA-129444 (filed on or about May 27, 2014); 21-CA-129446 (filed on or about May 27, 2014). Many of these charges contained multiple allegations. Many of these charges were considered blocking charges by the Region. This treatment in turn delayed processing of the objections and certification of the results in Case No. 21-RC-078342 and continues to block the election in Case No. 21-RC-126725. Other than the isolated allegations that are the subject of this matter and the three "he said she said" allegations made only by the Union's primary supporter and his terminated nephew as set forth in GC 3, all of the voluminous and baseless allegations in these eighteen charges were withdrawn or dismissed.

[4] The remaining unfair labor practice allegations proceeded to trial. These did not include a laundry list of claims as inaccurately portrayed by Counsel for the General Counsel (hereinafter GC) in his opening. *See* Tr. 11-12. Instead, the allegations concerned the lead union organizer claiming that a single supervisor had unwitnessed and uncorroborated conversations with him in isolated spots in the warehouse. GC 3 at 4-5. The remaining allegation was from his terminated nephew claiming that he was allegedly interrogated by a terminated supervisor as the result of conversation yet another supervisor "might" have overheard in a crowded lunch room "for a couple of seconds." *Id.* 3-4. As mentioned at the hearing without objection, the matter is pending review by the United States Circuit Court for the District of Columbia Circuit on the grounds that, *inter alia,* the record as a whole was not considered as required by *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951).

Union filed the instant matter and another blocking charge (21-CA-129444) making several allegations. The election in Case No. 21-RC-126725 was cancelled by the blocking charges and has not taken place to date. GC 6.

It has now been over three years since the Moreno Valley warehouse associates voted by an almost two to one margin to reject the Union as their bargaining representative. Nevertheless, these associates have yet to see the results of this choice because the Union has constantly bombarded the Respondent with meritless charges and objections. *See, e.g., supra* n.3. This activity, in turn, has forced the affected associates to remain in the restrictive limbo of sterile or laboratory conditions for all but two days of this three year period. *E.g., Mike O'Connor Chevrolet-Buick-GMC, Co.,* 209 NLRB 701 (1974), *denying enforcement and remanded on other grounds,* 512 F.2d 684 (8th Cir. 1975) (employer makes changes while charges or objections pending at its peril).

This case underscores the Union's continued and disturbing pattern of misuse of the Board's processes. The pattern is well documented. The Union files a series of false or fabricated claims. *See supra* n.3. Buried within these claims or added to them later are claims of isolated statements allegedly made only to the Union's staunchest supporters and in the absence of any other witnesses. The Union then hopes to use these supporters as witnesses to create factual disputes that generate hearings. The undisputed evidence shows that this scenario is a well-known tactic of the Union organizer responsible for the Union's effort to organize the DC warehouse employees. The Union, however, cannot overcome the facts and the truth in this matter.

Thus, the Union alleges that Consultant Carlos Ortiz (Ortiz) stated in a meeting on May 16, 2014 that Respondent would reduce or lower wages if they voted for the Union. *E.g.,* GC 1(a) Original Charge Attachment and Complaint, ¶ 7. Not one person, however, testified that

this happened. To the contrary, Respondent produced the slide deck shown at this meeting proving that it was the Union and not the Respondent who started this rumor. Further, and as noted above, it is undisputed that creating these rumors and then trying to blame the employer for them is a well-known tactic of the Union organizer running the Union's campaign. Respondent countered this known tactic by preparing a slide deck in advance of the May 16 meeting informing associates, in no uncertain terms, that no one representing Respondent was authorized to make a statement that employees would lose wages or anything else if they chose Union representation. Moreover, Respondent explained to employees in writing during the slide presentation that while they could lose some of what they had in collective bargaining, they could also gain or stay the same. Finally, not even the Union's witnesses testified that anybody said employees would or will lose wages if the Union was voted in. The ALJ's conclusion that these undisputed and indisputable facts somehow produced an unfair labor practice cannot be supported by the record evidence or applicable law.

The Union also contends that Consultant Juan Negroni (Negroni) had a conversation with known Union supporter and former UNF associate Armando Perez Aceves (Aceves). Aceves alleges that Negroni interrogated him in the warehouse about his Union activities and rejected the contents of a flyer outlining Section 7 rights. *E.g.*, GC 1(g) Complaint ¶¶ 6(a) and (b); Tr. 21-33 (Aceves). Not only do these allegations defy logic and common sense, the evidence shows that Negroni and Aceves were in the same meeting in a conference room at the time Aceves alleges the conversation took place in the warehouse. Further, while the ALJ found that there was no evidence that Negroni or Respondent knew of Aceves's Union sentiments at the time of this alleged conversation, even Aceves admitted that he spoke out in favor of the Union at the meeting attended by Aceves and Negroni just minutes before the alleged illegal statements were supposed to have been made. The fact is that Negroni never went onto the warehouse floor

that day and never made the alleged statements. The ALJ's conclusion that Negroni committed an unfair labor practice during a conversation that never took place, with due respect, defies common sense as well as the overwhelming clear preponderance of record facts and applicable law.

Finally, the Union contends that Negroni also interrogated the Union's most visible supporter, Lino Contreras ("Contreras"), about his union sentiments and rejected the contents of the same flyer. *E.g.*, GC 1(g) Complaint ¶¶ 6(c) and (d); Tr. 58-62 (Contreras). Again, and with due respect, the claim defies common sense and flies in the face of the overwhelming preponderance of evidence ignored without comment or analysis by the ALJ establishing that Contreras is not a reliable witness and that the conversation never took place.

For these and all the reasons discussed below, the ALJ findings and conclusions should be rejected and the Complaint should be dismissed in its entirety. The election should be unblocked and the DC warehouse employees should be allowed to exercise their right to vote on the question of union representation in a secret ballot election without further interference from the Union.

II. QUESTIONS INVOLVED AND EXCEPTIONS TO WHICH THEY RELATE

1. Did the ALJ err by finding that on May 16, 2014, Respondent, by Consultant Carlos Ortiz, threatened employees with a reduction of wages if they voted for the Union? ALJD 5:31 - 7:24; Objections 20 through 32, and 41 through 46.

2. Did the ALJ err by finding that on May 9, 2014 Respondent, by Consultant Juan Negroni, illegally interrogated employee Armando Perez Aceves (Aceves) and made threats of futility? ALJD 3:15 - 5:30. Objections 1 through 19, and 41 through 46.

3. Did the ALJ err by finding that on May 9, 2014 Respondent, by Consultant Juan Negroni, illegally interrogated employee Lino Contreras and made threats of futility? ALJD 7:23 - 8:34. Objections 33 through 46.

4. Did the ALJ err by failing to let Carlos Ortiz testify in his native language of Spanish? Objection 45.

5. Did the ALJ err by ordering, in particular, the extraordinary remedy of a notice reading and other relief not requested or litigated in this matter? Objections 45 and 46.

6. Did the ALJ err by refusing to allow the testimony of Jerome Dowdy, Howard Shelton, Joseph Elder, and Pete Manrique, and by refusing to allow the testimony of Andrew Ivey and the petition he tried to introduce as evidence? Objections 42 and 43.

III. STANDARD OF REVIEW

Respondent recognizes that, as a general matter, the Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enforced* 188 F.2d 362 (3rd Cir. 1951). Although an ALJ can consider all the evidence without directly addressing in the written decision every piece of evidence submitted by a party, an ALJ's factual findings *as a whole* must show that he "implicitly resolve[d]" conflicts created by all the evidence in the record. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir. 1982); *see also NLRB. v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 765 (2d Cir. 1996) (an ALJ may resolve credibility disputes implicitly rather than explicitly where his "treatment of the evidence is supported by the record *as a whole*."). The critical element in this standard is the phrase "on the record as a whole." As the Supreme Court instructs, the Board may not make its determination:

> merely on the basis of evidence which in and of itself justifie[s] it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

See Universal Camera Corp., 340 U.S. at 487.

Rather, the Board must "take into account whatever in the record fairly detracts from [the] weight" of the ALJ's decision. *TNS, Inc. v. NLRB*, 296 F.3d 384, 395 (6th Cir. 2002) (quoting *Universal Camera*, 340 U.S. at 488), *cert. denied*, 537 U.S. 1106 (2003). Stated another way, it is "not good enough" that the record contain *some* evidence that could conceivably have supported an ALJ's finding. The *Universal Camera* standard is not met if the ALJ does not discuss, or even provide a citation, to that evidence. *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 514 (7th Cir. 2003) (citing *Scivally v. Sullivan*, 966 F.2d 1070, 1076 (7th Cir.1992) (holding that "the ALJ must minimally articulate his reasons for crediting or rejecting" evidence)); *PPG Aerospace Indus., Inc.*, 353 NLRB 223, 224 (2008) (failure to explain credibility discrepancies resulted in remand of case in part); *Fortuna Enterprises, L.P. A Delaware P'ship d/b/a the Los Angeles Airport Hilton Hotel & Towers & Unite Here, Local 11*, 354 NLRB 202, 203 (2009) (ALJ's failure to make detailed factual findings and credibility resolutions resulted in remand of finding that employer violated Section 8(a)(1)).

IV. ARGUMENT

A. The ALJ Erred By Concluding That On May 16, 2014 Respondent, By Consultant Carlos Ortiz, Threatened Employees With A Reduction Of Wages If They Voted For The Union

(Exceptions 20 through 32 and 41 through 46)

1. INTRODUCTION

The Union alleges that on May 16, 2014, in a conference room, Consultant Carlos Ortiz (Ortiz) threatened employees with a reduction in wages if they voted for the Union. GC 1(g) Complaint ¶ 7. There literally is nothing in the record to support this allegation. To the contrary, the record establishes beyond any doubt that employees were told exactly the opposite – that no

one at Respondent was authorized to make any statement saying that employees would lose wages or anything else if the Union won an election. The ALJ's findings and conclusions should be rejected and this claim should be dismissed.

2. RELEVANT FACTS

The Union conducted a campaign to seek recognition of the DC's warehouse workers during April and May of 2014. *See, e.g.*, Tr. 147 (Negroni). Respondent held a series of information meetings with employees to provide them with facts they could use to help them make their decisions about whether they wanted to be represented by the Union. *E.g.*, Tr. 99 (Ortiz). These meetings were conducted in English and Spanish. *Id.* In every case, professional consultants with decades of experience in providing factual and legal messages to employee groups presented the material at these meetings. *E.g.*, Tr. 99-100; 111-12 (Ortiz); 147-49 (Negroni); Tr. 167-69 (L. Perez). Ortiz had eighteen years of experience and participated in over fifty campaigns that went to an election. Tr. 97 (Ortiz). Negroni has participated in seventy-six campaigns. Tr. 148. (Negroni). Consultant Louisa Perez (L. Perez) has also been involved in about seventy-eight campaigns. Tr. 166. None of these consultants have ever been required to testify at a Board proceeding about whether their actions violated the Act. Tr. 97 (Ortiz); Tr. 148 (Negroni). Tr. 166 (L. Perez).

The information meeting at issue was held on Friday, May 16, 2014, at 2:15 p.m. This meeting was conducted in Spanish. Bilingual consultant Ortiz presented and bilingual consultant L. Perez acted as a witness. Tr. 99-100; 167-69; 174-76 (L. Perez). The slide deck used for this presentation was in Spanish. Tr. 101 (Ortiz) and R 6; Tr. 167 (L. Perez); *see also* Tr. 87 (Urquiza).

Four associates attended this session. R 3. Two of them were well known to be strong Union supporters. The Union's most visible in house organizer Lino Contreras (Contreras)

admitted this. Tr. 64 (Contreras). He also admitted that he testified for the Union at the hearing that resulted in the decision in *UNF West, Inc.* 361 NLRB No. 42 (2014)[5]. *Id.* Juan Urquiza (Urquiza) also identified himself as well known Union supporter. Tr. 85-86 (Urquiza). He, too, provided testimony in the previous UNF matter. *Id.*

Both Ortiz and L. Perez were very aware of these facts. Tr. 107-08 (Ortiz); 169 (L. Perez). Ortiz also knew from his prior experiences dealing with Union's organizer Ruben Luna ("Luna") that Luna frequently used employees to try to put words in the mouths of employers and meeting presenters to create unfair labor practice claims where violations did not exist. Tr. 98; 107-08 (Ortiz). The Union never denied the undisputed fact that it was using this tactic during its 2014 organizing campaign at the DC[6].

Ortiz, as he always did, read the slides verbatim on May 16, 2014. Tr. 102, 107-09 (Ortiz); 168-69 (L. Perez). It was particularly important to do so at this meeting because known Union supporters Contreras and Urquiza were in attendance. Tr. 107 (Ortiz); 169 (L. Perez).

Ortiz read the second slide of the deck word for word. Tr. 102 (Ortiz); R 2 at 2; R 6 at 1[7]. This slide makes it clear that no one was going to make any predictions at any of the information meetings. R 2 at 2; R 6 at 1.

Ortiz also read the slide containing a letter from Union Organizer Ruben Luna to the Moreno Valley associates eligible to vote. R 2 at 7; R 6 at 2 (The "security professionals" letter). Luna alleged in the letter that "Management will tell you that when you negotiate a contract, you may lose the wages and benefits you already have." R 2 at 7; R 6 at 2. The letter, by its text, originally was designed for some unidentified group of "security professionals," not Respondent's employees. *Id.* This undisputed evidence confirmed that Luna was, as Ortiz knew

[5] This case is currently on appeal at the United States Circuit Court for the District of Columbia, a fact ignored by the ALJ. ALJD 2:42 - 3:3-6. *See also UNF West v. NLRB*, Case No. 14-1181 (D.C. Cir. filed September 17, 2014).
[6] Even though Luna was present during a portion of the hearing, *see* Tr. 8-9, neither he nor anyone else from the Union was called to rebut, explain away or deny this undisputed fact.
[7] R 6 is a Spanish translation of R 2. R 6 was translated by Mr. Ortiz (Tr. 101 (Ortiz)).

well from Ortiz's previous dealings with Luna, using the same trick he used in the past – trying to create claims of unfair labor practices where they did not exist.

Having seen the letter, Respondent prepared a slide deck specifically designed to thwart Luna's tactic. In addition to showing employees the letter, Respondent addressed its contents. The slide read by Ortiz made it clear that unlike the allegations in Luna's letter, bargaining did not start from "scratch." Instead, the slide clarified that bargaining started from what associates have and that associates can "gain, stay the same, or you can lose." *Id.* Further, Ortiz read the next slide which stated unequivocally that no one at Respondent was authorized to tell employees that they will lose wages or anything else if the Union gets in. R 2 at 8; R 6 at 2. Ortiz never told employees that they would lose wages if the Union got in. Tr. 110-11 (Ortiz); 174-75 (L. Perez). This fact is undisputed and confirmed by the Union's witnesses. Tr. 83 (Urquiza testified "company *could* lower our wages") (emphasis added); Tr. 72 (Contreras "the company can – *could* reduce the salary of all employees") (emphasis added).

Thus, Respondent exposed the Union's unsuccessful and well-worn tactic of raising the suggestion of an unfair practice allegation in its own literature and then claiming that it came from the employer. Respondent reacted by showing employees from where the allegation really came and then unequivocally disavowing the Union's statement. Nevertheless, the Union stuck to its playbook both during the May 16, 2014 meeting and at the hearing in this matter.

Contreras came to the May 16 meeting ready to talk about the false allegation concerning wages contained in Luna's "security professionals" letter. Contreras admitted that he pressed Ortiz on whether the Company could (not would) reduce benefits if the Union was successful. Tr. 55-56 (Contreras). Indeed, that was about all he claimed to remember.

Thus, and for example, Contreras first contended that an English slide deck was shown in this Spanish meeting. Tr. 55-57; 65 (Contreras). Then he said that Ortiz might have presented in

English at this Spanish meeting and that the slides might have been in Spanish. *Id.* at 66. Then he said we as not sure because he was not paying attention:

Q: So you're not sure what slides were shown on May 16th, were you?

A: Well, he showed something in the slide, but I didn't put too much attention to that, because --

Tr. 67-68 (Contreras)

Contreras also claimed that Ortiz showed the employees a slide that said that the Company was going to reduce wages if the Union came in:

Q: And what did you say?

A: I told Mr. Ortiz, "I have heard from the warehouse that you guys are saying that if the Union wins, the Company's going to reduce the wage of all employees.

Q: Do you recall how Mr. Ortiz responded after you spoke up?

A: Yes.

Q: How did he respond? In Spanish

JUDGE MCCARRICK: In Spanish

A: Lino, we put that message on the projector so everybody could see it.

Tr. 55 (Contreras).

Of course, it is undisputed that the slide deck said exactly the opposite of what Contreras stated. The message on the projector expressly said "No one is authorized to tell you that you WILL lose wages or anything else if the Union gets in." R 2 at 8; R 6 at 2 (emphasis original).

On cross examination, however, Contreras claimed that Ortiz never referred to the slides:

Q: All right. Well, Mr. Ortiz read the slides correct?

A: No. He never read the slides. He's just talking about the Union. He never said something about that. He never said something about the projector.

Contreras further contended that the presentation had something to do with a strike in Washington but then he said "I don't remember." Tr. 68 (Contreras). Of course, the presentation did not discuss the Auburn, Washington strike. R 2 and R 6.

By the time his cross examination was over, Contreras conceded that he could remember almost nothing. He could not remember which slide deck was shown at the meeting. Tr. 67 (Contreras). He could not remember whether slides were in English or Spanish. *Id.* at 68. He could not remember whether he had ever been told that bargaining could result in his getting more, the same or less even though this point was made in graphic detail at the May 16th meeting. *Id*. at 70; R 2 at 47; R 6 at 12. Indeed, he stated, "Sir, it's been for almost – I don't know. It's been for a long time. They showed me so many things on the projector. But it's hard for me to remember." It would be an understatement to say that Contreras was a completely unreliable witness.

All of this, though, did not deter Contreras from sticking to the Union script of trying to fabricate an issue where one did not exist. The best Contreras could do, though, was the following:

> Q: And your testimony is that Carlos [Ortiz] said that you could lose wages if the union got in, correct?
>
> A: No. Carlos said – he said we could lose sellers – he said it like this, that if the Union wins that company can – could reduce our salary all employees. That's what he says.

Tr. 72 (Contreras).

Similarly, Urquiza could remember very little, if anything, about what happened at the May 16 meeting. He claimed to remember that the slides and the presentation were in Spanish. Tr. 81-82; 87 (Urquiza). Contradicting Contreras, Urquiza remembers that Ortiz read from the slides. *Id.* at 87. He also claimed to remember that associate Ana Bravo was at the meeting.

When it was demonstrated to him that Bravo was not there, Urquiza then claimed he could not remember. *Id.* at 81, 86-87 (Urquiza); R 3. Urquiza further claimed to remember that subjects discussed at the May 16, 2014 meeting included Lowe's and the strike in Auburn, Washington. Tr. 82; 89 (Urquiza). Indeed, Urquiza claims Ortiz read slides about Lowe's and "Washington Unified." Tr. 90-91 (Urquiza). Of course, there were no such slides included within the May 16, 2014 presentation. *See* R 2 and R 6. In short, Urquiza also was a completely unreliable witness.

Nevertheless, and again, Urquiza did try to lend support to the Union's effort to create an issue about wages where none existed. His effort was also unsuccessful.. The best Urquiza could produce was the following: "He [Ortiz] also said that if the Union won they would represent us, that the company could lower our wages, salaries." Tr. 83 (Urquiza).

The testimony of Contreras and Urquiza, then, is most important, if it can be relied upon at all, for what they did not say. Neither of these witnesses, nor anyone else for that matter, testified that Ortiz ever said any associate "will" or "would" lose wages if the Union got in. Instead, the best these witnesses could offer was an allegation that wages "could" go down if the union got in. Tr. 72 (Contreras); Tr. 83 (Urquiza).

The General Counsel literally has presented no evidence to support the allegation in Paragraph 7 of the Complaint that Consultant Carlos Ortiz threatened employees with a reduction in wages if they voted for the Union. The evidence taken as a whole shows that Ortiz did exactly the opposite – he went out of his way to make clear that it was the Union that started this unfounded rumor and it was the Company that expressly disavowed it.

3. ANALYSIS

a) The Act allows Respondent to inform employees about the possibilities of unionization.

Under Section 8(c) of the Act, employers have the legal right to communicate facts to

employees and to explain the realities and laws governing the collective-bargaining process, among other subjects. The Company exercised its right in communicating with its employees. It did not violate the Act in any way.

The Board has consistently held that an employer may inform employees that existing benefits can be traded away during collective bargaining. In *Venture Industries, Inc.*, 330 NLRB1133, 1140 (2000) (employer legally recounted employees' existing wages and benefits and stated that these items would become negotiable and could be "put at risk" in collective bargaining if employees selected the union as their bargaining representative); *Jefferson Smurfit Corp.*, 325 NLRB280, 285 (1998) (employer did not violate the Act when it told employees they "could lose money and benefits"); *Histacount Corp.*, 278 NLRB 681, 686 (1986) (employer's actions were lawful where it distributed a letter to employees prior to a union representation election that stated in part "[t]here is no guarantee that the company's existing benefits 'before bargaining' will survive the bargaining. . . .This means that a company can get rid of one or more of its pre-existing benefits in the course of bargaining"); *Stumpf Motor Co.*, 208 NLRB 431, 432 (1974) (finding that employer had permissibly stated to employees that all existing benefits will be negotiable if employees selected the union as their collective bargaining representative); *Orchard Corp. of America*, 170 NLRB 1297, 1298 (1968), *enforcing* 408 F.2d 341 (8th Cir. 1969) (employer permissibly stated that wage rates and benefits would be negotiable in the event of a union election victory).

Moreover, the Board and federal courts have consistently held that statements that are alleged to threaten employees in any way are to be considered in conjunction with all the facts and circumstances surrounding the statements. As the Board found recently, "[i]n determining whether an employer's statement violates Section 8(a)(1), the Board considers the 'totality of the relevant circumstances.'" *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 541 (2003)

(quoting *Ebenezer Rail Car Services, Inc.*, 333 NLRB 167, 168 n.2 (2001). As the United States Court of Appeals for the Ninth Circuit stated in *NLRB v. Four Winds Industries, Inc.*:

> We look not for certain words that are allowed and others that are forbidden. Rather, we are to view the statements in their entirety and consider their total effect on the receiver.[8]

530 F.2d 75, 78 (9th Cir. 1976) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)).

Given these standards, it is clear that there is no violation of the Act on this record. The ALJ's conclusion to the contrary should be rejected and this portion of the Complaint should be dismissed.

First, and most importantly, both the documented evidence as well as the GC's witnesses, to the extent the latter can be believed at all, confirm that Ortiz told associates only that they *could* (not would or will) lose wages during collective-bargaining. Any such written or spoken statement does not violate the Act. *E.g., Jefferson Smurfit Corp., supra.*

Second, the context in which the statements were made underscores the fact that they were made in compliance with the Act. Indeed, the first substantive slide of Ortiz's presentation told employees:

> The Company would bargain in "good faith," if employees decide to surrender their rights as individuals to the Union – Unfortunately, <u>no one</u> can predict the outcome of good faith collective bargaining with a union. This presentation is a discussion of <u>FACTS</u> and what COULD or MAY happen, not necessarily what WILL happen. Because, remember, no one has a "crystal ball" to predict the future!

R 2 at 2 (emphasis in original).

Only a few slides later Ortiz further told employees "[t]he company has never stated that bargaining 'starts from scratch.' In fact, we have told you that the bargaining starts from where

[8] This statement has also been cited by the Board in several cases including *EMR Photoelectric*, 251 NLRB 1597, 1607 (1980); *Michael's Markets of Canterbury, Inc.*, 274 NLRB 826, 836 (1985); and *Skyline Transport*, 228 NLRB 352, 357 (1977).

you are now and you can gain, stay the same, or you can lose." R 2 at 7. Significantly, this slide was also prepared in response to a comment in Luna and the Union's "security professionals" letter, and not anything emanating from Respondent. *Id.*

Furthermore, Ortiz told employees, "NO one is authorized to tell you that you WILL lose wages or anything else if the Union gets in." R 2 at 8 (emphasis in original); *see also* R 6 at 2. Finally, Ortiz informed the group that in collective bargaining what they have now could go up, stay the same or go down. *E.g.*, R 2 at 47; R 6 at 12.

The context of Ortiz's lawful statements could not be more clear. He started by saying that he was not going to make any predictions. He demonstrated that any comments about possible pay cuts came from a trick Luna had used in previous campaigns with "security professionals." Ortiz then directly debunked Luna's claim and described all the possible outcomes of collective bargaining. In these circumstances, it is clear that no unlawful comments were made. *E.g., Jefferson Smurfit Corp., supra.*

Nevertheless, the ALJ somehow concluded that Ortiz's statements violated the Act. This conclusion cannot be supported by the record as a whole and is directly refuted by the clear preponderance of the evidence. *Universal Camera, supra; Standard Drywall, supra.*

For example, the ALJ stated that "Respondent's employee Juan Uriquiza corroborated Contreras' account of the May 16, 2014 meeting." ALJD 6:1-2. The record establishes exactly the opposite. The ALJ stated that Contreras claimed that the May 16, 2014 meeting began with Ortiz making comments about the Union being no good and that wages could be lost if the Union got in. Urquiza, however, on the very same page cited by the ALJ to claim that Urquiza supported Contreras, said that the meeting began with the "slides." Tr. 82 (Urquiza). On cross examination, Urquiza admitted that Ortiz read the slides. Tr. 87 (Urquiza). This, of course, supports the testimony of Respondent witnesses Ortiz and L. Perez and directly contradicts

Contreras. *Compare* Tr. 87 (Urquiza) (Q. He [Ortiz] read the slides as he presented them, didn't he? A. Yes.) *and* Tr. 66 (Contreras) ("No, he never reads the slides.")

Further, Urquiza claimed he "remembered" Ortiz "next" talked about "Lowes". Tr. 82 (Urquiza). On cross examination he claimed inaccurately that this subject was covered on the slides, too[9]. In any event, only after these comments about the slides, did Urquiza pretend to remember a discussion about wages. This rendition of events, even if true, directly contradicts both Contreras' testimony and the ALJ's findings that Urquiza corroborated Contreras' false claim that Ortiz began the meeting by discussing the wage issue, a key pillar upon which the ALJ's credibility findings were based. ALJD 6:41-43. Thus, on the record it is impossible for the ALJ to credit both Contreras and Urquiza. More importantly, both the record as a whole and the clear preponderance of the evidence show that Contreras' statements about what Ortiz said, and when, are false.

Next, the ALJ's observation that Contreras could not recall Ortiz reading the slides, that Urquiza had little recollection of the slides' content and that Contreras could not recall being told that bargaining could result in more, the same or less than what employees had when bargaining began hardly begin to summarize the maze of contradictions that make up the testimony of Contreras and Urquiza. Contreras claimed at various points during his testimony that the slides presented at the Spanish meeting he attended were in English, Tr. 57, that Ortiz made the Spanish presentation in English, Tr. 66, that Contreras could not remember whether the slides were in English or Spanish, Tr. 66, that he could not remember what was on the slides, Tr. 68, and that he was not paying attention, Tr. 67-68. Urquiza claimed that he could not remember

[9] It was not. In fact, to the extent Urquiza could remember anything at all about the meeting, he "remembered" seeing people who were not there and slides that were never presented. Tr. 87-89 (Urquiza). While he was not at all clear about exactly when he might have heard any conversation between Ortiz and Contreras about the false wage issue raised by Luna and his "security professionals" letter, he testified that Ortiz talked about the slides before any such comments were alleged to have been made. Tr. 82, 87-89 (Urquiza).

what was on all the slides, Tr. 88-89, that he did remember what was on some of the slides, Tr. 89, and that the slides said things that they did not say, Tr. 89-90. Neither witness could say for sure that Ortiz did not read the slides exposing Luna's ruse about wages and the slide underscoring that no one was authorized to say that employees would lose wages or anything else if the Union was successful because both GC witnesses were too busy trying not to remember anything but the single false story they had been sent to tell.

Moreover, and relatedly, the ALJ completely ignored the undisputed evidence establishing that the issue of whether employees might lose wages if the Union won was fabricated by Luna and the Union to create exactly the scenario that led to the hearing in this matter. The Union did not deny that Luna obviously used a poorly edited form letter from another Union campaign involving "security professionals" to raise the false issue of whether employees might lose wages if the Union won an election. The Union did not challenge the undisputed fact that Ortiz was aware of Luna's tactic from other organizing campaigns. It is undisputed that R 2 and R 6 were the slide decks shown at the meetings on May 16, 2014. The ALJ never addressed the obvious fact that two of the slides in that deck were created specifically to show employees the Union's form letter raising the false narrative of lost wages and telling them in no uncertain terms that the Union's contention was completely false. Clearly, then, the ALJ failed to consider the totality of the relevant circumstances. *E.g., Saginaw Control & Engineering, supra*; *Universal Camera, supra.*

Additionally, the ALJ's apparent reliance on the notion that Ortiz did nothing but read from the slides also fails to consider the record as a whole. It is highly significant to note in this context that the ALJ refused to let Ortiz testify in Spanish, his preferred language, while allowing the Union's witnesses to do so. Thus, the nuances of questions and answers about

whether Ortiz answered questions from Contreras in addition to reading the slides literally were lost in the absence of a translation. What the ALJ saw as contradictions in the testimony of L. Perez and Ortiz were nothing more that Ortiz's inability to clearly articulate what he wanted to say because of the ALJ's prejudicial refusal to allow Ortiz to testify in his native language.

Finally, the ALJ's analysis reflects all of these errors. As a result, the analysis misstates both the record and the law to arrive at exactly the wrong conclusion. ALJD 7:1-22. First, the Board has never held that an employer may not tell employees that the consequences of unionization may (as opposed to will) result in a cut in wages in the context of the facts presented by this record. *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB77 (1999) cited by the ALJ confirms this fact. In that case, the Board found an 8(a)(1) violation when the employer responded to a question about whether wages would go down if the union were voted in by stating it was "a possibility" without making any reference to the bargaining process.

In this case, of course, the alleged statement (even if it can be assumed for the sake of argument that it was made at all or as alleged) arose in the context of a presentation entitled "Facts About Negotiations And Labor Disputes." Even if it assumed, against overwhelming evidence to the contrary, that the discussion about wage reductions occurred at the beginning of the presentation and as alleged by Contreras but not Uruqiza, L. Perez and Ortiz, it is undisputed that six slides into the presentation, including two title slides (one of which mentioned Negotiations), or just mere minutes later, Ortiz showed the employees the Union's letter from which the rumor emanated, and then read a slide that said: "NO one is authorized to tell you that you will lose wages or anything else if the Union gets in. No one can predict the outcome of good faith collective bargaining. Again, the truth is you could get more, the same or less than you have now."

Thus, the ALJ's conclusion that any statement that might have been made by Ortiz was illegal because it was not made in the context of a discussion about collective bargaining, *see* ALJD 7:18-21, is objectively wrong as a matter of fact and irrelevant when considered properly in light of applicable law that only requires that such statements be made in exactly the context established by this record. *E.g., Venture Industries, supra; Jefferson Smurfit Corp., supra; see also Universal Camera* (requiring the ALJ to at least discuss evidence that is contrary to findings)*; Standard Drywall, supra* (credibility resolutions cannot stand where the clear preponderance of all the relevant evidence convinces the Board that they are incorrect).

Given this review of all the record facts, three things are clear. First, the ALJ's findings and conclusions are fatally flawed because he did not consider and address all the record evidence as a whole, as required by *Universal Camera.* Second, the clear preponderance of the evidence shows that Contreras and Urquiza are not credible witnesses. *Standard Drywall, supra.* Third, Ortiz did not make an illegal comment when considered in light of the all the facts and circumstances, as required. *Saginaw Control & Engineering, supra; Jefferson Smurfit Corp., supra.* Accordingly, the ALJ's findings and conclusions should be rejected and the allegations of Paragraph 7 of the Complaint should be dismissed.

B. The ALJ Erred By Concluding That On May 9, 2014 Consultant Negroni Interrogated Aceves And Threatened Him With Futility In Regards To His Rights Under The National Labor Relations Act

(Exceptions 1 through 19 and 44 through 47)

1. INTRODUCTION

The Complaint alleges that on May 9, 2014, Consultant Juan Negroni interrogated employees about their union sympathies in the warehouse. GC 1(g) ¶ 6(a). The Complaint further alleges that Negroni "threatened employees with futility in regards to their rights under the National Labor Relations Act." *Id.* ¶ 6(b). The GC called only former associate Aceves to

support this claim. The record, when considered as a whole, does not support these allegations. To the contrary, the record reveals that the ALJ's factual findings are directly contradicted by undisputed evidence. As a result, the ALJ's findings and conclusions should be rejected and this claim should be dismissed.

2. RELEVANT FACTS

In May 2014 Aceves was a backstocker in the repack area of the warehouse. Tr. 24 (Aceves). He admitted that he was well known as a strong union supporter. *Id.* at 35. On May 9, 2014, he was working the second shift which began at noon and ended when the work was complete. *Id.* at 43.

Respondent conducted three associate information meetings on May 9, 2014. Tr. 149-50 (Negroni). Consultant John Henderson conducted two of them in English while Negroni sat in as a witness. *Id.*; Tr. 112 (Ortiz). Ortiz conducted the third meeting in Spanish and Negroni again sat in as a witness. Tr. 120 (Ortiz); 152 (Negroni). Aceves attended the third meeting. Tr. 38-40 (Aceves) and R 1; Tr. 120 (Ortiz); Tr. 152 (Negroni). This meeting began at or shortly after 2:15 and ended sometime between a little after 3:00 p.m. and 3:45 p.m. Tr. 40 (Aceves); Tr. 120 (Ortiz); Tr. 150 (Negroni).

Negroni attended the Spanish meeting conducted by Ortiz that began at or shortly after 2:15 p.m. Tr. 150 (Negroni); Tr. 120-21 (Ortiz). Aceves was also there. Tr. 38-40 (Aceves) and R 1; Tr. 120 (Ortiz); Tr. 153 (Negroni). Consistent with the Union's playbook, Aceves admits that he attempted to create issues the Union could attribute to Respondent. He made comments about Respondent's handbook and about the Union's unfounded allegation that Respondent might use a temporary agency called Road Link to replace Respondent's employees. Tr. 42 (Aceves);

Tr. 153 (Negroni); *see also* R 2 at 4[10]. At one point, Aceves urged the other associates in the meeting to walk out. Tr. 153 (Negroni). When none of them did so, Aceves ended his disruption. *Id.* Everyone stayed until the meeting ended. *E.g.*, Tr. 42 (Aceves).

Negroni left the facility shortly after the meeting was over. Tr. 153-54 (Negroni); Tr. 123,144-46 (Ortiz). He never went into the warehouse either before or after the 2:15 p.m. meeting attended by Aceves. Tr. 154 (Negroni).

Nevertheless, Aceves stuck to the Union's playbook by trying to create a claim attacking the consultants, even if he did so only half-heartedly. Aceves testified that he merely "sort of" remembered an alleged conversation with Negroni in the warehouse that he claims occurred at about 3:00 p.m. on May 9. Tr. 30-31 (Aceves). He alleged that Negroni asked him, "How do you feel with the Union?" *Id.* at 31. Aceves says he responded by asking if this was an interrogation. Aceves says he asked Negroni to leave him alone. *Id.*

Aceves also alleged that he showed Negroni a paper outlining certain rights protected by the Act written in English that Aceves admits he cannot read without help. *Id*. at 32, 43-44; GC 2. Aceves further claimed that after being shown the paper, Negroni replied by saying "this document doesn't work here my brother." Tr. 33 (Aceves). Finally, Aceves claimed that Negroni made a completely irrelevant comment about who pays him, the Union or the Company. *Id.*

None of what Aceves "sort of" remembered ever happened. First, Negroni was not in the warehouse on May 9, 2014. Tr. 123, 144-46; Tr. 154 (Negroni). Second, Aceves was in the information meeting, not the warehouse, at about 3:00 p.m. on May 9, 2014. R 1; Tr. 40 (Aceves); Tr. 120-22 (Ortiz); Tr. 153 (Negroni). Third, Negroni had no need to question Aceves

[10] Indeed, this latter comment was the subject of a rumor control slide at the May 16, 2014 meeting. R 2 at 4; R 6 at 1.

about his Union sentiments, because as Aceves admits, Aceves spoke up in favor of the Union at the meeting that began at 2:15 p.m. on May 9 by attacking the provisions of Respondent's handbook as well as the use of a third party's employee. Tr. 42 (Aceves); Tr. 153 (Negroni). Fourth, Negroni was well aware of Aceves' demonstrated support for the Union and had no need to question him about his Union sentiments. Tr. 153, 155 (Negroni). Fifth, Negroni does not refer to employees or anybody else as "my brother." Unions do that. Tr. 158 (Negroni).

There is no credible evidence to support the claims that Negroni interrogated Aceves in the warehouse on May 9, 2014 or that Negroni "threatened employees with futility in regards to their rights under the National Labor Relations Act." For these and the reasons discussed below, these claims should be dismissed.

3. ANALYSIS

Notwithstanding this overwhelming evidence establishing that no conversation took place between Negroni and Aceves in the warehouse on May 9, 2014, the ALJ reached the opposite conclusion. The findings upon which this conclusion is based are not supported by the record as a whole.

First, the ALJ's credibility finding supporting Aceves is based upon only a portion of the record, and a misreading of that portion. *See* ALJD 4:16-29. The ALJ's comment that Negroni "doth protest too much," *Id*. at 17-18, reflects more of a personal dislike for Negroni's communication style than any accurate consideration of the record as a whole. *See Universal Camera, supra.*

It is undisputed that Negroni is an experienced consultant who had never been required to defend any statement he made in any of the over seventy campaigns in which he was previously involved. Tr. 148 (Negroni). It is undisputed that he was retained to communicate with employees in an atmosphere where this same Union had employed the tactic of fabricating

countless unsubstantiated allegations in at least eighteen unfair labor practice charges, as well as alleged illegal conversations between Respondent's agents and no one but the Union's staunchest supporters. Tr. 98-99 (Ortiz); Tr. 147 (Negroni). *See supra* n.3. It would be more suspicious if Negroni did not take umbrage with a false accusation made by a former employee of Respondent and well known Union supporter who literally had nothing to lose by offering his contrived claim that he admitted he only "sort of" remembered. The ALJ, of course, made no mention of Aceves' status as a former employee that provided Aceves the unique opportunity to contrive a story with impunity. The ALJ also ignored the admission that Aceves only "sort of" remembered what happened. *E.g., Saginaw Control & Engineering, supra* (all relevant circumstances must be considered).

Additionally, to the extent the ALJ based his credibility finding upon testimony describing when Negroni left the DC, this too is based upon a failure to consider the record as a whole. *Universal Camera, supra.* While it is true that Ortiz may have remembered some events after the meeting in question that Negroni did not, this at best confirms the fact that Negroni could not have met with Aceves at 3:00 p.m. as Aceves alleges. If Ortiz is correct, Negroni and Ortiz may not have left the human resources area of the facility where the meetings took place until after 4:00 p.m. Aceves said he met with Negroni in the warehouse at 3:00 p.m. Aceves, by his own testimony, though, admits that he was in a meeting with both Ortiz and Negroni at 3:00 p.m. Tr. 40-41(meeting began around 2:15 p.m. and lasted 40 to 50 minutes or longer if questions were asked); Tr. 46 (meeting lasted about 40 to 50 minutes on the day in question). Thus, it is not accurate to say that Aceves testified without contradiction and was specific. ALJD 4:28-29. To the contrary, his testimony is directly contradicted by Negroni and Ortiz, and could not have been more vague, particularly as Aceves admits he at best only "sort of" remembered

what happened. Tr. 31. (Aceves); *see also* Tr. 43 (Aceves evasivness when asked where he was at 3:00 p.m. – he talks about a noon start time).

Finally, the ALJ statement that Negroni's denial of having seen the leaflet he was allegedly shown by Aceves, when it was "posted prominently" by Respondent, is not an accurate characterization of the record. *See* ALJD 4:25-28. There is no citation to the record for this finding because there is no evidence to support it. Aceves said he got the document "from a co-worker." Tr. 46. Contreras never said a word about where he allegedly got the document or whether it was posted anywhere in the DC. Negroni truthfully stated he had never seen it before. L. Perez merely testified that the leaflet looked familiar. She said that "something like that" "might" have been posted on the UNFI bulletin boards. Tr. 177. L. Perez was never asked if the specific document Aceves says he showed Negroni, was posted or otherwise distributed by Respondent nor did anyone say that this was the case. *Id.* Thus, there simply is no evidence to support the conclusion that GC 2 was "posted prominently" by Respondent. ALJD 4:27-29. It was not.

Thus, the ALJ's finding, crediting Aceves over everybody else, is fatally deficient because it cannot be substantiated if the record is considered as whole, as required by *Universal Camera, supra,* and is clearly incorrect in every aspect, *Standard Drywall, supra.*

Even if it can be assumed for the sake of argument that comments like those alleged were made, the ALJ's conclusion that they somehow violated the Act cannot be supported by the law or the facts. The Board has long evaluated claims of alleged interrogation under the standards set forth in *Blue Flash Express, Inc.*, 109 NLRB 591 (1954), as reaffirmed in *Rossmore House*, 269 NLRB1176 (1984), *aff'd* 760 F.2d 1006 (9th Cir. 1985). Under this test, the Board looks to the "totality of the circumstances" to determine whether an interrogation reasonably tends to restrain, coerce, or interfere with Section 7 rights. Rejecting any "per se" approach, the Board

will consider such factors as whether the employee is an open union supporter, the identity of the questioner, the place and method of the interrogation, the background of the questioning, and the nature of the information sought. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57 (2011) (incorporating by reference, in relevant part, *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295 (2009)).

In *Verizon Wireless*, 349 NLRB640, 653 (2007), an employer directly questioned an open union supporter about collecting authorization cards on the shop floor. Despite the questioning, the Board sustained the ALJ's decision that this activity did not violate the Act. *Id*. The employee's open union support meant that the employer's questioning did not violate Section 8(a)(1) .

Likewise, in *Milum Textile Servs. Co.*, 357 NLRB No. 169 (2011), the Board found no violation when a manager asked a group of employees why they wanted a union. The Board explained that that question to the open supporters "was posed without animosity or intimidating comment and did not, therefore, tend to restrain, coerce, or interfere with the employees' statutory rights." *Id*. at *34.

The ALJ simply ignored this clear precedent. Instead, he tried to pound a square peg into a round hole by failing to address, if not denying, the undisputed facts in the record. Most obvious is the completely erroneous statement that "While Aceves was a union activist there is no evidence that Aceves engaged in Union activity in an open manner in the workplace or that Negroni was aware of this." ALJD 5:4-6. All of the evidence confirms that everybody knew about Aceves' open and notorious support for the Union. Aceves admitted that he had a Teamster license plate holder on his vehicle. Tr. 35 (Aceves). Ortiz and Negroni both testified that they knew Aceves was a Union supporter. Tr. 120-21 (Ortiz); Tr. 152-53 (Negroni). Both also testified that just minutes before Aceves alleged he had a conversation with Negroni in the

warehouse, Aceves spoke in favor of the Union and tried to convince people to walk out of the meeting. *Id.* Even Aceves admits that he spoke out in favor of the Union by criticizing Respondent's handbook and its use of a third party contractor in the warehouse. Tr. 41-42. The ALJ's finding is objectively wrong. *Rossmore House, supra; Universal Camera, supra; Standard Drywall, supra; and see Verizon Wireless, supra* (no violation to interrogate known union supporter on the shop floor). The ALJ's findings and conclusions should be rejected for these reasons alone.

Moreover, all the facts and circumstances clearly establish that there was no coercive interrogation or conversation. It is undisputed that Negroni was retained specifically for the purpose of helping Respondent communicate to its employees in a legal way. Tr. 147 (Negroni). Negroni knew full well that Aceves was a Union supporter. Tr. 152-53, 155 (Negroni). Aceves spoke out in favor of the Union on the very day, and, in fact, just minutes before Aceves pretends he was interrogated. *Id.* It is legally and factually impossible to find any violation of the Act in these circumstances.

The case cited by the ALJ underscores this point. In *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77 (1999), the employer's supervisor admitted that he asked several employees "what do you think about this union stuff?" *Id.* at 78. He also admitted he did so expressly to discern the Union sentiments of these employees. Further, the Board found that these conversations were not innocent banter because the supervisor was instructed by his superiors to "ferret out and report on the union leanings of unit employees." *Id.* at 78. These conversations were conducted in a "relatively confined area." *Id.* None of these circumstances are present in this case. To the extent it is possible to believe that any conversation occurred between Aceves and Negroni in the warehouse on May 9, 2014, it could have been nothing more than a passing comment in an open area from an experienced consultant who was on his guard to

be particularly careful about what he said to Union supporters who were known by Negroni to make false claims against Respondent representatives to pursue the Union's well known tactic of attempting to create unfair labor claims where they did not exist with the hope that something might stick.

Thus, the tale told by Aceves does not describe a violation of the Act, even if there were any grain of truth to it. *E.g., John W. Hancock, Jr., Inc.*, 337 NLRB 1223 (2002); *Verizon Wireless, supra*. It, at best, suggests an isolated and innocuous inquiry devoid of any coercion or interference. The ALJ findings and conclusions should be rejected and the claim should be dismissed for these reasons as well. *Rossmore House*, 269 NLRB at 1177–78 (to support a finding of illegality, the words used or the context in which they are said must suggest coercion or interference); *Mission Clay Prods. Corp.*, 206 NLRB 280, 283 (1973) (isolated, sporadic, and innocuous inquiries do not constitute coercion within the meaning of Section 8(a)(1) of the Act); *and see Blue Flash*, 109 NLRB at 597 ("[T]here are, of course, instances of interrogation which can be properly regarded as isolated, casual, and too inconsequential to constitute a violation of the Act.").

Again, assuming without conceding that something like what Aceves claimed he "sort of" remembered might have happened, he again failed to allege a violation of the Act. An unlawful threat of futility is established when an employer states or implies that it will ensure its nonunion status by unlawful means. *Ready Mix, Inc.*, 337 NLRB 1189, 1190 (2002). Threats are not viewed in isolation. Rather, the Board must consider all the circumstances, including circumstances that were well known to Aceves. *Mantrose-Haeuser Co.*, 306 NLRB 377, 377 (1992).

Respondent clearly and regularly announced its intent to comply with the Act and did so. Respondent specifically and regularly told employees that it would bargain in good faith. *E.g.*, R

2 at 2. More slides, each read to employees, told them they would not get fired for exercising their rights, that no one was authorized to threaten to take away wages or anything else if the Union was chosen, and that employees could get more (or the same or less) as the result of collective bargaining. R 2 at 2, 3, 8, 47. Further, Respondent affirmatively stated that it "would absolutely listen to the union and bargain in good faith." R 2 at 16. Respondent spent substantial amounts of time telling employees that it would comply with the Act in all of its presentations.

Moreover, and in any event, Negroni's comments and actions towards Aceves were not coercive. Quite the contrary, Aceves alleged that it was he who asked questions of Negroni. Aceves further claimed that Negroni tried to maintain a non-coercive atmosphere by saying "calm down," another fact completely ignored by the ALJ in his analysis. When considered in light of all the surrounding circumstances, Negroni did nothing that violates the Act even if what Aceves claims bears any resemblance to reality (which it does not). The ALJ should recommend dismissal of this portion of the Complaint for these reasons as well.

Once again, the ALJ's citation to authority does not support his findings or conclusions. In *Wellstream Corporation*, 313 NLRB 698 (1994), the threat of futility involved statements that "no son of a bitch would bring a union into Wellstream" and the company President saying "he'd personally see to it that no goddamn union would get into that company." *Id.* at 706. Any statement attributable to Negroni, even if made, certainly does not rise to the level of the type of comment needed to sustain a charge of futility. *Ready Mix, supra; Wellstream, supra.* This is particularly true when Respondent stated in writing in its slide deck on bargaining that it absolutely would bargain if the Union was voted in. This key fact is neither mentioned nor analyzed by the ALJ. *See Universal Camera, supra.*

Finally, in addition to being lawful, any alleged statement from Negroni is too ambiguous to violate the Act. The Board and federal courts have long held that ambiguous statements allegedly attributable to company officials, even when entirely corroborated and verified, do not rise to the level of a threat under Section 8(a)(1) of the Act when those statements are ambiguous, isolated, and undefined with little or no context.

In *Teksid Aluminum Foundry, Inc.*, 311 NLRB 711 (1993), a company manager, while discussing union issues with employees, told employees "don't make me negotiate against you." *Id.* at 718. The ALJ determined that the statement violated Section 8(a)(1) but the Board disagreed and stated "we think that the statement is ambiguous . . . . [and] did not violate Section 8(a)(1)." *Id.* at 711. In *Certainteed Corporation*, 282 NLRB 1101, 1110 n.23 (1987) , the Board agreed with an ALJ's determination that a company manager's "comment that . . . a known union supporter, had allowed the Union to 'warp' his mind" was an ambiguous statement and did not rise to the level of a violation of the Act.

In *Finlay Brothers Company, Inc.*, 282 NLRB 737 (1987) , an employee alleged that a manager "said don't do something stupid that might stop you from moving ahead in the future … don't do anything that might jeopardize your future with this company." *Id.* at 740. The ALJ found that "[t]he most that can be granted to the General Counsel's case is that the remark might be ambiguous." *Id.* at 741. The ALJ made particular note of the fact that "something stupid" was not defined elsewhere in the record and that the alleged statements were made "alone" and were therefore uncorroborated. *Id.* at 740–41. These comments did not violate the Act.

In *Albertson Manufacturing Company*, 236 NLRB 663 (1978), the Board upheld an ALJ's determination that a manager's statement was "open to too many interpretations to warrant a finding that it was a Section 8(a)(1) threat." *Id.* at 676. The Board held in *Bomber Bait Company, Inc.*, 210 NLRB 673 (1974), that certain statements allegedly made by a manager,

even if true, did not rise to the level of an unlawful threat under the Act. According to one employee, a company manager told another employee that "if the union goes in it won't help you because you won't be here that long." *Id.* at 673. The Board held that:

> [E]ven assuming *arguendo* that [the company manager] did make the statement in question, we are of the opinion, in the absence of any other indication of animus or evidence that the statement was heard [by the employee to whom the statement was allegedly made] or of any of the assembled employees other than [the accuser], that it was too ambiguous as well as too isolated and minimal to warrant a finding that it violated the Act.

Id. at 674.

In *Louisville Chair Co.*, 146 NLRB 1380 (1965), the Board held that a company owner's ambiguous, unexplained and undefined statements to an employee did not violate the Act as a Section 8(a)(1) threat. The employee alleged that the company's owner asked the employee how his union friends were doing and told him that he would "have to walk the chalk line" or he "was going out." *Id.* at 1381. The Board held that they were "unable to find that the record as to [the statement] preponderates in favor of finding a finding that by [the owner's] remarks, the Respondent violated the Act." *Id.* Nowhere in the record had the General Counsel in *Louisville Chair* established what "to walk the chalk line" meant, or was even taken to mean by the employee. There was no further context given and the Board could therefore assign it no meaning on its own. The Board held that the remarks could "just as readily" be related to something else, even though the statement was immediately preceded by a comment about the employee's union affiliation. *Id.*

The ALJ completely ignored all this precedent. This is because the allegations in this matter fall short of even those found above to be perfectly legal statements. In this case, Aceves

claims that he showed Negroni a folded document.[11] No one else was present. Aceves does not claim that Negroni read it. He only claims that Negroni told him "this document doesn't work her [sic], my brother." There is no hint in the record as to what "doesn't work here, my brother" means or what Aceves or anyone else thought it might mean. Beyond the nebulous nature of Negroni's alleged comments, they allegedly occurred in an environment where Respondent repeatedly explained the collective-bargaining process to employees and told employees Respondent would comply with the Act. The allegations, considered in the context of the surrounding discussions and circumstances, simply are too ambiguous to violate the Act. *Albertson Manufacturing Company, supra; Louisville Chair Co., supra.*

For these and all the reasons set forth above, the ALJ's findings and recommendations should be rejected and the allegation of paragraphs 6(a) and (b) of the Complaint should be dismissed.

C. The ALJ Erred By Concluding That On May 22, 2014, Negroni Interrogated Contreras About His Union Sympathies And Threatened Him With Futility In Regards To His Rights Under The National Labor Relations Act

(Exceptions 33 through 46)

1. INTRODUCTION

The Complaint alleges that on May 22, 2014, Negroni interrogated employees about their Union sympathies in the warehouse. GC 1(g) ¶ 6(c). The Complaint further alleges that Negroni "threatened employees with futility in regards to their rights under the National Labor Relations Act." *Id.* ¶ 6(d). The GC called only Contreras to support these claims. Tr. 57-62 (Contreras). As noted above, Contreras is a completely unreliable witness. The credible facts established by the record, when considered as a whole, show that no such conversation took place. These allegations are false and this portion of the Complaint should be dismissed.

[11] Aceves never testified that he even gave the document to Negroni to read. This was only suggested by a leading question. Tr. 32-33 (Aceves).

2. RELEVANT FACTS

As described above, Contreras was a well-known Union supporter. Tr. 64 (Contreras). He testified for the Union at the previous unfair labor practice proceeding. *Id.* Negroni was well aware of this fact. Tr. 155-56 (Negroni). Indeed, Contreras said that he and Negroni had only had two or three one-on-one conversations since 2012 when the Union first began its efforts at Respondent's Moreno Valley facility. Tr. 58 (Contreras). In reality, none occurred. Tr. 156-57.

Contreras followed the Union playbook and re-emphasized his already obvious sentiments about the Union. At the information meeting he attended on May 16, 2014, Contreras attempted to attribute the Union's contrived rumor about wages to Respondent. *See supra* at 9-14 and 16-22 and citations to the record therein. Contreras also followed the Luna-Union playbook by trying to create an accusation against Negroni with the now familiar tactic of alleging an isolated and unwitnessed one on one conversation occurring only with a known Union supporter.

Contreras chose May 22 as the date upon which he contends that Negroni spoke to him in the warehouse one on one for only the second or third time in two years. Tr. 58 (Contreras). This was less than one week after Contreras tried to set up Ortiz with the bogus claim of a threat to reduce wages even though the slides prepared for the meeting on May 16 exposed this claim as a transparent Union tactic. *Supra* at 9-14 and 16-22 and citations to the record therein .

Contreras claimed that Negroni approached him in a warehouse aisle. He could not remember which one because they "all look the same." Tr. 72 (Contreras). These aisles are in an open area of the warehouse yet no one else saw the two talking. Tr. 189-90 (Bravo). Contreras' accusations against Negroni were suspiciously similar to those fabricated by Aceves. *Compare* Tr. 59-62 (Contreras) and Tr. 30-32 (Aceves). Thus, Contreras said Negroni approached him

while both were alone and said "[w]hat about the Union?" Tr. 59 (Contreras). Contreras claimed that Negroni said he heard that the Union was making a lot of promises. Contreras, similar to comments made at the meeting, contended he told Negroni that it was the Company that was making promises, lies and threats. *Id.* at 60. Contreras also said he showed Negroni the same document that Aceves claims he showed to Negroni. *Id*. 61-62. Contreras claimed that Negroni replied by saying that the document was useless and the Company had its own policies. *Id*. at 62. Significantly, no effort was made to have Contreras corroborate any suggestion that the document he allegedly showed Negroni was posted under glass by Respondent. This is because the document allegedly shown to Negroni was not posted by Respondent and the record is devoid of any evidence that it was posted by Respondent.

Again, Contreras' testimony was completely unbelievable. Negroni was well aware of Contreras' sentiments about the Union as well as his willingness to testify in Board proceedings. Tr. 155-57 (Negroni). Indeed, Negroni watched Contreras try to set up Ortiz at the May 16 meeting. *Supra* at 9-14 and 16-22 and citations to the record therein. Negroni testified that he avoided speaking to Contreras other than to say hello for just these reasons. *Id*. 156-57. The ALJ completely ignored this fact. Contreras readily admitted that that the two had spoken only once or twice in two years. Tr. 58 (Contreras). The ALJ completely ignored this testimony as well.

In short, the record facts, when considered as a whole, establish beyond debate that Contreras would be among the last people Negroni would have any reason with which to speak, much less have a conversation about Union sentiments or the exercise of rights protected by the Act. These claims have no support in the record. The ALJ's findings and conclusion should be rejected and the claims should be dismissed.

3. ANALYSIS

Once again, the allegations cannot be supported by either credible evidence or common sense. It is undisputed that Negroni is a consultant with decades of experience free from any finding that any of his acts ever constituted an unfair labor practice. It is undisputed that Negroni knew Contreras was a Union supporter. It is undisputed that Negroni knew that Contreras testified (falsely, Respondent believes) for the Union at a prior hearing. It is undisputed that Negroni watched Contreras try to set up Ortiz in public at a meeting on May 16. Even Contreras admits that he and Negroni almost never spoke during the two years the Union tried to get into the DC.

Notwithstanding all of this, Contreras continues to pretend that Negroni approached him out of the blue in the warehouse and chose Conteras, the most well-known Union supporter and person that Negroni knew testified for the Union before, from among the hundreds of eligible voters to ask about his Union sentiments. There is no reason whatsoever why Negroni would do this. To the contrary, given the undisputed facts above, Contreras would be the last person Negroni might interrogate if he had any inclination to interrogate anybody (which he did not). Negroni knew full not only where Contreras stood on the Union issue, but that he would be among the first to report and testify about any perceived or contrived violation of the Act. The indisputable facts and common sense alone compel the conclusion that this conversation could not have, and never did, take place.

Moreover, and in any event, Contreras' testimony was completely unbelievable. As detailed above, Contreras regularly contradicted himself and other GC witnesses such as Urquiza. *Supra* at 12-16 and 18-22 and citations to the record and authorities therein. When his contradictions were exposed, he conveniently lost his memory. *Id*. The record is clear.

Contreras' story is not true. This portion of the Complaint should be dismissed for these reasons alone. *Universal Camera, supra; Standard Drywall, supra.*

Next, and as explained above, the Board considers the "totality of the circumstances" to determine whether an interrogation reasonably tends to restrain, coerce, or interfere with Section 7 rights. *Supra* at 27-28 and citations to the record and authorities therein. Here, no doubt exists that Contreras openly supported the Union for years. He testified at a previous Board hearing and admitted that "people recognize that [he is] one of the chief supporters" for the Union. Tr. 64. This vocal support, along with testifying on the Union's behalf, provides necessary context when evaluating Contreras' claims.

Contreras was a strong Union supporter in a working environment where Respondent communicated to employees repeatedly that it would respect their rights. Contreras states that on the rare occasions when Negroni spoke to him, he used a friendly salutation. In addition, Contreras does not indicate Negroni's alleged comment, "what about the union?" made him uncomfortable. Rather, Contreras answered and then started asking Negroni about the Union. Here, the context as contrived by Contreras creates an alleged conversation devoid of any coercive influence rather than some sort of illegal interrogation.

The Board has found regularly, that conversations that much more clearly resemble an interrogation than that alleged by Contreras do not violate the Act. The Board found no violation when an employer questioned open union supporters about why they supported the union. *Milum Textile Servs. Co.*, 357 NLRB No. 169 (2011). As in *Milum Textile Services*, Negroni's alleged comments even if made were not coercive because Negroni is not alleged to have threatened Contreras, nor were his purported comments alleged to tend to interfere with or restrain Contreras' statutory rights. Negroni's alleged statement, then, even if made as Contreras

contends and even if it can be construed to be an inquiry about Contreras' Union sentiments (a subject about which Negroni already knew and did not need to ask), does not violate the Act. *Sunnyvale Medical Clinic, Inc.*, 277 NLRB 1217 (1985) (no violation where employer questioned semi-open union supporter); *Brigadier Industries Corp*., 271 NLRB 656 (1984) (no interrogation occurred when employer questioned open union supporter); *Aladdin Hotel*, 273 NLRB 773 (1984) (no interrogation where employee was an open union supporter). The ALJ never addressed, much less attempted to apply this precedent. His findings and conclusions should be rejected for these reasons as well.

Further, and also as explained above, an unlawful threat of futility is established only when an employer states or implies that it will ensure its nonunion status by unlawful means. *Ready Mix, Inc.*, 337 NLRB 1189, 1190 (2002). The Board does not view statements in isolation and must consider all the circumstances. *Mantrose-Haeuser Co.*, 306 NLRB 377, 377 (1992).

Again, Respondent spent substantial amounts of time and resources on numerous occasions telling employees that it would respect their section 7 rights and comply with the Act. Again, this is beyond dispute. *E.g.*, *supra* at 6-7; R 2 and R 6.

Additionally, Negroni's alleged acts towards Contreras, if one assumes for the sake of argument that they y happened at all, were not coercive even as alleged by Contreras. Contreras' testimony fabricated a normal conversation in which he participated fully. Contreras did not describe any circumstances that could remotely be deemed coercive. While Negroni allegedly called the paper that Contreras allegedly showed him "useless" because Respondent "has its own policies," this does not suggest, much less establish that Respondent would or did use unlawful means to stifle employee exercise of their Section 7 rights so that Respondent would remain Union free. In short, even if Contreras could be believed, the statement he alleges Negroni made about the leaflet is not the type that raises issues of futility as defined by Board law.

Finally, and again for the reasons detailed above, the Board and federal courts have long held that ambiguous statements allegedly attributable to company officials, even when entirely corroborated and verified, do not rise to the level of a threat under Section 8(a)(1) of the Act when those statements are ambiguous, isolated, and undefined with little or no context. *See supra* at 31-33 and authorities cited therein. Contreras' story offers allegations even more vague than those insufficient to prove a violation of the Act, as alleged by Aceves.

Thus, Contreras alleges nothing more than that Negroni said a paper shown to him by Contreras was "useless" because Respondent "has its own policies." There is nothing in the record to explain the source or content of the unidentified "policies" to which Negroni allegedly referred or how they might somehow be inconsistent with the description of rights Contreras alleges he showed to Negroni. To the contrary, the only "policies" or statements in this record irrefutably demonstrate Respondent's commitment to informing employees of their rights under the Act and encouraging the full exercise of those rights. *See, e.g.,* R 2. Thus, the allegations by Contreras in the context of this record are far more ambiguous than other statements the Board found do not violate the Act. *E.g., Teksid Aluminum, supra* ("don't make me negotiate against you"); *Finlay Brothers, supra* ("don't do something stupid that might stop you from moving ahead in the future…" or "don't do anything that might jeopardize your future with this company").

For these and all the reasons discussed above, the ALJ's findings and recommendations should be rejected and the allegations in Paragraphs 6 (c) and (d) of the Complaint should be dismissed.

D. The ALJ Erred By Refusing To Let Ortiz Testify In His Preferred And Native Language Of Spanish

(Exceptions 20 through 32 and 41 through 46)

The ALJ refused to let Respondent's witness Ortiz testify in his preferred native language of Spanish. Tr. 94-95. Counsel for Respondent urged the ALJ to reconsider, noting that testifying in Spanish would allow Ortiz to better address questions concerning, among other things, the presentations. The Judge still refused, saying "Let's see how it goes." Tr. 96. In the wake of this refusal, the ALJ then parsed Ortiz's English testimony and held him to a narrow literal interpretation by concluding that he did nothing at the meeting but read the slides verbatim, when it was clear to all that Ortiz was having difficulty understanding and responding fully to the Judge's questions in English. *E.g.*, Tr. 108-10. At the same time, the ALJ allowed GC witnesses Aceves and Urquiza to testify through a translator. This error obviously prejudiced Respondent, in that Ortiz did not clearly articulate, at least apparently to the ALJ's satisfaction, how he presented and what he said at the May 16, 2014 meeting. At the very least, due process requires that if any claim in this matter concerning Ortiz's testimony is to be sustained, this prejudicial error as to any such claim should be repaired by, at least, a remand for a new hearing so that Ortiz can be provided the same opportunity as that given to the GC's witnesses to testify in his native language.

E. The ALJ Erred By Ordering The Extraordinary Remedy Of A Notice Reading And By Adding Cease And Desist Provisions That Were Not Alleged Or Proved At The Hearing

(Exceptions 44 through 46)

The ALJ ordered the extraordinary remedy of a notice reading. ALJD 9:4-37. The primary basis for this recommendation appears to be the observation that there is a case pending in the United States Circuit Court in which The Board erroneously concluded that Respondent

committed minor violations of Section 8(a)(1) of the Act. Once again, the ALJ failed to consider the record, as a whole, and misapplied applicable law to reach a conclusion that cannot be supported by the record in this matter.

Notice reading is an extraordinary remedy. It is only available in extraordinary circumstances. Notice reading is not available to humiliate employers for run of the mill allegations where there has been no showing that the alleged unfair labor practices have eroded support for the union. *Ishikawa Gasket Am., Inc.*, 337NLRB 175, 176 (2001) (denying notice reading), *aff'd*, 354 F.3d 534 (6th Cir. 2004); *see also Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1079 (D.C. Cir. 1996) (the Board is obligated to explain "why the traditional remedies will not suffice"). Of course, the ALJ remains obligated to consider the record as a whole when making findings relevant to this remedy. *Cf. Universal Camera, supra.*

Given this standard, The ALJ's recommendation suffers from several fatal flaws. First, the GC never pled this form of relief as a requested remedy. The GC never moved to amend the Complaint to seek this extraordinary remedy, even though Respondent pled failure of the GC to seek any relief as a defense to this matter. The request for this extraordinary relief should be rejected for this reason alone.

Next, the ALJ ignored the fact that the minor infractions alleged in *UNF West, Inc.*, 361 NLRB No. 42 (2014) were alleged by only two individuals; the primary union supporter at the time (as is the case here) and his formerly employed (as is the case here) nephew. *Id*. sl. op. at 2. They were alleged only against two low level supervisors. They concerned unwitnessed "he said she said" allegations, most of which allegedly occurred in one on one conversation in the warehouse. There was no allegation or finding that they were widely disseminated. Moreover, the ALJ completely ignored the fact that these limited unwitnessed claims were all that remained

of eighteen charges filed by the Union. *See* n.3 *supra*. Further, the case is currently on appeal before the District of Columbia Circuit.

The ALJ failed to analyze any of the above facts. Further, the ALJ never even mentioned, much less analyzed, the fact that the circumstances in *UNF West, supra,* are remarkably similar to the instant matter, making the alleged violations here even less likely to have occurred. The allegations in both cases also involved the same Union and the same organizer. Tr. at 16-20. Once again, the Union targeted lower level officials, this time consultants. The Union alleged that only its strongest supporters, and no one else, witnessed acts that evidence showed never occurred. Indeed, in this case there is undisputed documented evidence showing that the Union created the very issues it is now trying to claim the Respondent used as threats. There is also undisputed documented evidence that Respondent publicly assured employees that it would comply with the law and that no one was authorized to say otherwise. All of this was brought to the ALJ's attention. And, of course, there is no evidence that any of the alleged comments in this case were widely disseminated. Indeed, the GC's own evidence shows that only five employees in a unit of well over 200 even knew about the circumstances giving rise to the allegations in this case. None of this was even mentioned, much less discussed in the context of considering all the record evidence as required. *See Universal Camera, supra.* Regardless of the ultimate outcome of this matter, as the evidence plainly shows it should be dismissed in its entirety, there is no basis in the record for the extraordinary relief sought by the GC in this case should any claim survive.

The case cited by the ALJ once again confirms Respondent's position. *Federated Logistics and Operations,* 340 NLRB255 (2003), the Board found that a notice reading was appropriate where two company vice presidents and a manager engaged in a litany of alleged illegal conduct that included predictions of strikes, a threat to close the facility, claims that

bargaining started from "zero", threats to move the facility, withholding a wage increase, suspending employees for engaging in protected activity, and issuing discriminatory warnings. *Id.* at 256-57. None of that happened in this case, or in *UNF West, supra* for that matter.

Additionally, the Board in *Federated* also found that some of the Respondent's conduct pervaded the unit. *Id.* at 257. Other conduct had a long term coercive effect. Further, much of the conduct was committed by high-level management officials. *Id.* at 257. None of this was alleged or proved in this case because none of these circumstances is present in this case.

It was only under all of these circumstances that the Board found extraordinary remedies appropriate in *Federated*. Nothing even remotely similar to what happened in *Federated* occurred in this case. Even if everything the Union alleges in this case is somehow upheld against the overwhelming evidence to the contrary, and even if these allegations are coupled with those not likely to survive appeal in *UNF West, supra,* there is nothing to remedy but a few isolated "he said she said" allegations that impacted a very small number of individuals. This is far from the "numerous, pervasive and outrageous" allegations required to support the extraordinary remedy of a notice reading. Accordingly, the language of Paragraph 2 (b) of the Order should be struck from any order that might be issued in this matter. *See* ALJD 10:34-39.

Finally, the Judge also ordered that Respondent cease and desist from "Instructing employees not to discuss the Union or engage in union activities, including by telling them, in reference to their Union activities, not to cause trouble or problems." ALJD 10:8-10. There is no allegation in the Complaint that such a comment was made. There is no finding to support that any such statement was made. Accordingly, to the extent that any of the claims in this matter might survive, despite overwhelming evidence to the contrary, this portion of the Order should be struck as well.

F. The ALJ Erred By Refusing To Let Certain Employees Testify At The Hearing To Support Respondent's Defense

(Exceptions 42 through 46)

The ALJ failed to let several employees working at the DC testify about key aspects of the GC's case. Thus, in the wake of Contreras' testimony that consultants made threats of lost wages and futility, and the CG's stated theory that Respondent was a "recidivist employer," Tr. 12, Respondent attempted to call employee Andrew Ivey. Tr. 205-09. Mr. Ivey wanted to testify about his personal knowledge of the Union's tactics of fabricating unfair labor practice claims where none exist. He wanted to tell the ALJ that a large majority of employees (approximately 180 of 230) signed a petition stating that they wanted the Union to leave them alone and stop filing frivolous charges that kept them in laboratory or sterile conditions. He wanted to tell the ALJ that he sent this petition to both the Union and Region 21 but got no response. He wanted to tell the ALJ that the employees at the DC knew that Respondent was not violating the law as alleged by the Union.

Respondent also intended to call employees Jerome Dowdy, Howard Shelton, Joseph Elder, and Pete Manrique to testify that they signed the petition and knew from their experiences that the GC's witnesses were not telling the truth. Tr. 211-13. These witnesses were not allowed to testify. Tr. 214.

It was prejudicial error not to allow these witnesses to testify and refuse to admit the petition into evidence. This is particularly true in light of the ALJ's statement that "There can be little doubt that Respondent's conduct has chilled employee support for the Union." ALJD 9:18. These witnesses were going to testify that the overwhelming majority of employees knew exactly the opposite was true. They were going to testify that it is the Union's abuse of the Board's processes to which they object, not any conduct on the part of Respondent.

The GC opened the door to this testimony when it put on witnesses to say that Respondent never made comments in support of employee Section 7 rights and when the GC insisted that there was some pattern of "recidivist" behavior. The ALJ made this testimony clearly relevant and material to the ALJ's ruling when the ALJ assumed, without any evidentiary basis, that employee support for the Union was somehow "chilled" by things that never happened while refusing at the same time to let these very employees testify that it was the Union, and not Respondent, that was interfering with their Section 7 rights.

The ALJ's ruling underscores the crucial nature of this testimony. If the Board does reject the ALJ's findings and recommendations in this matter, it should at least remand the case so that this admittedly material evidence can be heard and considered as part of the record as a whole. *Universal Camera, supra.*

V. CONCLUSION

The record evidence establishes that counsel for the GC did not prove the allegations of the Complaint. As the Respondent's Exceptions and supporting memorandum reveal, the ALJ made numerous errors in concluding to the contrary. For these and all the reasons set out above, Respondent's Exceptions should be accepted, the findings and conclusion of the ALJ to which Respondent excepted should be rejected, the Board should conclude that no violations of the Act occurred, and the Complaint should be dismissed in its entirety with prejudice. Alternatively, the matter should be remanded so that a complete record can be made and thoroughly considered. Alternatively, any order issued in this matter should contain no extraordinary remedies and should be otherwise amended as requested above.

Dated: August 31, 2015

Respectfully submitted,

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Case 21-CA-129446

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

UNF WEST, INC.
Respondent

and

TEAMSTERS, CHAUFFERS, WAREHOUSEMAN, INDUSTRIAL
AND ALLIED WORKERS OF AMERICA,
LOCAL 166, INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Petitioner

CERTIFICATE OF SERVICE

I certified that a copy of the foregoing document in the above-captioned case has been electronically filed, served by email and/or sent by overnight delivery on the following persons this 31st day of August, 2015:

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