UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILUM TEXTILE SERVICES CO.

and **Cases 28-CA-20898**
28-CA-20906
28-CA-20973
28-CA-21050
28-CA-21203

UNITE HERE!

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COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Respondent's Exceptions to the Decision of Administrative Law Judge Lana H. Park (ALJD) are without merit and not supported by the evidence.[1] The ALJ's findings that Respondent violated Section 8(a)(1) of the National Labor Relations Act by filing and pursuing a lawsuit against the Union that was preempted by federal law; by promulgating and thereafter maintaining a rule prohibiting employees from wearing union buttons while working; and by creating the impression of surveillance by operating a security video camera in its lunchroom, are fully supported by the record. Similarly, the record also supports her findings that Respondent violated Section 8(a)(1) and (3) of the Act by suspending Evangelina Guzman because she refused to remove a union button and by discharging employees Denise Knox and Soe Moe Min because of their support, and protected activities on behalf of, UNITE HERE! (the Union). Accordingly, the Board should adopt the ALJ's

[1] Milum Textile Services Co. is referred to as Respondent. UNITE HERE! is referred to as Union. References to the transcript are designated as (Tr.) with the appropriate page citations. References to the General Counsel, Respondent, and Charging Party Exhibits are referred to as (GC.) (R.) and (CP.) respectively, with the appropriate number or numbers for those exhibits. References to the ALJD are designated as "ALJD" followed by the applicable page number.

findings of fact, conclusions of law, and recommended order as they relate to Respondent's Exceptions.

I. PROCEDURAL HISTORY

The hearing in this matter was conducted before ALJ Joseph A. Gontram between March 5 and April 11, 2007, over a total of 14 days. (GC 1(m); GC. 1(v); GC. 1(mm); GC 1(oo); GC 1(ww)) On July 18, 2007, Judge Gontram unexpectedly died. The parties waived their right to a trial de novo, and on August 7, 2007, the matter was transferred to ALJ Lana Parke to issue a decision based upon the record. (ALJD at 1)

In her decision, ALJ Parke properly found that soon after the Union began its organizing drive, Respondent engaged in an extensive campaign of unfair labor practices intended to thwart its employees' rights to organize, including:

1. In March 2006,[2] providing employees with benefits, in the form of nametags, to assuage employee complaints that Respondent's Production Manager, Angela Kayonnie, would clap and poke at them, rather than address them by name, in violation of Section 8(a)(1). (ALJD at 15, 27)

2. In April, attempting to obtain injunctive relief against the Union in Federal court using a legal theory which was objectively baseless because it was preempted, in violation Section 8(a)(1). (ALJD at 16, 27)

3. In June and July, prohibiting employees from wearing pro-Union buttons, in violation of Section 8(a)(1). (ALJD at 17, 27)

4. In July, suspending Evangelina Guzman because she refused to remove a pro-Union button, in violation of Section 8(a)(3). (ALJD at 24, 27)

5. In July, discharging Union activist Denise Knox and her coworker Soe Moe Min, in violation of Section 8(a)(3). (ALJD at 21-23, 27)

6. In December, mandating that each employee watch a video presentation containing a threat to employees that unionization would result in a reduction in their wages, in violation of Section 8(a)(1). (ALJD at 19-20, 27)

[2] All dates are in 2006, unless otherwise noted.

7. In January 2007, installing a video surveillance camera in the employee lunchroom, a place where employees routinely engaged in Union activities, in violation of Section 8(a)(1). (ALJD at 19, 27)

8. In preparation for the hearing in this matter, illegally interrogating at least 10 employees by failing to communicate to them the safeguards provided in *Johnnie's Poultry Co.,* 146 NLRB 770 (1964), in violation of Section 8(a)(1). (ALJD at 20, 27)

On November 30, 2007, Respondent filed five exceptions to the ALJD and a brief in support. In Exception 1, Respondent excepts to: (a) the ALJ's finding that Respondent's termination of Denise Knox and Soe Moe Min violated Section 8(a)(1) and (3) of the Act, and (b) that the ALJ's award of backpay and reinstatement is an appropriate remedy. Respondent's Exception 2 asserts that the ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by filing and pursuing a lawsuit that was preempted by federal law. Respondent's Exception 3 claims the ALJ erred in concluding that Respondent illegally promulgated and maintained a rule prohibiting employees from wearing union buttons while working. In Exception 4, Respondent excepts to the ALJ's finding that Respondent violated Section 8(a)(1) and (3) by suspending Evangelina Guzman because she refused to remove a union button. Finally, Respondent's Exception 5 asserts that the ALJ erred in finding that Respondent illegally created the impression of surveillance by operating a security video camera in its lunchroom.

Respondent did not file exceptions to any other finding, conclusion of law, or recommendation made by the ALJ, including the determination that Respondent violated Section 8(a)(1) by providing employees with benefits in the form of nametags; mandating that employees watch a video presentation containing a threat that unionization would result in a reduction of wages; and unlawfully interrogating employees by failing to communicate the *Johnnie's Poultry* safeguards. Because no exceptions were filed to these findings of violation,

the Board should adopt the ALJ's findings, along with all other findings of fact, conclusions of law, and recommendations as set forth in the ALJD that are not specifically asserted in Respondent's exceptions, or otherwise excepted to by the General Counsel.[3] BOARD'S RULES AND REGULATIONS, § 102.48; *Kings Electronics Co., Inc.*, 109 NLRB 1324, 1324 (1954) (upon respondent's failure to file exceptions, the Board abides by Section 102.48 and adopts the ALJ's findings, conclusions, and recommendations).

II. QUESTIONS INVOLVED

A. Whether the ALJ erred in finding that Respondent violated Section 8(a)(1) by attempting to obtain injunctive relief against the Union in Federal court using a legal theory which was objectively baseless because it was preempted. (Resp't Exceptions #2) (ALJD at 16, 27)

B. Whether the ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by prohibiting employees from wearing pro-Union buttons in June and again in July. (Resp't Exceptions #3) (ALJD slip op. at 17, 27);

C. Whether the ALJ erred in finding that Respondent violated Section 8(a)(1) by installing a video surveillance camera in the employee lunchroom. (Resp't Exception #5) (ALJD at 19, 27)

D. Whether the ALJ erred in finding that Respondent violated Section 8(a)(1) and (3) by discharging Denise Knox and Soe Moe Min, and ordering reinstatement and backpay as a remedy. (Resp't Exception #1) (ALJD at 21-23, 27)

E. Whether the ALJ erred in finding that Respondent violated Section 8(a)(3) by suspending Evangelina Guzman for refusing to remove a pro-Union button. (Resp't Exception #4) (ALJD slip op. at 24, 27)

III. BACKGROUND

A. Respondent's Operations

Respondent operates a commercial laundry in Phoenix, Arizona, laundering both restaurant and healthcare linens, and provides pickup and delivery services to its area

[3] On November 30, 2007, the General Counsel filed exceptions to the ALJD, asking the Board to find that the ALJ erred in refusing to find nine separate 8(a)(1) violations, three separate 8(a)(3) violations, and for refusing to order a remedy pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

customers, including hospitals and restaurants. (ALJD at 2) The laundry is a large facility, occupying an entire city block. (Id.) Respondent's production department, which includes the finishing, washing, and sorting employees, operates Monday through Saturday and has two general shifts: 6:00 a.m. until 2:00 p.m., and 2:00 p.m. until the work is completed for the day. (Id.) In March, Respondent's laundry employed about 70 production employees, who had never been represented by a labor union. (ALJD at 2) (Tr. 1901, 2202)

Craig Milum serves as Respondent's President and CEO. (ALJD at 2) Respondent's facility is managed by Production Manager Angela Kayonnie and Production Supervisor Jaime Chavez. (Id.) Milum, Kayonnie, Chavez, Respondent's Maintenance Engineer Raphael Parra, and its Information Technology Director, Jason Meyers, are all admitted Section 2(11) supervisors and Section 2(13) agents of Respondent. (Id.)

B. <u>The Union's Organizing Drive</u>

1. The Union's Initial Steps

The Union officially launched its organizing campaign by conducting a "blitz" during the weekend of February 24, 2006, and brought in organizers from throughout the country to help. (Tr. 841-42, 859-61, 867-69, 887, 951-52, 987-88, 1012-13, 1622, 1635) As part of the blitz, the Union organizers visited employees, speaking to them about their working conditions, educating them about the Union, and asking them if they would like to join the Union and authorize the Union to represent them in negotiations with Respondent. (Tr. 860) (GC. 28, 127) Employees who desired to be represented by the Union signed a petition (Petition) accepting membership in the Union and expressly authorizing the Union to bargain on their behalf. (GC. 28, 127) More specifically, the Petition, in both English and Spanish, stated:

WE DEMAND TO JOIN WITH UNITE HERE AND 40,000 UNION LAUNDRY WORKERS ACROSS THE COUNTRY![4]

> I hereby accept membership in UNITE HERE, the international laundry workers' union, and authorize UNITE HERE to represent me in negotiations with my employer about wages, hours and all other conditions of employment.

Respondent's workers delivered the Petition to Milum during a work stoppage on March 4. (ALJD at 3)

2. The Employees' March 4 Demand For Recognition

By March 4, a majority of Respondent's production employees – at least 43 out of 70 – had signed the Petition authorizing the Union to represent them. (ALJD at 3, 13, 26) On this date, employees stopped work and asked to speak to Milum. When Milum arrived, an employee presented him with the Petition saying that the workers wanted the Union to represent them. (ALJD at 3) After receiving the Petition, Milum spoke with employees for about 45-60 minutes, with Chavez translating. (ALJD at 5) Milum asked the congregated employees why they wanted a union. Some employees responded by complaining that Kayonnie did not treat them with respect and dignity and that she clapped her hands or poked at them instead of using their names. Milum told employees that the process of getting a union could be long, there could be a lot of problems because the employees could strike, and they might have to go to court to obtain a union election. Milum then told the workers that there was no need for a union because he could resolve the problems at the plant, and asked workers what issues they wanted him to change. (Id.) (Tr. 572)

In response to Milum's solicitation, some employees suggested that Kayonnie be removed. (ALJD at 5) Milum responded by telling employees that Kayonnie was a good

[4] The ALJ erred in noting that the petition said "UNITED HERE" instead of "UNITE HERE." (See, ALJD at 3) (GC. 28, 127)

supervisor and assuring them that he would speak to her about treating employees better. (ALJD at 5, 15) When one employee suggested Respondent provide them with nametags so that Kayonnie would have no excuse for not calling them by name, Milum promised to do so. Indeed, he immediately set out to obtain name badges, expediting their purchase. (ALJD at 5) (GC. 30) (Tr. 56) The nametags, which were attached by a metal pin with a rotating enclosure, contained Respondent's logo and the first name of each employee, and were distributed about a week after the work stoppage. (ALJD at 5) (Tr. 440) (GC. 31, 32) By distributing these nametags, Respondent illegally granted a benefit to employees in order to discourage them from engaging in Union activities. (ALJD at 15, 27)

3. Post-March 4 Organizing Efforts

Around the same time as the work stoppage, the Union began having biweekly meetings for employees. (ALJD at 4) These meetings would take place, among other places, outside the plant on the Sixth Avenue sidewalk or at the McDonald's restaurant across the street. (Tr. 574-75, 881) The Union also recruited a team of employees to distribute fliers inside Respondent's facility; organized a picket with Respondent's employees on the Sixth Avenue sidewalk; circulated petitions for employees to sign relating to their working conditions; and handed out Union shirts, wrist-bands, stickers, and buttons, which many workers wore while working. (ALJD at 4) (Tr. 467-71, 1117, 1134-35) (GC. 45, 104, 134)

C. <u>The Union's Publicity Campaign</u>

In conjunction with its activities focusing on Respondent's employees, on March 10, the Union started publicizing its organizing drive and employee complaints about their working conditions to the public. For example, the Union created a website entitled "milumexposed," on which safety and employee issues were discussed. (ALJD at 4) In early

March, relying upon findings of governmental regulatory agencies and employee reports, the Union sent letters to some of Respondent's customers alerting them to Respondent's unacceptable health and safety practices. (ALJD at 4-5) (GC. 8 – attached letters) (Tr. 1693, 2252-54) Relying upon this same information, on April 24 the Union issued a press release repeating its criticism of Respondent's health and safety practices, and publicizing a report on these practices which was to be released on April 27. (ALJD at 4) (GC. 8 – attached press release) (Tr. 2256) The press release also alerted the public that the Union's president and Respondent's employees would present this report to restaurants using Respondent's services and their customers, and that Respondent's employees would speak about their working conditions. (GC. 8 – attached press release)

During this same time period, the Union started distributing informational leaflets publicizing its organizing efforts to members of the public. (Tr. 879) The leafleting generally occurred outside various restaurants using Respondent's services. (ALJD at 4) (Tr. 307-308)

In June, a State Senator along with various community leaders signed a letter asking Respondent to respect its employees' rights to unionize and expressing solidarity with the employees. (GC. 43) Also in June, union representatives, community leaders, and employee supporters, came to Respondent's plant with a local television crew, and spoke to Respondent about working conditions at the plant and the employees' demand for union representation. A news segment about this meeting ran that evening on a local television station. (ALJD at 4) (Tr. 134-34)

On July 6, the Union sponsored a community forum in Tucson where some of Respondent's employees discussed their working conditions. (ALJD at 4) (GC. 9) A news segment about this meeting aired on the evening news in Tucson, showing Respondent's

employees, accompanied by Union leaders, speaking about their working conditions. (Id.) The segment also contained an interview with employee Denise Knox. (ALJD at 9) Milum was in Tucson that day, in anticipation of being interviewed for the segment, but the interview did not take place. (ALJD at 4 n.9)

D. Respondent's Response to the Union's Organizing Drive

Because the Union had successfully organized other area laundries, Respondent had been anticipating that the Union would attempt to organize its employees. (Tr. 40, 2040-43, 2055) Accordingly, Milum had warned his supervisors to be alert for the Union and to contact him if such activity occurred. (Tr. 1868) When the Union first appeared, Kayonnie telephoned Milum, telling him that the Union was distributing literature and speaking to employees outside the Sixth Avenue entrance. (Tr. 39)

After the Union's organizing drive started, Milum instructed his managers to gather information about employee union support and discussed this information with them. For example, Milum met with Kayonnie every other day to discuss what was occurring with the Union organizing drive. (Tr. 73-74, 129) Kayonnie told him which employees were speaking with the Union organizers and whether the employees were treating her any differently. (ALJD at 4) (Tr. 73-74) At the hearing, Milum admitted that, in one of these meetings, Kayonnie told him that some of Respondent's Burmese employees had joined the Union after speaking with organizers outside the plant. (Tr. 71-72, 92) Kayonnie also told him that at least one employee was speaking to organizers from inside the plant, through the plant window. (Tr. 143-44, 146) Similarly, Respondent's other supervisors kept Milum well-informed about the Union's activities amongst employees. For example, Respondent's Maintenance Engineer Raphael Parra told Milum that the Union was visiting employees at

home and telephoning them late at night. Parra obtained this information directly from an employee. (Tr. 308)

Additionally, one week after the March 4 work stoppage, Milum met separately with a group of four Burmese employees, the majority of whom were political refugees, wanting to clarify to these employees what occurred at the work stoppage. (Tr. 64, 66, 145-46) He told these employees that the Union wanted to represent employees and, if this occurred they would be required to pay the Union dues. (Tr. 67-69)

E. Respondent's Publicity Campaign

Respondent attempted to engage in its own public relations counterattack to thwart the Union. Milum wrote various opinion pieces and was interviewed for newspaper articles regarding the Union. (GC. 37, 92) Some of these pieces were published. (GC. 92) In these articles, Milum compared the Union's organizing drive to an "organized crime shakedown" and blamed the Union for complaints made to various regulatory agencies. (ALJD at 7, 21) (GC. 92-attachment, 97) At the hearing, Milum testified that he believed that the Union was associated with the mafia. (Tr. 390) (GC. 5, p. 4) Respondent also tried to engage in a "counter-leafleting" campaign. (Tr. 381-82) More particularly, Milum drafted a leaflet he forwarded to some of his customers asking if they could be distributed at their restaurants. (Tr. 381-82) (GC. 78) Milum informed his customers that he had individuals ready to respond to any Union hand-billing in 30 minutes with his counter-leaflets. (GC. 80)

F. Computer Video Presentation to Employees

In December, the Respondent showed each of its approximately 70 employees a company-created video that threatened employees with a drastic reduction in wages if they selected the Union, and blamed the Union for asking various regulatory agencies to

investigate the Respondent's activities. (ALJD at 8) (Tr. 101-05) (R. 71) This video presentation was mandatory for all employees, who were individually escorted to it by Kayonnie or Chavez. (Tr. 101) The ALJ found this video to contain unlawful threats to reduce wages, and Respondent has not excepted to this finding. (ALJD at 19-20, 27)

G. ***Johnnie's Poultry* Violations**

In preparation for the hearing, Respondent's attorney and Milum interviewed a number of employees at the Respondent's facility, including: Maria Zambrano, Carlos Zambrano, Edgar Villagrande, Pat Goebel, Edel Davilla, Alvaro Munoz, Maria Martinez, Rosa Reyes, Maria Teresa Velasquez, and Lydia Roberts. Each of these employees testified, and the ALJ found, that none of them were ever informed that their participation in the interview was voluntary or that no reprisals would be taken. (ALJD at 8, 20) Similarly, the ALJ found that, at the interview, neither Respondent's attorney nor any representative of the Respondent assured any employee that the meeting was voluntary and/or that no reprisals would be taken. (Id.) The ALJ found that these interviews violated the Act, and Respondent did not except to this finding.

IV. ANALYSIS

A. Contrary to the Respondent's Exceptions, the ALJ properly found that Respondent's attempt to obtain injunctive relief based upon the secondary boycott allegation violated Section 8(a)(1).

1. Facts

Concerned about the release of the Union's report, the press release and the press conference scheduled for April 27, and anxious about the circulation of the customer letters (see Section III.C, above), Respondent sued the Union in Federal Court, seeking to stop these

actions from occurring.[5] (GC. 8, 10) More specifically, on April 26, Respondent filed a verified complaint for injunction and damages (Complaint), and a motion for temporary restraining order (Motion), in Arizona Federal District Court, seeking temporary and permanent injunctive relief prohibiting the Union from contacting Respondent's customers or the customers of Respondent's customers. (ALJD at 6) Respondent's Complaint alleged that the Union was engaged in an illegal secondary boycott, and also alleged several pendant state common law claims including libel, intentional interference with economic relations, intentional interference with prospective economic advantage, and fraud. (Id.) Respondent's Motion was based solely on the illegal secondary boycott allegation, and was aimed at stopping the Union's activities planned for the next day. (GC. 10, 11, 12)

On April 27, the district court held a hearing and denied Respondent's Motion on grounds that the issues were preempted by federal law. (ALJD at 6, 16) At the hearing, Respondent conceded this point. (GC. 12) The court also held that, to the extent any of Respondent's claims were not preempted, but were instead defamation tort claims, the evidence Respondent presented failed to meet the federal test for "actual malice." (GC. 12, p. 20) Despite the court's clear and unequivocal ruling, Respondent continued to maintain and prosecute its federal lawsuit against the Union until May 26, thus requiring the Union to file an answer to the Complaint and incur additional attorneys' fees. (ALJD at 6) With the injunction issue resolved, the Union proceeded with its planned activities for that day. (R 29, GC. 5, 42)

[5] Before filing its lawsuit, on April 3, Respondent filed a charge against the Union with the NLRB seeking an injunction, alleging that the customer letters constituted a secondary boycott. (ALJD at 5) As of the time of the April 24 press release, the charge was still pending. On April 28, Region 28 dismissed Respondent's charge against the Union, and the dismissal was upheld by the NLRB Office of Appeals on June 7. (ALJD at 5)

2. Argument

The ALJ properly found that Respondent violated the Act by attempting to obtain injunctive relief based upon its secondary boycott claim. (ALJD at 16) In so finding, she applied the standards articulated in *BE&K Construction Co.,* 351 NLRB No. 29 slip op. at 1, 8 (2007), namely, that Section 8(a)(1) is violated where a lawsuit is objectively baseless and filed with a retaliatory purpose. The Board in *BE&K* instructed that a lawsuit is objectively baseless, lacking a reasonable basis in law or fact, if no reasonable litigant could realistically expect success on the merits. Id. slip op. at 7, citing *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.,* 508 U.S. 49, 60 (1993). Likewise, a lawsuit is retaliatory if it directly attacks or seeks to enjoin protected concerted activity. *Geske & Sons, Inc.,* 317 NLRB 28, 58 (1995) enfd. 103 F.3d 1366 (1997) (lawsuit whose subject matter in significant part was aimed at protected activity is retaliatory, even though some causes of action were not preempted.)

Respondent's secondary boycott allegation, and its attempt to obtain injunctive relief in federal court based upon this allegation, is precisely the type of objectively baseless lawsuit contemplated by *BE&K Construction.* As the district court judge held, Respondent's injunctive relief claim was preempted because its secondary boycott allegation clearly concerned matters within the Board's exclusive jurisdiction. See *San Antonio Community Hospital,* 125 F.3d 1230, 1235 (9th Cir. 1997) (NLRA preempts injunctions for secondary activity; injunctive relief possible only for defamation claims if "actual malice" standard is met); see also 29 U.S.C. § 104 (limiting federal courts from enjoining activities "involving or growing out of any labor dispute"). Furthermore, Respondent's lawsuit was retaliatory within the meaning of *BE&K*, since it was targeted directly at protected activity, specifically, seeking

to prohibit publicity aimed at improving employee terms and conditions of employment. *Geske & Sons, Inc.*, supra.

In an attempt to gloss over the baselessness of the Motion it used to drag the Union into court, Respondent asserts that ALJ cannot find a violation based solely upon Respondent's actions concerning its secondary boycott claim. See *Resp't Br. Supp.* at 23-26. This assertion is without merit. A similar argument was rejected in *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), which specifically noted that "the Board has enjoined an employer from prosecuting specific portions of a lawsuit found to be preempted by Federal labor law while deferring actions on others that were not." Id. at 603, citing *Mano Electric, Inc.*, 321 NLRB 278, n.5, 297 (1996). Thus, contrary to Respondent's claim, the Board is not required to consider the litigation "as a whole." Accordingly, the ALJ properly found that Respondent's attempt to obtain injunctive relief based upon the secondary boycott allegation had no reasonable basis in law and was unlawful under Section 8(a)(1) of the Act. (ALJD at 16). Respondent's Exception 2 to the ALJD should be denied.

B. <u>Contrary to the Respondent's Exceptions, the ALJ properly found that Respondent's prohibition of Union buttons violated Section 8(a)(1).</u>

1. The Respondent-Supplied Employee Nametags

It is undisputed that, a few days after the work stoppage, Respondent unlawfully granted a benefit to employees in the form of nametags, to discourage them from engaging in Union activities. (ALJD at 15, 27) The white plastic nametags are 3 inches by 1 ¼ inches, and are affixed to a person's clothing by a 1 ¼ inch metal pin on the back with a rotating closure. (ALJD at 5) The front of the nametag contains Respondent's logo and the employee's first name. (GC. 32) Employees wore their nametags after they were distributed, but some employees lost them. (441-42, 500, 580, 702, 1138) At least four people, including

Kayonnie and Chavez, testified that their nametags either fell off or were lost at the plant. (Tr. 440-41, 605; 754, 838-39) (ALJD at 7)

In apparent recognition that the use of these nametags conflicted with the rule prohibiting the wearing of Union buttons, at the hearing Respondent tried to create the impression that it had reconsidered its policy requiring employees to wear the nametags. When first asked this question, however, Milum unequivocally testified that he had not reconsidered this policy. (Tr. 2078) Hoping for a better answer, seconds later, his counsel re-asked the question. Milum then changed his answer, claiming he had decided to eliminate the nametag policy. (Tr. 2078) Under cross-examination, however, Milum admitted that he never told any of his employees that there was any change to Respondent's nametag policy. (Tr. 2236) Moreover, Kayonnie admitted that employees were still wearing their nametags in August, well after Respondent prohibited the Union buttons. (Tr. 702-03, 2236)

2. Respondent's June Prohibition on Wearing Union Buttons

In late June, Respondent's employees started distributing Union buttons, which they wore at work. (Tr. 414, 1629) These buttons are made out of metal and plastic, are 1 ½ inches in diameter, and say "UNITE HERE!" (Tr. 1629-30) (GC. 45) The buttons are affixed to a person's clothing by means of a 1 inch, spring-loaded metal pin with a safety latch. (ALJD at 6)

On June 27, Zulema Ruiz wore a Union button to work. Milum was summoned to the workroom floor, and told her that she was not allowed to wear the button while working because it contained a "sharp needle" and because it could fall off and damage the equipment. (ALJD at 6) (Tr. 150-51) Milum admitted that he had not examined the Union button, but

simply assumed it was affixed with a sharp pin. (ALJD at 6 n.17) Ruiz removed the button, and never wore one again.[6] (Tr. 419)

3. Respondents' July Prohibition on Union Buttons and Guzman's One Day Suspension

On July 4, Evangelina Guzman arrived at work wearing a Union button. (ALJD at 6) As she approached the time clock, Milum told her that she had to remove the button and could not wear it while working. (ALJD at 6) (Tr. 157, 579) Guzman wanted to wear the Union button, but Milum insisted the button was a safety hazard because the pin could press into a person's body if they were picking up linens, or fall into and scratch the ironer. (ALJD at 6) (Tr. 157-58) Milum told Guzman that she could not work with the button and that she would lose holiday pay for not working that day. (ALJD at 6) Guzman refused to remove the button, and left without working. (Id.)

4. Respondent's Stated Reasons for its No Button Rule Are Pretext

Notwithstanding its nametag policy, Respondent insisted that a prohibition against Union buttons was necessary because they posed a safety risk to individual employees and could also damage its equipment. (Tr. 151, 153, 702-03, 2236) In support of this assertion, Milum testified that the nametags were safer than the Union buttons. (Tr. 166) For example, Milum claimed that the design of the nametag, with a closing mechanism for the pin, kept the pin from opening and the nametag from falling off. (Tr. 167) He also claimed that the nametag's design precluded employees from sticking themselves with the pin. (Tr. 167)

These conclusory assertions unraveled at the hearing. During a demonstration by the General Counsel, Respondent's nametag opened easily, whereas the Union button would not.

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[6] Numerous witnesses testified that Respondent's employees are allowed to wear a wide variety of jewelry, and do so without incident, including large and small earrings, watches, rings, necklaces, and chains. (ALJD at 7) (Tr. 416, 444-445, 580, 698, 1146, 1225-26, 1574)

(ALJD at 7) (Tr. 168) Milum himself substantiated this when, during a demonstration, he attached a nametag to his shirtsleeve to show that it would not come off. (Tr. 169-70) Comically, when Milum shook his arm, the nametag quickly flew off, almost hitting the Judge. (Tr. 169-70) Milum's demonstration confirmed the testimony of the four employee witnesses, who testified that they lost their nametags when they fell off at work. (ALJD at 7) (Tr. 441-42, 605, 754, 838-39)

Moreover, the General Counsel called Dr. Gary Bakken as an expert witness to testify as to the relative safety of the Union button versus the Respondent's nametag. (ALJD at 7) (Tr. 217-240; GC. 47-48) Bakken, an industrial engineer and professor at the University of Arizona, testified that the Union button was, in fact, safer than Respondent's nametag. (ALJD at 7, 17) (Tr. 223-240; GC. 47, 48) Bakken also testified that Respondent's nametag was more likely to become unlatched and dislodged during the workday, and was more likely to injure someone at work. (ALJD at 7, 17) (Tr. 224-29, 232, 239) Finally, Bakken testified that the Respondent's nametag was more likely to cause greater damage if it fell into Respondent's equipment. (Tr. 229)

5. Analysis

It is well established that employees have a statutorily protected right to wear union insignia. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945). An employer may not prohibit the wearing of union insignia absent special circumstances. *Airport 2000 Concessions, LLC,* 346 NLRB No. 86 slip op. at 3 (2006). An employer seeking to ban union insignia bears the burden of establishing substantial evidence of such special circumstances. *Inland Counties Legal Services,* 317 NLRB 941, 942 (1995). The ALJ properly found that

Respondent could not establish that special circumstances existed, and therefore its prohibition on the Union buttons violated Section 8(a)(1) of the Act.

Respondent's claim that the ALJ erred in finding a violation because of the safety risks posed by the buttons utterly fails. *Resp't Br. Supp.* at 34-35. The ALJ properly considered, and rejected this argument. (ALJD at 17) First, it is undisputed that Respondent allowed its employees to wear all types of jewelry to work, including large and small earrings, necklaces, chains, watches, and rings, which, from a safety risk standpoint, are indistinguishable from the Union buttons. (ALJD at 7, 7 n.19) Second, it is undisputed that just months before employees started wearing the Union buttons, Respondent had issued nametags to its employees, which they were still wearing at the time Respondent banned the Union buttons. The record establishes that Respondent's nametags were, in fact, more dangerous to employees than the Union buttons, and potentially more hazardous to Respondent's equipment. Under these circumstances, Respondent's rule prohibiting employees from wearing Union buttons violated Section 8(a)(1) of the Act. *Airport 2000 Concessions, LLC,* 346 NLRB No. 86 slip op. at 3 (ban on union button unlawful where employer allowed employees to wear other kinds of pins and buttons).

Similarly without merit is Respondent's claim that the ALJ erred in finding a violation because Respondent's ban was not motivated by anti-Union animus. *Resp't Br. Supp.*, at 32-33, 35. As noted by the ALJ, Respondent's motivation is not the test when determining whether an employer violated Section 8(a)(1) of the Act. (ALJD at 17) See *Homer D. Bronson Co.*, 349 NLRB No. 50 slip op. at 28 (2007) (motive is irrelevant when considering an 8(a)(1) violation); *U.S. Postal Service,* 204 NLRB 299, 310 (1973) (purity of employer's motives in prohibiting union button does not exonerate it from its otherwise unlawful

conduct). Instead, the test is whether Respondent's conduct reasonably tended to interfere with its employees' free exercise of their guaranteed rights. Id. Here, the ALJ properly found that Respondent interfered with its employees' Section 7 right to wear and display union insignia while at work without proper justification. *Airport 2000 Concessions, LLC,* supra. Both the record evidence and the law support this finding, and Respondent's Exception 3 to the ALJD should be denied.

C. Contrary to the Respondent's Exceptions, the ALJ properly found that Respondent created the impression of surveillance by installing the lunchroom camera.

The ALJ properly found that Respondent created the impression that it was spying on employees when it installed a new video surveillance camera in the employee lunchroom, a place where employee interaction and Union activity regularly occurred. (ALJD at 19) In determining whether the installation of cameras violates the Act, the "inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances, because keeping pictorial records tends to create fear among employees of future reprisals." *Trailmobile Trailer, LLC.*, 343 NLRB 95, 96 (2004) Thus, while an employer has a right to maintain security measures necessary to further their legitimate business interests during union activity, an employer engaged in videotaping such activity has the burden to demonstrate that it had a reasonable basis for its actions. Id.

Here, Respondent simply cannot do so. The record evidence clearly establishes that employees actively participated in union activities in the lunchroom. (ALJD at 19) Employees placed stacks of Union fliers in the lunchroom (Tr. 884); kept a microwave donated by the Union and festooned with Union stickers in the lunchroom, and positioned a large pro-Union banner on the lunchroom wall. (ALJD at 4) The record also supports the ALJ's conclusion that Respondent's stated reasons for installing the lunchroom camera –

prior vandalism of vending machines, complaints about stolen lunches, and the use of the lunchroom to pass out paychecks – were complete and utter pretext. (ALJD at 19)

More specifically, Respondent's Information Technology Director, Jason Meyers, testified that Respondent did not look into the reasons to justify placing a camera in the lunchroom until *after* the decision to do so was made. Myers' wife researched the issue and found a case where an employer was allowed to place a camera in a break room because the employer passed out checks in that area. Based upon this after-the-fact research, Myers and Respondent's office manager decided that the distribution of checks would be the primary reason they would rely upon for the installation of the new lunchroom camera. (Tr. 1469-73) It was at this time that Respondent also decided it would use the presence of vending machines in the lunchroom as another reason for the camera. (Tr. 1472) Similarly, Myers testified that the issue of stolen lunches did not arise until *after* the lunchroom camera was installed. This justification was concocted while he was preparing an outline of his testimony in this matter, which he e-mailed to Milum for review. (Tr. 1473, 1476) Myers testified that the stolen lunches were nothing more than a reason Milum "added" to the other reasons Myers had documented for installing the lunchroom camera. (Tr. 1473) The utter baselessness of these reasons are reinforced by Respondent's failure to communicate them to its employees, who would have instantly recognized them as pretext. (ALJD at 19)

Respondent also suggests that the timing of the lunchroom camera's installation does not support a violation. *Resp't Br. Supp.*, at 41. This suggestion is without merit. Respondent installed the camera just a few weeks after one of its largest customers had informed Respondent it wished to terminate its contract with Respondent because of the Union's publicity campaign. (GC. 76, 83) (Tr.373-374) Thus, although the Union campaign

had been ongoing for some time, it was still having an effect and clearly had not become stale. The effectiveness of the Union's campaign, combined with the blatantly pretextual reasons for the installation of a camera in the area where significant union activity transpired, supports the ALJ's finding that Respondent violated Section 8(a)(1), and Respondent's Exception 5 to the ALJD should be denied.

D. Contrary to the Respondent's Exceptions, the ALJ properly found that Respondent discharged Denise Knox and Soe Min in violation of Section 8(a)(1) and (3) and, as a remedy, ordered backpay and reinstatement.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), the General Counsel has the burden of establishing that an employee's protected activity was a motivating factor for an adverse employment action. The Administrative Law Judge correctly found that the General Counsel met this burden in connection with the discharges of Denise Knox and Soe Min, where both engaged in Union activity, Respondent was aware of their Union activity and sympathies, Respondent harbored significant Union animus, and Respondent discharged Knox and Soe Min for reasons that were blatantly pretextual.

1. Background Facts

a. Events Leading Up to Soe Min's and Knox's Discharges

Denise Knox and Soe Moe Min (Soe Min) were two of six employees who worked in Respondent's soil sort area, sorting dirty hospital linens. (ALJD at 9) (Tr. 1303, 1481-82, 2097) They were both terminated on Saturday, July 8, even though neither had ever received a previous written warning. (Tr. 368) (GC. 111, 112) Indeed, Soe Min, who speaks only Burmese, was a new employee, having started in February, and new to the United States, having emigrated just a month before starting his job. (Tr. 514, 525-26)

On July 8, the soil sort employees, including Soe Min and Knox, were scheduled to start work at 4:00 a.m. (Tr. 526, 1482-83) Knox clocked in at 3:53 a.m, and was in the

lunchroom a little after 4:00 a.m., when Milum walked in and found her sitting down. (ALJD at 9) (Tr. 245; GC. 50, 54) Milum told Knox that it was wrong for her to be in the lunchroom sitting down on work time, that she was stealing time and money, and that she was to punch out and go home. (ALJD at 9-10) Knox told Milum that the other soil sort employees, including the lead person Maria Zambrano, would do the same thing, but her plea was to no avail. (ALJD at 10, 10 n.27) In fact, the ALJ found that it was a well-established practice for all of the soil-sort employees to remain in the lunchroom for several minutes after clocking in instead of beginning work immediately. (ALJD at 10, n.27) (Tr. 184; GC. 46) Despite this practice, Milum told Knox she was fired, and Knox punched out at 4:11 a.m.. (ALJD at 10) (Tr. 249)

Similarly, on July 8, Soe Min made the 45-minute trek to work on his bicycle and clocked in at 3:53 a.m. (Tr. 521) Shortly after he began work emptying bags of dirty laundry, he became thirsty and went to the lunchroom to get a soda. When Soe Min arrived in the lunchroom, he saw Milum with Knox. (ALJD at 10) Soe Min got his soda, took a drink, and then walked back to his work area, where he continued working. About 10 minutes after Soe Min had resumed work, Milum approached and spoke to him, gesturing at the time clock. Soe Min understood Milum's actions to mean that he was wasting time instead of working. (ALJD at 10) (Tr. 523, 540) Soe Min tried to show Milum the work he had completed, but to no avail. (Tr. 523) Milum left and, several minutes later, returned with a Burmese-speaking janitor, who told Soe Min that he was fired. Soe Min punched out at 4:17 a.m. (ALJD at 10)

b. Knox's Union Activities and Respondent's Knowledge

Knox was an active Union supporter, appearing on television several times supporting the Union, including a newscast on July 6, just two days before she was fired. (ALJD at 9) Milum knew of Knox's public pro-union appearances and admittedly believed her to be a

strong Union supporter. (ALJD at 21) By June, Milum thought that Knox was one of the strongest Union supporters amongst his employees. (Tr. 134-36)

c. Knox and Soe Min Were Disciplined More Severely than Similarly Situated Employees Who Had Not Engaged in Union Activities

The record is replete with instances in which employees engaged in conduct similar to Knox's and Soe Min's, and were not fired. (ALJD at 10, 22-23) Kayonnie testified that, if she had seen employees in the lunchroom lingering or sleeping instead of working, she would issue them an immediate verbal warning. (Tr. 711) This relatively low level of discipline is consistent with the discipline that Respondent has issued other employees who were caught "stealing time." For example, Kayonnie admitted that that she has given multiple employees verbal warnings for stopping work early to heat up their lunches in the lunchroom, or for punching in and then going to the lunchroom to put their lunches in the refrigerator. (Tr. 708-09)

Similarly, Milum testified that at least once a year he catches employees leaving their work areas, going to the bathroom, and then stopping in the lunchroom to get a snack or beverage. (Tr. 272-74) He has never fired any of these employees, but instead gives them a "stern discussion." (ALJD at 10) (Tr. 272-74) Milum also admitted that he has witnessed employees standing around after break, instead of returning to work. (Tr. 274) Similarly, none of these employees was ever fired. (Tr. 274)

Additionally, other employees have received written warnings as discipline for "stealing time." (ALJD at 10, 22-23) For example, just one month before Knox and Soe Min were terminated, Respondent <u>twice</u> caught an employee smoking cigarettes instead of working, once outside of the facility and once in the lunchroom. (ALJD at 10) That employee received only a written warning. (Tr. 790-91; GC. 122)

In another instance, Kayonnie watched for a one-week period as an employee continually left his work area to go to the bathroom every 15 minutes. (ALJD at 10) This employee received nothing more than a written warning. (Tr. 792; GC. 123) Finally, Patricia Goebel, another soil sort employee who testified at trial for Respondent, received a written warning in May for smoking in the bathroom when she should have been working. (Tr. 793-94; GC. 124) While Milum claimed that Respondent has a practice of terminating employees for severe misbehavior, the only relevant example he could cite involved an employee who was caught stealing linens and selling them to the public almost 20 years earlier. (Tr. 2115-22) The other occasions cited by Respondent involved supervisory or other non-unit employees, and the ALJ properly sustained the General Counsel's objections, finding these actions irrelevant. (Tr. 2115-22)

2. The ALJ Correctly Found the Discharges Violated the Act

The record amply supports the ALJ's finding that Knox was an active Union supporter, and that Respondent knew she was a strong Union supporter.[7] (ALJD at 21) The record is also clear that Respondent harbored significant union animus, starting with the numerous independent 8(a)(1) violations found by the ALJ, to which Respondent has not filed exceptions. See *Sunrise Health Care Corp.*, 334 NLRB 903, 906 (2001) (independent violations of Section 8(a)(1) constitute evidence of animus toward a union). Respondent's animus is further demonstrated by Milum's vitriolic statements concerning the Union, equating the Union with organized crime, describing it as a monster, and its representatives as cockroaches. (ALJD at 21) The Board and the Courts have long held that such statements are powerful evidence of anti-union animus. *Tualatin Elec., Inc.*, 319 NLRB 1237, 1237 (1995)

[7] Respondent's claim that Knox's discharge was not illegal because Milum had identified Guzman, not Knox, as its number one Union supporter strains credulity. *Resp't Brief in Support* at 7. Milum identified Guzman as its top supporter only after Knox was terminated. (GC. 86)

(owner evinced deep hostility toward union by calling it "organized crime"); *Progressive Elec., Inc. v. NLRB.*, 453 F.3d 538, 551 (DC Cir. 2006); *People's Transp. Service*, 276 NLRB 169, 184 (1985) (referring to the Union as a "snake" is evidence of union animus).

Additionally, the Board has held that it "is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation." *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). Here, the terminations occurred just two days after Knox spoke at the Union's community forum in Tucson, and was interviewed on television at the forum. Milum admitted he was in Tucson the day Knox appeared on television (Tr. 304), and the ALJ properly found that Milum knew about Knox's July 6 television appearance before her discharge. (ALJD at 9 n. 24) Respondent did not file an exception to this finding. Thus, the timing of these discharges, coming just two days after Knox's television appearance supporting the Union, further supports the ALJ's conclusion.

Further, Respondent's animus is demonstrated by the pretextual reasons given for the discharges of Knox and Soe Min. See *Limestone Apparel Corp.*, 255 NLRB at 722. Respondent's lead person, Zambrano, admitted that all of the employees working in the soil sort area, including her, would linger in the lunchroom during work time. (GC. 46) The record is devoid of any evidence that Respondent sought to stop this widespread practice or considered it a significant problem. Moreover, the record demonstrates that every other employee caught "stealing time" was not fired, but instead received either a verbal or written warning or a "stern lecture" from Milum. Indeed, in cases of "stealing time" far more egregious than the conduct of Knox and Soe Min, e.g., an employee twice caught on unauthorized smoking breaks or an employee taking bathroom breaks every 15 minutes for an

entire week, the most severe discipline levied was a written warning. Contrary to Respondent's assertion, the record demonstrates that only time it has terminated an employee for misbehavior occurred 20 years ago, and involved theft of property. *Resp't Br. Supp.*, at 17-18.

Finally, Respondent's failure to conduct any investigation is further evidence of illegal motive. Knox specifically told Milum that taking a break in the lunchroom during work hours was a common practice among employees. Milum did not look into this defense, but instead fired Knox on the spot. Milum also did not look at Knox's or Soe Min's personnel files or consider their good work records. It is well-established that an employer's failure to conduct a fair and complete investigation of allegations of employee misconduct suggests that the employer is not genuinely interested in knowing the underlying facts and circumstances of the event but, rather, is looking for pretext. See *Publishers Printing Co.*, 317 NLRB 933, 938 (1995); *Burger King Corp.*, 279 NLRB 227, 239 (1986).

In summary, the record shows that Milum was furiously trying to find a way to stop the Union at his plant, and was trying to send a message to his workers to "realize the seriousness and foolishness" of their union activities. (GC. 64) Respondent discharged Knox to serve this purpose, by ridding itself of a known Union activist, and Soe Min was caught up in Respondent's illegal scheme, making his discharge similarly illegal. *Embassy Vacation Resorts*, 340 NLRB 846, 848 n.13 (2003) (discharge of a neutral employee in order to facilitate or cover-up discriminatory conduct against a known union supporter is a violation of Section 8(a)(3)); see also *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), enfd 782 F.2d 64 (6th Cir. 1986) (such employees are "pawns in an unlawful design," and their discharge is consequently unlawful); *Frenchy's K & T and Earl's News Stand*, 247 NLRB

1212, 1226 (1980) (discharge of employee who was collateral victim of employer's scheme to rid itself of a union activist was illegal); *Von Der Ahe Van Lines, Inc.*, 164 NLRB 606, 608-609 (1967) (respondent violated the Act as to employee who was the innocent victim of respondent's plan to rid itself of an acknowledged union supporter).

Respondent cannot show that Knox and Soe Min would have been fired otherwise, and its reliance upon *Delco-Remy Division, General Motors Corp, v. NLRB*, 596 F.2d 1295 (1979), does not support its claim that the discharges were justified.[8] In *Delco-Remy Division,* unlike here, the reviewing courts found that there was no evidence of anti-union animus, or a causal connection between the employer's anti-union attitude and the discharge. *Delco-Remy Division,* supra. at 1305-06. Here, the ALJ properly found Respondent harbored significant anti-union animus, and there was a nexus between Respondent's animus and the discharges. The record evidence supports the ALJ's finding that Respondent illegally discharged Knox and Soe Min in violation of Section 8(a)(1) and (3) of the Act, and Respondent Exception 1 to the ALJD should be denied.

3. Evidence Supports a Finding that Soe Min's Discharge was Unlawful, Independent of Knox's Termination

While the ALJ properly found that Soe Min's discharge was unlawful to the extent he was collateral damage in Respondent's scheme to fire Knox, the evidence also shows that a prima facie case exists showing that Soe Min was fired because of his own union activities. Soe Min openly supported the Union, and wore a Union t-shirt to work almost daily.[9] (ALJD at 9)

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[8] Respondent also cites *NLRB v. Clark Manor Nursing Home Corp*, 671 F.2d 657 (1st Cir. 1982), for the proposition that a termination based upon a supervisor's finding an employee "asleep during his shift" is valid. *Resp't Br. Supp.* at 17. However, a review of this case finds no such holding, nor any recitation of facts involving an employee sleeping during a shift.

[9] Respondent's claim that Soe Min could not have worn a Union t-shirt to work, because its employees wear uniforms, is not supported by the record. *Resp't Br. Supp.*, at 19. Respondent's video shows multiple instances

In an attempt to bolster is claim that Milum did not know Soe Min was a Union supporter when he fired him, Respondent suggests that Soe Min could not have supported the Union because he only spoke Burmese. *Resp't Br. Supp.*, at 20. The record, however, reflects that the Union used both paid translators and unpaid volunteers to help translate for the Burmese employees. (Tr. 1638-46, 2251-52, 2259-60) Respondent's denial that Burmese employees could be involved with the Union is further undercut by evidence that Milum met personally with the Burmese employees to discuss the Union (Tr. 64, 66-69, 145-46); testimony from one of Respondent's witnesses that she had seen Soe Min on Sixth Avenue speaking to the Union organizers before his termination (Tr. 1091); evidence that Kayonnie reported to Milum that she had seen some Burmese employees signing up with the Union; and Soe Min's credible testimony that both Milum and Kayonnie watched him through the plant window at times when he was meeting with Union organizers on the Sixth Avenue sidewalk.[10] (Tr. 517-18)

In view of this evidence, and Milum's overall lack of credibility,[11] Milum's bare denial that he had any knowledge of Soe Min's Union sympathies is unavailing, and his discharge independently violated the Act.

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employees wearing t-shirts or other personal clothing at work, and of soil sort employees wearing personal clothing under their gowns. (R. 71 at counter 17:33, 17:44-18.25, 18:35-46, 18:57-19:03, 22.11) (R. 72 at counter 24:40-55, 25:45-26:00)

[10] The fact that Respondent's supervisors looked through the plant window to watch employees participate in Union activities is demonstrated throughout the record. (Tr. 1607, 1740; GC. 134)

[11] The record is replete with instances in which Milum contradicted his affidavit testimony, equivocated in response to the General Counsel's questions, and generally refused to provide testimony for which he could be held accountable. See Tr. 33, 41, 42, 44, 58, 59, 61, 65, 66, 67, 77, 99, 111, 117, 128, 138, 146, 147, 149, 158, 159-162, 244, 245, 266, 275, 304, 328, 364, 369, 374, 389, 396, 405, 408, 1893, 1939, 1951, 1954, 1972, 1983, 1988, 2044, 2055, 2067, 2074, 2090, 2102, 2107, 2111, 2113, 2123, 2124, 2181, 2182, 2185, 2200, 2203, 2220, 2225, 2236-37)

4. The ALJ Properly Ordered Backpay and Reinstatement

While the Board possesses a certain latitude in fashioning remedies for unfair labor practices, a remedy of reinstatement and backpay is appropriate where an employee is discharged for engaging in union or other protected activities. *Taracorp Inc.*, 273 NLRB 221, 222 (1984). Such a remedy was imposed by the Board in its first published decision in *Pennsylvania Greyhound Lines*, and since then has become the traditional means by which the Board seeks to neutralize employer discrimination. 1 NLRB 1, 51 (1935).

Relying upon Section 10(c) of the Act, and *NLRB v. Magnusen,* 523 F.2d 643 (9th Cir. 1975), Respondent claims that the ALJ erred in ordering reinstatement and backpay. *Resp't Br. Supp.*, at 21-22. However, Section 10(c) of the Act only states that the Board cannot order backpay when an employee is discharged for cause. That is not the case here. The ALJ specifically found that Knox and Soe Min were unlawfully discharged, and that Respondent's "cause" for doing so was mere pretext. Moreover, this case is markedly different from *NLRB v. Magnusen*, where the Ninth Circuit Court of Appeals refused to enforce the Board's backpay and reinstatement order for an employee who falsified his time-card, claiming to have worked throughout the night, and committed purgery while testifying about the incident. *Magnusen*, supra., at 645-646, 646 n.3. This conduct cannot compare to the conduct of Knox and Soe Min, who at most dallied in Respondent's lunchroom for a few minutes, consistent with the condoned practice of many of Respondent's employees.[12] Accordingly, the ALJ properly ordered reinstatement for Knox and Soe Min, and Respondent's Exception 1 should be denied.

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[12] Also, the Board in *Magnusen* ordered reinstatement and backpay as a remedy for all of the employees illegally discharged, including the employee who committed purgery. *Henry Magnusen d/b/a North Star Refrigerator Co.* 207 NLRB 500 (1973). The Board generally applies its "nonacquiescence policy" and follows Board precedent, not court of appeals precedent, unless overruled by the Untied States Supreme Court. *Baker Electric*, 351 NLRB No. 35 slip op. at n.42 (2007).

E. Contrary to the Respondent's Exception, the ALJ properly found that Respondent suspended Evangelina Guzman in violation of Section 8(a)(1) and (3) for refusing to remove a Union button.

As discussed in detail in Section IV.B above, the ALJ properly found that Respondent's stated reason for requiring Guzman to remove her Union button – to protect her and Respondent's machinery – was pure pretext where employees were allowed to wear all types of jewelry to work and employees wore nametags which were less secure than the Union buttons. (ALJD at 7) Accordingly, by refusing to allow Guzman to work wearing her Union button, the ALJ properly found that Respondent violated Section 8(a)(1) and (3) of the Act, and Respondent's Exception 4 must be denied. *Southern California Edison Co.*, 274 NLRB 1121, 1124-25 (1985) (employer violated Section 8(a)(3) for sending workers home for wearing a union button).

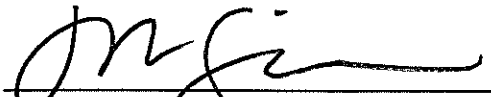
V. CONCLUSION

Based on the foregoing, and the record evidence considered as a whole, the General Counsel respectfully submits that the ALJ properly found that Respondent has been engaging in conduct in violation of Section 8(a)(1) and (3) of the Act, as set forth in the ALJD. It is respectfully submitted that Respondent's exceptions are without merit and should be rejected by the Board. The Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order insofar as such are consistent with the General Counsel's exceptions to the ALJD, filed on November 30, 2007. It is further requested that the Board

order whatever other relief it deems just and necessary to remedy Respondent's numerous violations of the Act.

Dated at Phoenix, Arizona, this 4th day of January 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS, Cases 28-CA-20898 et al., was served via E-Gov, E-filing and by facsimile this 4th day of January 2008, on the following:

E-Gov, E-Filing (and overnight delivery of the original and seven copies) to:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
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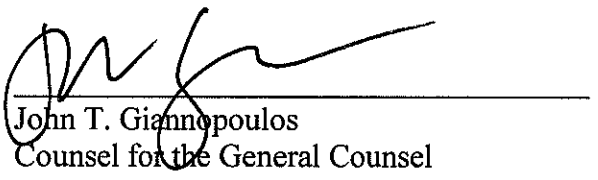

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