UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and **Case 28-CA-087842**

YOLANDA GALAVIZ, an Individual

and **Case 28-CA-095332**

COMITÉ DE TRABAJADORES DE SANTA FE TORTILLA

REPLY BRIEF IN SUPPORT OF THE ACTING GENERAL COUNSEL'S CROSS EXCEPTIONS

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In its Answering Brief, Respondent takes a final opportunity to misstate the record to the Board. In its introduction Respondent argues that "the entire record demonstrates *time* and *time* again that SFTC management was not hostile towards the Committee." (RB at 2)[1] However, the evidence clearly shows that Respondent was *hostile* to the Committee, as Administrative Law Judge William Kocol (ALJ) properly found, Respondent illegally fired lead Committee activists Yolanda Galaviz (Galaviz) and Delfina Bruno (Bruno) within two weeks of Respondent learning of the Committee's existence. (ALJD at 13-15) Next, Respondent illegally transferred Yolanda Rivera (Rivera) and Lilian Lopez to a more difficult production line. (ALJD at 10 – 11) Respondent also targeted Committee members by suspending and issuing write ups to Rivera and Jesus Saldana (Saldana). Through these

[1] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the Exhibits of the Acting General Counsel (General Counsel) and General Counsel's Exhibits will be denoted by "GC" respectively. Respondent's Answering Brief will be referred to as "RB"; ALJD refers to the Administrative Law Judge's Decision. All dates in are in 2012 unless otherwise noted.

actions Respondent effectively diminished the Committee's ability to organize the tortilla workers and stifled the ability of the workers to have a collective voice.

I. The Committee was a labor organization in a nascent organizing drive

Despite the ALJ properly finding that the Committee was a labor organization as defined in Section 2(5) of the Act,[2] in its Answering Brief Respondent argues the employees were not seeking to organize a "formal union" or to establish the Committee as their bargaining agent. (ALJD at 2; RB at 17) The argument is a red herring. Respondent failed to cite legal authority for its proposition that there is a difference between a labor organization under the Act and a "formal union." (RB at 2, 17) There is no difference; Section 2(5) of the Act states that the term "'labor organization,' means any organization of any kind." Significantly, Respondent's illegal actions eroded the possibility of the Committee ever seeking a representation petition where employees could freely elect the Committee as their Section 9(a) bargaining representative. Accordingly, the Board should dismiss Respondent's argument.

Moreover, the evidence shows that Respondent knew the Committee was organizing the tortilla workers. (ALJD at 8- 9; 14 – 15; Tr. 322, 320 – 24, 328 - 31; GC 11, GC 9, p. 14, 16, 18). President Kenny Kalfin acknowledged he knew Galaviz was seeking signatures on the Committee membership petition and Committee documents, as is described in the written statements that Plant Manager Gustavo Terrones (Terrones) translated for him before he fired both Galaviz and Bruno. (Tr. 85 – 88, 185 - 186) Also, the ALJ specifically found that Terrones confronted Galaviz about collecting signatures in his office and that she showed him

[2] Because Respondent did not file an exception to this finding the Board should adopt the ALJ's ruling. Board's Rules and Regulations, § 102.46 (b)(2) (any exception to a ruling, finding, or conclusion, not specifically urged is waived); Id. at § 102.48 (in the event of no timely or proper exceptions, the ALJ's findings automatically become the decision and order of the Board); *Kings Electronics Co., Inc.*, 109 NLRB 1324, 1324 (1954) (upon the failure to file exceptions, the Board abides by § 102.48 and adopts the ALJ's findings and conclusions).

the Committee petition that the tortilla workers had signed. (ALJD at 9; Tr. 339-40, 381; GC 11) In sum, the ALJ erred in his decision regarding the 8(a)(1) allegations by not considering the Committee's organizing efforts in his conclusions, and Board should reverse this error as urged in Counsel for the Acting General Counsel's (CGC) cross exceptions. (ALJD at 5)

II. Solicitation of grievances and promise of benefits

The ALJ erred by failing to consider the fact Respondent's solicitation of grievances and promises were in response to the Committee's organizing drive. (ALJD at 5) Even though the Committee had expressed concerns in the August 7 letter, Respondent was not privileged to probe into these concerns. The Board has found that, even where "employees volunteer information to their employer that they are seeking union organization because of their displeasure with their conditions" at work, the employer is not then "free to continue to press the inquiry in such a way as to indicate to the employees that it was prepared to remedy their grievances and thus render union representation unnecessary," as such conduct constitutes a solicitation of grievances. *Emery Air Freight Corporation*, 207 NLRB 572, 575 (1973).

Similarly, the ALJ erred in finding that employees have in the past expressed grievances to Terrones and that he has promised to remedy them. (ALJD at 5) The Board should reverse the ALJ and find a violation as the Respondent's conduct here is similar to the employer in *Albertson's, LLC,* 359 NLRB No. 147 (July 2, 2013). There, after employees started organizing, the employer changed its existing practice of addressing employee grievances through a telephone hotline to having one-on-one meeting with employees and high-level labor relations officials. The Board found unlawful solicitation when a supervisor

suggested that one employee visit with the labor relations officials in the employee break room if she wanted to complain or address problems about scheduling. Id. slip op. at 1-2. When the employee went to the employee break room, the director of labor relations told her it was open insurance enrollment season, asked if she had any questions about the insurance, and then asked if she "had any concerns." Id. Similarly, here it was only in response to the Committee's organizing drive, which Terrones knew Galaviz was trying to get co-workers involved in advocating for a pay raise, that Respondent called the Committee members into the office to resolve their problems. The Committee members were directed to meet with Plant Manager Terrones and Assistant Plant Manager Alfredo Jasso (Jasso) in Terrones' office on the second floor of the factory to discuss their concerns at work; this had never previously occurred. (Tr. 435, 466, 479, 498) In the past, Respondent was unwelcoming of Galaviz' request for a pay raise. After Galaviz had previously asked for one, Terrones held a meeting and announced the doors were open for anybody who did not want to work for what Respondent paid. (Tr. 360-63; 377) Because the Committee members were scheduled to attend <u>mandatory</u> meeting to discuss their concerns with high ranking officials, and Respondent has no history of previously having such meetings, employees could reasonably infer that they should refrain from the supporting the Committee now that the company was prepared to address their concerns. Under well-established principles, the Respondent's solicitation of grievances and promises during the organizing drive violated Section 8(a)(1).

III. The Board should consider the hearing evidence as there is no due process issue

It has long been recognized that "the Board is not precluded from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." *NLRB v. Fant Milling Co.,*

360 U.S. 301, 308-309 (1959); *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). The additional allegations CGC urges the Board to find meet the requirements of *Redd-I, Inc.* First, they involve Respondent's immediate response to coerce and frustrate the right of employees to freely support the Committee, including instructing employees to record the protected activity of Committee activists, creating an impression that employee Committee activity was under surveillance, promulgating unlawful rules, and interrogating employees about their protected activity. Second, the unfair labor practices occurred during the one-on-one meetings Respondent had with the Committee members and in the course of Respondent building a case to fire Committee activists Galaviz and Bruno.[3] Third, Respondent's defenses to these allegations are primarily legal, as the allegations are based upon the testimony that is already in the record. Accordingly, the Board should address the admissions of Respondent's officials, and testimony of Respondent's witness Gustavo Abel Lopez, and Galaviz, and find that Respondent's conduct violated the Act.

IV. The evidence establishes Respondent discriminated against Jesus Saldana

Respondent overstates the record, claiming that there is "substantial evidence in the record of all of the many positive actions that SFTC took relating to [Saldana], including . . . its continuous accommodation of his medical condition". (RB at 4) Aside from permitting Saldana to attend treatment necessary to battle cancer, it is unclear what "positive actions" to which Respondent refers. Instead, it is dispositive that the ALJ erred in dismissing overwhelming evidence establishing Respondent unlawfully suspended Saldana in August, October, and December. By repeatedly suspending Saldana, because of his Committee membership and on-going Committee activity, Respondent frustrated his livelihood at a time when he was already dealing with a terminal illness.

[3] The ALJ's refusal to consider evidence he credited to support the other violations was error. (ALJD at 9, fn. 6)

A. The record is silent as to the name Saldana used on his employment application

Respondent suggests that because Saldana was also known as Luis Juarez his testimony lacks credibility, claiming that " 'Jesus Saldana' was only the name that [Saldana] used to obtain employment at SFTC. . .the Board should not ignore [Saldana's] testimony on this point." (RB at 3 fn. 1, 3-4) However, the record does not establish which name Saldana used to obtain employment at SFTC. As shown, the ALJ precluded this line of questioning (Tr. 656):[4]

> Q [Respondent Counsel] Mr. Juarez, when you completed your application documents for the employment with Santa Fe Tortilla Company, you did not provide the name, Luis Juarez, correct?
>
> MS. ALONSO: Objection, relevance.
>
> JUDGE KOCOL: What is the relevance?
>
> MR. TOPPEL: Goes to his credibility.
>
> JUDGE KOCOL: Sustained.

Although Respondent's counsel questioned Saldana about the name in the pre-trial affidavit, he made no attempt to impeach Saldana with statements from the affidavit. (Tr. 655-56) As such, Respondent's request that the Board find Saldana was not a credible witness on the sole basis of his alias should be dismissed.

[4] The Board should adopt the ALJ's objection ruling because Respondent did not file an exception to this ruling. *Kings Electronics Co., Inc.*, 109 NLRB 1324, 1324 (1954) (absent exceptions, the Board adopts the ALJ's findings and rulings).

B. Respondent's reasons for demanding a medical note from Saldana in August and December are pretext

The record does not support Respondent's argument or the ALJ's conclusion that Saldana asserted he was restricted from working in cold temperatures in the Committee letter. (RB at 5) The August 7 Committee letter does not assert that Saldana was restricted from working in cold temperatures. (ALJD at 3; GC 2) Instead, the Committee letter voices a concern that he was being "forced to work in cold conditions and in the most difficult positions." (ALJD at 3; GC 2) Because the letter does not assert a medical restriction, the ALJ's finding and Respondent's arguments are flawed, and should be dismissed on this point.

Next, Respondent argues that the ALJ's credibility determinations preclude finding that Saldana's August suspension was unlawful; this argument also lacks merit. The ALJ's finding that Saldana had not discussed cold conditions with Terrones before the Committee letter does not overcome the overwhelming evidence that Respondents purported health concerns were mere pretext. When Respondent first learned that Saldana would both work and attend chemotherapy treatments, it was not concerned with the potential health risks. (Tr. 24-25, 597 – 599, 662,671 - 672) Before the Committee, Saldana was never asked for a medical note to show he was still fit to work while attending chemotherapy. Instead, Respondent adjusted his work schedule so that he could both attend chemotherapy and work. (Tr. 111 – 113; 602 - 603) Similarly, the first time that Respondent learned that Saldana was unable to carry out his work in the janitorial department Respondent was not concerned with determining his restrictions. (Tr. 25, 203– 205, 600 – 601, GC 9, p.10) Rather than demand a medical note, Respondent assigned Saldana to the tortilla production line.

The only thing that changed when Saldana complained of working in cold areas is that Saldana had signed the Committee's August 7 letter. There is no dispute that Respondent had previously done everything possible to accommodate Saldana. Terrones admitted that Respondent had never demanded a note from Saldana until had signed the Committee letter. The fact Respondent was unconcerned with Saldana's health risks until his signature appeared on the August 7 Committee letter, viewed in conjunction with Respondent's other unlawful conduct, is evidence that Respondent's true motive for demanding a note from Saldana was his Committee activity.

As for Saldana's December suspension, the evidence shows that Respondent's purported claim that it suspended Saldana because its obligations under immigration law is pretext. The ALJ specifically found that "Santa Fe Tortilla knew informally that Saldana had used another name" and that, since 2011, Saldana had informed both Arleta de la Mora and Terrones his other name was Luis Juarez. (ALJD at 17, 19) Both Terrones and de la Mora were called by Respondent's counsel to testify after Saldana. However, Terrones and de la Mora did not contradict or rebut Saldana's testimony regarding his conversations with them regarding his name. Interestingly, Respondent was not concerned with its immigration law obligations when Saldana informed Terrones and de la Mora of his alias in 2011, before his Committee involvement. Contrary to the ALJ's decision, Respondent was obligated to comply with federal immigration law since hiring Saldana, and at the time it learned of his alias in 2011. Although Supervisor de la Mora told Saldana that "everybody [at Santa Fe Tortilla] has a very artistic name" Respondent offered no evidence of having suspended other employees with more than one name. (Tr. 647-48) It was only after Saldana's Committee activity that it became problematic for Respondent to cope with his alias. In sum, the Board

should reverse the ALJ's decision and find that Respondent violated the Section 8(a)(3) of the Act by suspending Saldana in August and December.

V. The evidence establishes Respondent discriminated against Yolanda Rivera

The ALJ properly found the evidence supported a prima facie case that Respondent gave Rivera a write up on September 29. Respondent's argument that the ALJ allowed CGC to "side step" the burdens of *Wright Line* lacks merit. (RB at 11) It is "well established that, in the absence of direct evidence, an employer's knowledge of an employees union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn." *Pan-Oston Co.,* 336 NLRB 305, 308 (1988). Inferences of discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense, disparate treatment, departure from past practice, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric,* 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993); *Naomi Knitting Plant,* 328 NLRB 1279, 1283 (1999); *JAMCO,* 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (7th Cir. 1991), cert. denied 502 U.S. 814 (1991); *Electronic Data Systems Corp.,* 305 NLRB 219 (1991); *Visador Co.,* 303 NLRB 1039, 1044 (1991); *Associacion Hospital Del Maestro,* 291 NLRB 198, 204 (1988); *Clinton Food 4 Less,* 288 NLRB 597, 598 (1988).

Next, Respondent's claim that Mariela Campos was the decision maker in issuing Rivera the write up misrepresents the record, and should be dismissed. (RB at 10- 11) Rivera testified that Campos gave her a written warning when Rivera reported to work on Monday after September 29. (Tr. 488) Rivera immediately went up the chain of command, spoke to Assistant Plant Manager Jasso, and objected to the write up. (Tr. 489) Jasso said he would

talk to Plant Manager Gustavo Terrones and they would send for her to discuss it. However, she was not called to the office to discuss the write up. (Tr. 489) The same day, Rivera also protested the write up with Supervisor de la Mora. (Tr. 489) Unlike Respondent's claim that it Campos was the decision maker, de la Mora said that Campos "was giving [Rivera] the warnings, . . .per Arlette [de la Mora]'s orders. (Tr. 490)

Notwithstanding the actions Rivera took to challenge the write up, the ALJ erred in his conclusion that "Rivera did not challenge Campos' assertion that she had danced on Friday; however there is no explanation as to how Campos came to know of Rivera's dancing." (ALJD at 16) The ALJ further erred in concluding that Rivera called in sick to "enjoy a 3-day weekend." (ALJD at 16) However, Rivera called in sick on Saturday, September 29 and reported to work the following Monday, October 1. In sum, the ALJ dismissed the allegation based on his presumptions rather than the evidence. He further erred in not considering the timing of Rivera's write up in relation to Respondent transferring her to the corn line, and that Respondent applied different call in procedures to Rivera after she became involved in the Committee. Accordingly, the Board should correct the ALJ's errors and find that Respondent issued Rivera a write up in violation of Section 8(a)(3) of the Act. See, e.g. *Toll Mfg. Co.*, 341 NLRB 832, 833-34, 847 (2004) (disparate enforcement of "call-in" procedures against union activist violates 8(a)(3)).

VI. CONCLUSION

Based on the foregoing, CGC respectfully requests that the Board dismiss the Respondent's arguments in its Answering Brief to the General Counsel's Cross Exceptions. As discussed above and in the General Counsel's Cross Exceptions Brief, the Board should correct the errors of ALJ William Kocol's decision and find that Respondent violated the Act as urged by CGC.

Dated at Albuquerque, New Mexico this 3th day of September 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of REPLY BRIEF IN SUPPORT OF THE ACTING GENERAL COUNSEL'S CROSS EXCEPTIONS in SFTC, LLC d/b/a SANTA FE TORTILLA COMPANY, Cases 28-CA-087842 was served by E-Gov, E-Filing, and E-Mail on this 3rd day of September 2013, on the following:

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