

1 UNITED STATES OF AMERICA
2 BEFORE THE NATIONAL LABOR RELATIONS BOARD
3 REGION 20
4

5 SQUIRES LUMBER COMPANY, INC.

Cases 20-CA-160279;
20-CA-162074; 20-CA-162418;
20-CA-162722; 20-CA-162732;
20-CA-162834; 20-CA-166576;
20-CA-165730

9 and

10
11 CARPENTERS LOCAL 2236,
12 UNITED BROTHERHOOD OF CARPENTERS
13 AND JOINERS OF AMERICA
14

15
16 GENERAL COUNSEL'S BRIEF
17 TO THE ADMINISTRATIVE LAW JUDGE
18

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1 **I. INTRODUCTION**

2 On September 2, 2015, all three of the millworkers directly employed by Respondent at
3 its newly opened lumberyard in Northern California (Respondent’s facility) presented it with a
4 petition. The petition authorized the Carpenters’ Union to represent them for purposes of
5 collective-bargaining with Respondent over their wages, hours, and other terms and conditions of
6 employment. Respondent, which has proudly boasted about numerous failed union organization
7 attempts at its headquarters in Southern California, immediately embarked on a course of unfair
8 labor practices in order to nip-in-the-bud the millworkers’ attempt to obtain union representation
9 in Northern California.
10

11 As set forth in greater detail below and in the underlying Complaints, these unfair labor
12 practices violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), and
13 include: (1) threatening employees with job loss for union supporters; (2) disciplining employees
14 because of their union support; (3) firing employee Bobby Saephan because of his union support;
15 (4) failing or refusing to directly hire a millworker to replace Saephan, instead relying on
16 temporary millworkers to perform his work; (5) changing and imposing more rigorous and
17 onerous terms and conditions of employment because of their union support; (6) attempting to
18 cause the arrest of employees and non-employees engaged in a strike and picketing outside its
19 facility; (7) unlawfully surveilling employees engaged in lawful picketing at Respondent’s
20 facility; and (8) maintaining workplace rules that inhibit employees’ ability to freely engage in
21 union and other protected, concerted activities protected by Section 7 of the Act.
22
23

24 The effects of Respondent’s unfair labor practices have been widespread and severe.
25 News of Respondent’s unfair labor practices disseminated amongst both Respondent’s directly-
26 employed millworkers and those employed by temporary employment agencies to work at
27 Respondent’s facility. This created a climate of fear of retaliation for those who would openly
28

1 support the Union at the lumberyard. Only one of the three millworkers who petitioned for
2 union representation remains employed by Respondent. Respondent's barrage of unfair labor
3 practices has caused the Union to lose the majority support it once enjoyed, has made it all but
4 impossible to hold a fair Board election on the important issue of union representation, and has
5 made it necessary for Your Honor to issue a *Gissel* bargaining order requiring Respondent to
6 recognize and bargain with the Union in good faith and to reinstate millworker Bobby Saephan.
7 The General Counsel also requests an order requiring Respondent to rescind the unlawful
8 disciplines and the retaliatory and unilateral changes it imposed on the millworkers, to cease and
9 desist from threatening employees with job loss or arrest for engaging in union activity, to grant
10 all other appropriate relief, and to order Respondent to read any Notice issued in this case to its
11 employees.
12

13 **II. STATEMENT OF FACTS¹**

14 **A. Respondent's Operations in Suisun City, California**

15 Squires Lumber Company, Inc. (Respondent) is a family owned and operated lumber
16 company that mills, fabricates and sells lumber products for commercial and residential
17 construction projects. Tr. 646-48. Its headquarters are in Colton, located in Southern California,
18 where it has operated since 1946 and proudly defeated numerous union organizing efforts. Tr.
19 646-48; GC Ex. 23. The allegations here pertain to a wholesale lumber yard Respondent opened
20 in April 2015² in Suisun City, located in Northern California (Respondent's facility),³ where it
21 leases a parcel of property. Tr. 651-53, 971. The facility is enclosed by a chain link fence with
22
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24 ¹ There were surprisingly few disputed material facts raised during the administrative hearing. While the
25 parties dispute the legal significance of the underlying facts, the General Counsel's witnesses and evidence
26 were generally corroborated, or at least not contradicted, by Respondent's witnesses and evidence.

27 ² Unless otherwise noted, all dates are from calendar year 2015.

28 ³ Unless otherwise noted, all references to Respondent's facility are to the Suisun City facility.

1 an entry gate, and includes a lumber yard and a warehouse with a small business office located
2 inside. Tr. 54-58; GC Ex. 8; Resp. Ex. 16-17, 21-27, 32, 34, 54. It is monitored throughout by
3 approximately forty surveillance cameras, which automatically delete their content after thirty
4 days unless a manager electronically saves footage from a particular date. Tr. 641-43.

5 Respondent hired Operations Manager John Gilfillan in early 2015 to oversee the new
6 facility and its operations. Tr. 743-45. Human Resources Manager and Safety Coordinator
7 Kelly Bankston, who has worked out of the Colton facility for the past three years, is in charge of
8 payroll, benefits, workplace safety, and employee relations for both facilities. Tr. 885-87. Both
9 Gilfillan and Bankston report directly to Vice President Kyle Paxson and President Chris Paxson,
10 two brothers who work out of Respondent's headquarters in Colton and own the company along
11 with their mother. Tr. 646, 751.

12
13
14 The bulk of the work is performed by millworkers, whose primary tasks are to cut and
15 stack lumber and to build concrete forms for residential and commercial customers. Tr. 400.
16 Respondent initially staffed the yard with millworkers provided by temporary employment
17 agencies (temporary millworkers), who numbered from about six to twelve per day, depending
18 on the workload. Tr. 668-70; 900-03; Resp. Ex. 55. As of September, Respondent relied on two
19 temporary employment agencies (Workers.com and Labor Ready) to provide it with temporary
20 millworkers. Tr. 689-81, 893-94; GC Ex. 19. Respondent has informed the temporary agencies
21 about the general skill level and experience that it seeks in millworkers, but has no say in which
22 individual employees the temporary agencies send to Respondent, except for the rare case in
23 which Respondent sends an individual employee applicant to one of the agencies to sign up as a
24 temporary employee with the agency in order to work for Respondent. Tr. 685-86, 984-87.
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1 By August 2015, Respondent had converted three of its longest-tenured temporary
2 millworkers, Francisco Martinez, Bobby Saephan and Louie Morabito, from temporary
3 employees employed by a temporary agency to direct hires employed directly by Respondent.
4 Tr. 896; GC Ex. 19. As direct employees, they received their paychecks from Respondent
5 instead of the temporary agency, made leave requests to Respondent instead of the temporary
6 agency, received a raise in pay from \$12 per hour to \$13 per hour, received a new employee
7 handbook, and became eligible for Respondent's health and welfare benefits, including a 401(k)
8 plan, none of which was available to temporary millworkers. Tr. 135, 183-85, 411-13, 421, 970-
9 71. They also became subject to discipline from Respondent, unlike temporary millworkers,
10 who are not. Tr. 686-87. The direct millworkers continued to work alongside anywhere from
11 three to seven temporary millworkers, who have a high degree of turnover and work for
12 Respondent for various lengths of time ranging from days to several weeks. Tr. 668-70, 705,
13 739-40; GC Ex. 19; Resp. Ex. 55. Respondent has since converted one additional temporary
14 millworker to a direct employee, Jonathan Van Loo, who started on August 26 and was directly
15 hired on October 1. Tr. 684-85, 896; GC Ex. 19.

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17
18 The direct and temporary millworkers begin and end their shifts, rest breaks and lunch
19 breaks at the same times, clock in and out using Respondent's digital time clock, and report
20 directly to Mill Foreman Caleb Alvarez. Tr. 53-54, 125-27, 134-35, 153-54, 419-24; GC Exs. 12
21 and 20. Alvarez had been a millworker at Respondent's Colton facility for years, and
22 Respondent transferred him to the Suisun City facility in June and gave him the official title of
23 "foreman" and a substantial pay raise. Tr. 684, 706, 967-68. Alvarez replaced another long-time
24 employee of Respondent, Yard Manager Mauricio Vargas, who Respondent had temporarily
25 brought up from Colton to help Gilfillan get the Suisun City facility up and running (along with
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1 Manager Gilfillan) between April and June. Tr. 173-78; 400-03, 709-10, 713. Unlike the direct
2 and temporary millworkers, Alvarez was paid a salary rather than by the hour, did not have to
3 clock in or out like the millworkers, and Respondent labeled him an “exempt” employee, at least
4 prior to January 1, 2016, when Respondent converted him back to being an hourly employee. Tr.
5 965-69.

6
7 Manager Gilfillan trusts Alvarez to run the yard as he sees fit, and testified that he does
8 not know what Alvarez does throughout the day, although he has observed him working with the
9 crew, teaching the crew how to do things, driving a forklift, creating cut lists and production
10 logs, and fixing machinery. Tr. 845-48. Alvarez speaks with Vice President Paxson on a daily
11 basis about production matters, and has given him direct reports on employees’ striking,
12 picketing, and other union activities. Tr. 683-84, 695-98. Alvarez assigns and oversees the
13 work of both the direct and temporary millworkers each day, announces rest and meal breaks,
14 monitors employees clocking in and out, solicits employees to work overtime, grants or denies
15 employee requests for access to the business office, and informs the millworkers about the
16 quality of their work. Tr. 125-27, 131, 157-58, 166-67, 185, 190-91, 369-71, 403-04.

17
18 Although it is not clear that Alvarez, who Respondent did not call to testify, actually
19 exercised hiring, disciplining, or firing authority, and although Respondent asserts that he is not a
20 supervisor or agent of Respondent within the meaning of the Act, Alvarez told employees that he
21 did have such authority, at least until September 18, when Manager Gilfillan announced that
22 Alvarez was being demoted, that he was no longer a supervisor, that employees should
23 henceforth go to Gilfillan rather than Alvarez with questions or issues, that he no longer had
24 access to the office, and asked Alvarez to return his keys (which he reluctantly did). Tr. 124,
25 129-30, 132, 149, 179-86, 404-11, 603. Alvarez told millworkers Martinez, Saephan, and
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1 Shayne Phillips as temporary millworkers that he and Gilfillan wanted to bring them on as direct
2 hires, and Alvarez gave Martinez and Saephan the new hire packets and sat in with Gilfillan
3 during the new hire meetings. Tr. 124, 130, 182-85, 410-11, 603.

4 Before September 18, Alvarez had keys to the entire facility and access to the business
5 office in the warehouse that houses John Gilfillan's private office and an adjacent open office
6 area, which contains confidential and proprietary information and was used by Alvarez and
7 Respondent's salesman and driver to perform paperwork and take breaks.⁴ Tr. 127-28, 132-34,
8 625-26, 667-68, 664, 692-93, 704-05, 760-61. Unlike the rest of the warehouse, the business
9 office is air conditioned and contains a restroom with hot running water, and the millworkers
10 were not allowed access without Alvarez' or Gilfillan's permission. Tr. 128, 439-40. Alvarez
11 also enjoyed access to a special parking area reserved for him, Gilfillan, the salesman, and the
12 driver, at least before his apparent demotion on September 18. Tr. 445-46.

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14
15 **B. The Union Campaign Meets Respondent's Anti-Union Campaign**

16 **1. The Union Petition**

17 Martinez, the first of the three millworkers to be hired directly by Respondent, was
18 simultaneously employed as a Field Representative by the Union, which assigned him to get a
19 job with Respondent in order to help organize the workers there, a position described as a "union
20 salt." Tr. 40, 80, 397-98, 538-43. Union Representatives John Pock and Tim Lipscomb were the
21 primary Union contacts for the millworkers to assist them in their unionization effort,
22 occasionally with the help of other Union representatives. Tr. 39-42. By August 31, the three
23 direct employees had each signed a petition authorizing the Union to represent them for purposes
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⁴ Respondent did not call Alvarez, the driver, or the salesman as witnesses.

1 of collective bargaining with Respondent over their wages, hours, and other working conditions
2 (the Union petition). Tr. 43, 195-97, 424-25; GC Ex. 3(a).

3 On September 2, before the workday was to begin at 7:00 a.m., the three direct
4 millworkers, Martinez, Morabito, and Saephan, dressed in red Union t-shirts, met Union
5 Representatives Lipscomb and Fidel Chavez at Respondent's facility, and presented the Union
6 petition to Operations Manager Gilfillan. Tr. 22-38; GC Ex. 2 (transcription of video recording
7 of encounter and video itself). Lipscomb did the speaking, and Chavez recorded the encounter.
8

9 *Id.* Lipscomb presented Gilfillan with the petition and explained that all three of Respondent's
10 direct millworkers had signed the petition authorizing the Union to represent them. *Id.* He
11 provided some information about the Union and the types of workers it represents in the area.
12

13 *Id.* He stated that the employees had some concerns about their working conditions that he
14 wanted to discuss, specifically their lack of access to the office sink with hot running water and
15 the lack of a vacuum on one of the saws that created an issue with sawdust. *Id.* Gilfillan took
16 the petition and indicated that he was familiar with the Carpenters' union from previous work.

17 *Id.* He stated that access to the office sink should not be a problem, but he was not sure about the
18 vacuum issue. *Id.* Lipscomb said he would like to schedule a time to "continue these
19 negotiations." Gilfillan responded that Lipscomb would have to talk to the corporate office
20

21 about that, and he provided Lipscomb with a corporate contact after Lipscomb so requested. *Id.*
22 The meeting ended amicably, the Union representatives left, and the employees got ready for
23 their workday. *Id.* The three petitioning employees continued to wear their red Union shirts
24 throughout their employment with Squires. Tr. 161.
25

26 That relative amity quickly turned to enmity when Respondent's headquarters got
27 involved later that morning. Tr. 662-63. Respondent and the Union, primarily by counsel, began
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1 exchanging correspondence regarding the significance of the petition and the morning meeting
2 with Gilfillan. Tr. 52-53; GC Ex. 7. The Union initially thanked Respondent for recognizing it
3 as the representative of the Unit employees, for agreeing to its proposal for employee access to
4 the office sink, and for considering its proposal for installing vacuums on the saws. *Id.* The
5 Union proposed dates to negotiate a collective-bargaining agreement. *Id.* Respondent asserted
6 that it had not yet agreed to recognize or bargain with the Union, and was investigating whether
7 it had any obligation to do so. *Id.* It requested the video of the encounter, and questioned
8 whether the Union had violated California privacy law by recording it. *Id.* The Union asserted
9 that Gilfillan's actions had amounted to voluntary recognition of the Union, denied that the video
10 recording was unlawful and ultimately permitted Employer counsel to view the video, but did
11 not provide a copy. *Id.* President Chris Paxson and Vice President Kyle Paxson instructed
12 Gilfillan not to read any more documents from the millworkers or the Union, but to scan and
13 email anything he received to corporate headquarters and counsel before mailing it. Tr. 665-66,
14 692-93.

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17 The Union filed the first of these underlying charges on September 16, 2015,
18 after Respondent refused to recognize or bargain with the Union. GC Exs. 1(a) et al. The Union
19 has not filed a petition with the Board for an election. Tr. 79-80.

20
21 **2. Respondent Meets With Employees to Express Its Opposition to the**
22 **Union; Threatens to “Get Rid” of the Union Supporters**

23 Later on September 2, Manager Gilfillan met one-on-one with the temporary
24 millworkers, and reading from a prepared speech, stated that he learned that morning that a few
25 of the millworkers had become involved with the Union, and that “it is important for everyone to
26 know right away that Squires Lumber opposes unionization of our Suisun City facility, and we
27 think most of our employees will want to have nothing to do with this union once they learn all
28

1 of the facts.” Tr. 137-38; GC Ex. 22.⁵ He added, “if you are contacted by the union, please do
2 not feel forced into signing anything you don’t understand,” that Respondent would be providing
3 more information about the Union and its problems soon, and that Respondent did not think it
4 makes sense to involve an outside third party like a union with its Suisun City employees. *Id.*

5 About September 10, Colton Yard Manager Mauricio Vargas and Labor Consultant
6 Ricardo Pasalagua visited the Suisun City facility specifically to meet with the approximately
7 eight temporary employees working that day. Tr. 139-41. Pasalagua, an admitted agent of
8 Respondent, did most of the talking, and introduced himself as a representative of Squires
9 Lumber. Tr. 139-41, 169, 721-23. He read to the employees information about how unions were
10 bad, stated that the company was not for unions, that the three direct millworkers who had signed
11 a petition to bring in the union did not have a leg to stand on, and that Squires would “get rid of
12 them, if they had to.” Tr. 139-41. Respondent did not call Pasalagua to testify at the hearing,
13 and Yard Manager Vargas could not recall what Pasalagua said during the meeting, other than
14 that unions promise stuff and “don’t do it” and one employee said he worked for a union and
15 didn’t like it. Tr. 722-23, 733. Martinez and Saephan both learned about this meeting and
16 Paslagua’s statements in discussions with various temporary employees. Tr. 212-13, 461-66,
17 896. Current direct millworker, Jonathan Van Loo, who Respondent did not call to testify, was
18 employed as a temporary millworker for Respondent at the time. Tr. 896; GC Ex. 19.

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22 About October 1, in a meeting with both the direct and temporary millworkers, President
23 Chris Paxson and Vice-President Kyle Paxson introduced themselves as the owners of the
24 company. Tr. 214-16, 450-56. Kyle Paxson, reading directly from a script, described the history
25 of the company, and said that for the past seventy years the Union had tried to get into the
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27 ⁵ Gilfillan’s testimony clarified that the speech notes are misdated “10-2-16,” and that the correct date was
28 September 2, 2015. Tr. 851-53.

1 company with “bags full of empty promises” and lies from the union pushers, but each time,
2 Respondent’s Southern California employees told the Union “we don’t want you here.” GC Ex.
3 23.⁶ Paxson said that he was aware that the Union tried to ambush Manager Gilfillan a few
4 weeks earlier and claimed that Gilfillan had agreed to recognize the Union, but the company had
5 not done so, that Respondent believed employees should be given an opportunity to vote on the
6 issue of unionization in a secret ballot election, and that Respondent would respect the law if a
7 majority of employees voted for the union, and would not retaliate against them. *Id.*
8

9 **3. The Employees Attempt to Present Additional Petitions Requesting**
10 **Improved Working Conditions**

11 In the meantime, between September 8 and 23, Martinez, Morabito, and Saephan
12 submitted (at least attempted to submit) three more petitions to Respondent by which they
13 demanded certain improvements to working conditions. Tr. 43-49, 198-203, 435-43; GC Ex. 3.
14 These improvements included access to the hot running water in the office sink, training on
15 working with sawdust, training on heat illness prevention, access to the air conditioned office for
16 meal and rest breaks when temperatures climb past 100 degrees, more frequent servicing of the
17 portable toilets, and that Respondent cease committing unfair labor practices and bargain in good
18 faith with the Union. *Id.* Manager Gilfillan refused to accept hand delivery of any petitions
19 from the employees after September 2,⁷ so the employees simply slid them under his office door
20 after each refusal. Tr. 48-49.
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25 _____
26 ⁶ The speech misidentifies the speaker as Chris Paxson, when in fact Kyle Paxson gave the speech. Tr. 628-
29, 670-74; GC Ex. 23.

27 ⁷ President Chris Paxson instructed Gilfillan not to accept or look at any papers from employees, but to
28 forward anything to Respondent’s counsel electronically and by mail. Tr. 664-66, 813-14.

1 **C. Sudden Changes in the Workplace**

2 Within hours of receiving the Union petition on September 2, Respondent made a number
3 of changes in the workplace. Manager Gilfillan announced that he would be keeping the gates to
4 the facility closed throughout the day due to “trespassers.” Tr. 147, 229-30, 428, 448-49.

5 Previously, the gates had always been left open during the work day, but since then, Gilfillan has
6 kept the gates closed, and placed a sign on the gate for customers and vendors to call the office to
7 access the facility. *Id.* Similarly, Gilfillan and Alvarez began locking the office door. Tr. 148,
8 230-31, 449. Previously, the door had been unlocked during the workday, and employees could
9 knock and enter to grab tools or speak with Gilfillan or Foreman Alvarez. *Id.*

10
11 As previously noted, the millworkers took issue with their lack of access to hot, running
12 water to wash the dust, dirt, and mold from their hands before meal breaks when they presented
13 Gilfillan with the Union petition on September 2 and Gilfillan said it wouldn’t be a problem to
14 give them access to the office sink. Tr. 22-38; GC Ex. 2. Prior to that, the millworkers had
15 occasional access to the office sink, but at some point, each heard from either Yard Manager
16 Vargas, Manager Gilfillan, or Foreman Alvarez that they had to use the portable sink outside so
17 they stopped trying to use the office sink. Tr. 225-228. Martinez tested Gilfillan’s veracity
18 about giving the workers access to the office sink during his morning break on September 2. Tr.
19 428-29. He knocked on the office door, Alvarez answered, and Martinez asked if he could wash
20 his hand in the office sink. *Id.* Alvarez asked Gilfillan, also in the office, if it was okay, and
21 Gilfillan said it was, so Martinez washed his hands. *Id.* At the beginning of his lunch break that
22 day, Martinez asked Gilfillan if he could wash his hands in the office, Gilfillan said go ahead, so
23 Martinez did. Tr. 429. At some point during the day on September 2, Gilfillan called Martinez
24 into his office and told him that if the employees wanted hot water or to use the office bathroom
25 to wash their hands, they should have talked to him first, and not “those guys.” Tr. 430-32.
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1 By the time Martinez repeated his request for access to the office sink on his lunch break
2 the next day, Gilfillan had changed his tune, saying that corporate did not want any of the
3 workers in the office area, so they would have to wash their hands in the portable sink outside.
4 Tr. 228-29, 429-30. Saephan also attempted to wash his hands in the office sink before a
5 company pizza party on September 4, but Alvarez told him that he could not. Tr. 229, 432-35.
6 Prior to September 2, some of the temporary millworkers had access to the office sink, but within
7 days of September 2, Alvarez stated that temporary employees could no longer use the office
8 sink. Tr. 145-46. The millworkers have not attempted to use the office sink since then. Tr. 229.

10 About September 10, the same day that Colton Yard Manager Vargas and Labor
11 Consultant Pasalagua visited the Suisun City facility to meet with the temporary millworkers
12 regarding Respondent's opposition to unions, Vargas, Manager Gilfillan, and Foreman Alvarez
13 announced at various points throughout the day that, from then on, all millworkers would have to
14 wear their hard hats at all times at the facility, even during meal and rest breaks, unless they were
15 in their vehicles or at the break table, and that they could be written up for failing to do so. Tr.
16 143-45, 221-22, 298, 446-47, 719-21, 732-33. Prior to this announcement, the millworkers
17 almost always removed their hard hats and left them at their work stations as soon as Alvarez
18 announced break time, which provided immediate relief from the weight and heat of the hard
19 hats. Tr. 144-45, 220-23, 447-48.⁸

22 Further, about September 23, the day after the employees presented a petition to
23 Respondent complaining about the filthy condition of the portable toilet, the employees arrived
24

25 ⁸ During the hearing, Respondent solicited evidence that there was lumber stacked throughout the warehouse
26 and that Manager Gilfillan would occasionally operate the forklift while the millworkers were on break,
27 presumably seeking to justify the hard hat rule. Tr. 314-15, 626-27, 630-31, 762-62. The General Counsel
28 does not dispute that there are safety reasons that could justify the new hard hat rule, but those safety
reasons were present before and after Respondent added the new break-time restriction to its hard hat rule
when Respondent did not enforce the rule during break time.

1 at work to find that the portable toilet had been moved from outside to inside the warehouse near
2 the employee break table. Tr. 223-25, 359-60, 442-43, 747-49. Although Manager Gilfillan
3 disagreed, the millworkers testified that the portable toilet was filthy, putrid and foul-smelling,
4 fly-infested, and the stench spread throughout the warehouse. Tr. 224-25, 440-44, 753-54, 758-
5 59. Martinez complained to Foreman Alvarez, who told Martinez that it was corporate's idea, so
6 Gilfillan would have to talk to corporate about moving it back outside. Tr. 444, 747-53. The
7 next day, the portable toilet was back outside. Tr. 444-45. Respondent did not offer an
8 explanation for the temporary toilet transfer.
9

10 Finally, since firing Bobby Saephan on October 10, Respondent has failed or refused to
11 directly hire a millworker to replace his vacant position, instead relying on temporary
12 millworkers to perform his work. GC Ex. 19; Resp. Ex. 55.
13

14 **D. Respondent Issues Retaliatory Discipline; Employees Engage in a Strike and**
15 **Picketing; Respondent Calls Police on Picketers and Videotapes Picketing**
16 **Employees**

17 As described chronologically below, Respondent continued to retaliate against
18 millworkers Francisco Martinez and Bobby Saephan, the only remaining employees who had
19 signed the union petitions,⁹ by concocting various pretextual reasons to issue them both
20 discipline and ultimately fire Saephan. The Union responded by calling for a strike and
21 picketing to protest Respondent's unfair labor practices. Respondent thereafter attempted to
22 have the picketers arrested by calling the police, and engaged in unlawful surveillance by setting
23 up a video camera in front of the picketing employees and Union representatives.
24

25 _____
26 ⁹ On September 30, Respondent fired Louie Morabito, the third union supporter who had been involved with
27 each of the Union petitions, for attendance reasons. GC Ex. 19. There is no contention that his firing was
28 unlawful. On October 1, Respondent converted Jonathan Van Loo from temporary (he had worked as a
temporary millworker since August 26) to a direct hire. GC Ex. 19. Thus, Respondent currently employs
only two millworkers directly, whereas prior to the employees' Union activity, it employed three.

1 Saephan, purportedly because they refused to work “mandatory” overtime the day before. Tr.
2 238-40, 466-67, 928-29; GC Exs. 13 and 24. Vice President Paxson (who did not testify on this
3 point) told her to issue the warnings because Alvarez had reported to him that they had both
4 refused to work overtime the day before, so she complied, without conducting any further
5 investigation or discussing the matter with Alvarez. Tr. 929-31, 987. Notably, Gilfillan, who
6 was present for the disciplinary meetings, testified that he had no knowledge of the alleged
7 infractions. Tr. 833. This was the first discipline that Respondent had issued to either employee.
8
9 Tr. 238, 241; GC Ex. 29.

10 Both employees explained that they had never been given any indication from Alvarez,
11 Gilfillan or anyone else, neither on that particular occasion nor at any time in the past, that
12 Respondent considered overtime to be mandatory when it asked employees if they were available
13 to work overtime.¹⁰ Tr. 240-41, 466-70. Martinez told Bankston and Gilfillan that he had told
14 Alvarez that he could rearrange his schedule if needed. Tr. 612-13. Bankston was hearing none
15 of it, and told them that they should have known that overtime work was mandatory because it is
16 stated in the Employee Handbook and under state law.¹¹ Tr. 240-41, 466-70. She added that
17 Alvarez did not tell them that overtime was mandatory because he wants to be nice and do things
18 “Caleb style,” so he phrases it as a question. Tr. 240-41, 466-70. Martinez later asked Alvarez
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22 ¹⁰ On October 13, Alvarez told the millworkers that there was likely to be overtime work at the end of the day
23 and asked if they were able to work it. Tr. 242-43, 317-18, 470-72. Martinez and Saephan both said they
24 had other things they needed to do, and Alvarez said, okay. *Id.* Martinez offered to rearrange his schedule
25 to stay, but Alvarez said he didn’t need to. Tr. 612-13.

26 ¹¹ The Employee Handbook states on page 37 that “[e]mployees *may* be required to work overtime as
27 necessary.” Tr. 307; GC Ex. 11 (emphasis added). Respondent’s employment application states that
28 “Overtime is a required duty. Are you willing to work overtime *as required?*” Resp. Ex. 36 (emphasis
added). Under Section 510 of the California Labor Code Section, employers must generally
pay mandatory overtime to any employee who works more than eight hours a day or forty hours a week,
but the General Counsel is unaware of any law or regulation stating that it is mandatory to work overtime
anytime an employer offers it. *See, e.g.,* Cal. Lab. Code § 510(a) et seq.

1 why he did not tell them that overtime was mandatory. *Id.* Alvarez responded that he did not
2 tell them so because he had never heard that overtime was mandatory. *Id.* Bankston did not
3 materially contradict the employees' testimony. Tr. 917-18, 922-23, 930-31, 934-36.

4 Prior to that, Foreman Alvarez had occasionally requested that employees work overtime,
5 and historically, both Saephan and Martinez had generally been able to, but on at least one prior
6 occasion, Saephan said that he could not because he had things to do, and Alvarez said, okay,
7 without further discussion, and certainly no discipline. Tr. 244, 318-19; GC Ex. 29.

8
9 **3. October 15: Respondent Orders Saephan to Take a Drug Test;
10 Saephan Attempts to Comply, But Testing Facilities Are Closed**

11 On October 15, 2015, Human Resources Manager Kelly Bankston, still visiting from
12 headquarters, received a report from Foreman Alvarez that Jonathan Van Loo, who had just been
13 converted to a direct hire, had reported to him that he smelled marijuana on Saephan and Saephan
14 was smoking marijuana on his break. Tr. 938-41. Without further investigation, and without
15 involving Manager Gilfillan, Bankston called the Paxson brothers, told them what Alvarez had
16 reported, and recommended that they send Saephan to take a drug test, and they agreed. Tr. 815,
17 940-41. After preparing paperwork, Bankston approached Saephan while he was sitting in his
18 car smoking a cigarette during the 2:00 p.m. break. Tr. 245-48, 334-37, 445-48, 939-40, 948,
19 981, 983-84. She told him that she had a reasonable suspicion that he was under the influence of
20 alcohol or drugs at work and needed him to take a drug test. *Id.* She gave Saephan a "Drug
21 Screen and Physical Authorization" form that she had filled out, a flyer with two addresses for
22 Occupational Health offices, one located in Fairfield and one in Vacaville, and a print-out with
23 directions to the Vacaville location where she told him to go immediately. Tr. 72-73, 245-48; GC
24 Ex. 9. Saephan asked several times why she suspected that he was under the influence, and she
25 simply repeated that she had reasonable cause. Tr. 245-48, 334-37, 947-48. He asked why he
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1 could not go to the facility in Fairfield, which was closer than Vacaville, and she responded that
2 the Vacaville facility was where she wanted him to go. *Id.* She said she would clock him out and
3 he would get paid for the rest of the day, but he had to leave immediately because drug tests are
4 time sensitive. *Id.*

5 Saephan immediately left the jobsite with the paperwork, went directly to the Vacaville
6 testing location after telling Martinez why he was leaving work, and presented the paperwork to
7 the receptionist, who informed him that they did not have an occupational health department at
8 that location and that he would have to go to the Fairfield facility for the drug test. Tr. 248-49,
9 343. Saephan returned to his car and, as his phone records show, started calling Manager Gilfillan
10 at about 3:19 p.m. until he reached him at about 3:24 p.m. and explained the situation Tr. 249-50;
11 GC Ex. 14. Gilfillan said hang on, he would talk to Human Resources Manager Bankston and
12 call him back. Tr. 249-50. Saephan waited in the parking lot for a bit, then decided to drive to the
13 Fairfield facility, reasoning that Respondent would probably send him there. Tr. 250. While en
14 route, at about 3:42 p.m., Gilfillan called Saephan and told him to go to the Fairfield facility to
15 take the test, and Saephan went straight there. Tr. 250; GC Ex. 14. Gilfillan's testimony and
16 phone records did not materially contradict those of Saephan. Tr. 816-29.

17 When Saephan arrived at the Fairfield testing facility, he encountered a flyer that said the
18 facility had closed at noon that day (a Thursday) and would also be closed on Friday, October 16,
19 because the facility was moving to a different location where it would reopen on Monday,
20 October 19. Tr. 250-51. He spoke with a woman who said she worked there and confirmed that
21 the flyer was accurate. Tr. 251. Saephan took pictures of the flyer and went to his vehicle, called
22 Gilfillan, explained what happened, and texted him the picture of the flyer. Tr. 251, 372-75, 380-
23 82; GC Ex. 14, p. 4; Resp. Exs. 14 and 53. Gilfillan said he would get back to him. Tr. 251-52.
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1 Gilfillan's phone records show that he received the picture text of the flyer from Saephan at 4:26
2 p.m, and that at 5:07 p.m., he sent Saephan a text message that inexplicably directed him to go
3 back to the same location at 7:30 a.m. on the following day. Tr. 256-57, 372-75; Resp. Ex. 53.
4 Having already explained that the facility would be closed on Friday and sent the picture of the
5 flyer, Saephan merely texted back "ok," and went to the Union office to report what had
6 happened. Tr. 72-73, 86-89, 257; Resp. Exs. 14 and 53. Martinez was at the Union office when
7 Saephan arrived, and both decided to go on a one-day strike the next day to protest Respondent's
8 unfair labor practices, and signed a petition to inform Respondent that they would be returning to
9 work the following Monday (the strike notice). Tr. 50, 58-66, 92-98, 258-61, 330-31, 473-74; GC
10 Ex. 4. Again, Bankston did not materially contradict Saephan's testimony. Tr. 943-55.

11 **4. October 16: Employees Strike and Picket; Respondent Calls Police**

12
13 In the early morning on Friday, October 16, millworkers Martinez and Saephan, along
14 with four Union representatives, gathered outside the gate to the Suisun City facility in order to
15 picket and present Respondent with the strike notice. Tr. 50, 58-66, 92-98, 258-61; GC Ex. 4;
16 Resp. Exs. 1-4. Manager Gilfillan pulled up to the gate, noticed the picketers, and quickly peeled
17 away. Tr. 50, 58-66; 258-61, 475-83, 613-18. After the normal 7:00 a.m. start time had come
18 and gone, neither Gilfillan, Foreman Alvarez, nor any of the temporary workers had yet shown
19 up to work. *Id.* Union Representative John Pock and employee Martinez drove to look for them
20 and found Gilfillan, Alvarez and a group of temporary workers gathered around the corner. *Id.*
21 Gilfillan was on the phone, and when Pock attempted to hand him the strike notice, Gilfillan
22 jumped in his vehicle and drove away. *Id.* Pock introduced himself to Alvarez and the
23 temporary workers and asked why they were gathered there. *Id.* Foreman Alvarez said that
24 Gilfillan had called the police and wanted the workers to wait until they arrived before going to
25 work. Tr. 63-64.
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1 A few minutes later, Alvarez received a phone call, then announced to the temporary
2 employees that Gilfillan said it was time to go to work. Tr. 479-81. Martinez asked Alvarez
3 how he was going to open the gate, since Gilfillan had taken his keys from him, and Alvarez
4 responded that Gilfillan had given him a set of keys so that he could open the gate. Tr. 480-81.¹²
5 As Alvarez and the temporary workers drove to the gate, Pock called the picketers to let them
6 know to set up the picket line, and he and Martinez returned to the facility. Tr. 65. Pock and
7 Martinez again tried to deliver the strike notice to Gilfillan, who again refused to accept it. Tr.
8 65, 362-64, 481-82. Employee Martinez followed Gilfillan into the facility and once again
9 attempted to give him the strike notice, but Gilfillan still would not accept it, so Martinez slipped
10 it under the office door and went to join the picket line. Tr. 482-85. By 8:24 a.m., the Union had
11 faxed copies of the strike petition to Manager Gilfillan at the Suisun City facility and to General
12 Manager Kevin Campbell at Respondent's headquarters in Colton. Tr. 50-51, 728-29.

15 Meanwhile, two officers from the Solano County Sheriff's office arrived around 8:04
16 a.m. after receiving a phone call from Gilfillan at 6:33 a.m. Tr. 66-69, 112-19, 483-; GC Ex. 10
17 (sheriff's log).¹³ When they arrived, the officers passed through the picket line and went
18 directly to speak to Gilfillan inside the gate. Tr. 66-69, 76; GC Ex. 10. The picketers had not
19 started picketing or chanting at this point. Tr. 364, 485-86.

21 After speaking with Gilfillan, the officers came to the picket line and told Union
22 Representative Pock that "they" wanted the picketers removed for trespassing and wanted them
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24 ¹² Gilfillan confirmed that he had given Alvarez the keys so that Alvarez could open the gate for the
25 temporary millworkers. Tr. 800.

26 ¹³ Gilfillan admitted that he had called the police, and that he had recognized Martinez, but initially did not
27 notice Saephan or recognize the other picketers. Tr. 794-98. Gilfillan did recall seeing Saephan on the
28 picket line by around 8:30 a.m. Tr. 808. He asserts that Vice President Paxson told him to call the sheriff
on each occasion for safety reasons. Tr. 797, 809.

1 arrested. Tr. 66-68, 77, 102.¹⁴ Pock explained that they were engaged in lawful labor union
2 activity and had a right to be on the property under Section 602(o) of the California Penal
3 Code.¹⁵ *Id.* One of the officers went to his vehicle to check the Penal Code while the other
4 officer attempted to have the picketers relocate across the street and off of Respondent's
5 property. Tr. 67-69. The Union refused to move, and eventually, the second officer returned
6 and said that the penal code did give them the right to picket on private property and that he
7 would so advise Gilfillan. Tr. 68-69. The Union assured the officers that they would not be
8 blocking any vehicles or pedestrians from coming or going through the gate, and after speaking
9 with Gilfillan again, the officers left at around 8:30 a.m. Tr. 69; GC Ex. 10. The picketing
10 continued until around 1:00 p.m., with the picketers marching back and forth, chanting union
11 slogans, using a bullhorn, and holding picket signs. Tr. 70. The picketers did not impede any
12 vehicles or pedestrians from passing through the gate. Tr. 70-71, 486-87.

15 **5. October 16: Saephan Reports to Closed Drug Testing Facility Before**
16 **Striking, Refuses to Report to Another Testing Facility While On**
17 **Strike**

17 As described above, employee Bobby Saephan met with the other picketers at the gate to
18 Respondent's facility on the morning of October 16, but he left sometime around the 7:00 a.m.
19 start time to report to the drug testing facility at 7:30 a.m. as Gilfillan had instructed the night
20 before. Tr. 73; 258-62, 487-88. Alas, it was still closed, with the same flyer posted from the day
21 before, as he had reported to Gilfillan the previous afternoon. Tr. 262. Saephan's phone records
22 show that he arrived at the Fairfield testing facility by 7:22 a.m., texted Gilfillan at 7:29 a.m. with
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25 ¹⁴ Gilfillan asserted that he did not explicitly tell the officers that Respondent wanted to have the picketers
26 removed or arrested. Tr.804, 810.

27 ¹⁵ The ALJ took administrative notice of California Penal Code Section 602(o), which states that trespass
28 "shall not be applicable to persons engaged in lawful labor union activities which are permitted to be
carried out on the property by the . . . National Labor Relations Act." Tr. 68-69.

1 another picture of the flyer stating that the facility was closed, and added, “I don’t know what you
2 want me to do.” Tr. 262-64; GC Ex. 15; Resp. Ex. 14. Minutes later, Gilfillan texted back, “hang
3 tight let me call corporate,” and Saephan responded “okay.” *Id.* Saephan then called Union
4 Representative Pock, who told him to come back and join the strike and picketing. Tr. 74; 264-
5 65. Saephan returned while the sheriff’s officers were still present. Tr. 265-66. Gilfillan recalled
6 noticing Saephan on the picket line by about 8:30 a.m. Tr. 808.

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8 While on the picket line, at a little after 9:00 a.m., Saephan noticed a text from Human
9 Resources Manager Bankston telling him to leave work now and go to a new location in Vacaville
10 to take the drug test. Tr. 266-67, 354; GC Ex. 16; Resp. Ex. 15. Saephan asked Union
11 Representative Pock what he should do. Tr. 74-75, 267-68. After Pock called the Union’s
12 attorney, he told Saephan that, since he was on strike, he was not obligated to follow
13 Respondent’s instructions, and that Respondent could ask him to take the test on Monday when he
14 returned to work and he could take the test then. Tr. 74-75; Tr. 267-68, 353-54. Saephan did not
15 respond to Bankston’s text and did not go to the second testing facility in Vacaville, but remained
16 at the picket line until it ended around 1:00 p.m. *Id.* Bankston did not materially contradict
17 Saephan’s testimony. Tr. 943-55.

20 **6. October 19: Respondent Suspends Saephan**

21 The following Monday, October 19, Respondent suspended Saephan for not complying
22 with its drug testing policy. Tr. 269-71, 277-79; GC Ex. 17. Manager Gilfillan called Saephan
23 into his office to speak with Human Resources Manager Bankston by speakerphone, and handed
24 him a notice of a one-day suspension. *Id.* Saephan protested that it was inaccurate and he would
25 not sign it. *Id.* Bankston said he did not have to sign it, and could submit an email response by
26 4:00 p.m. if he wished. *Id.* On his way home, Saephan received a call from Union Representative
27 Lipscomb asking him to come back to the facility and join the picket line that the Union was
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1 setting up, which he did. Tr. 271-73. After joining the Union representatives on the picket line,
2 he went to the Union's offices and emailed Bankston a response, reminding her that he had
3 followed the instructions to take the test twice and both times the testing facility was closed, he
4 had been on an unfair labor practice strike on October 16, he in no way avoided taking the drug
5 test, and he believed the threat of termination was retaliation for his Union support. Tr. 276-79;
6 GC Ex. 17 at p.3.

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8 Bankston did not materially contradict Saephan's testimony regarding the meeting. Tr.
9 958-60. She confirmed that by around 9:30-10:00 a.m. on October 16, she received a report that
10 Saephan was picketing. Tr. 954-55. At around 1:00 p.m., she informed Chris and Kyle Paxson
11 that Saephan had not shown up at the drug testing site after she had told him to go to by text
12 message that morning, and the Paxson brothers decided to suspend him. Tr. 954-56.

13 14 **7. October 19: Respondent Calls Police on Picketers Again**

15 At about 6:51 a.m. on Monday, October 19, Gilfillan again called the Sheriff's office
16 about the picketers. Tr. 273-76; GC Ex. 10. The officers arrived around 8:19 a.m., after
17 Saephan had re-joined the picketers. Tr. 273-76; GC Ex. 10. This time, the officers told the
18 picketers that some of the tenants in the area were complaining about the noise levels. Tr. 273-
19 76. The officers left after the picketers agreed to keep the noise down. Tr. 273-76.

20 21 **8. October 20: Respondent Fires Saephan**

22 When Saephan reported to work on October 20 following his suspension, Gilfillan again
23 called him to his office to speak with Bankston via speakerphone, and handed him a termination
24 notice. Tr. 279-80; GC Ex. 18; Resp. Ex. 8. Bankston told Saephan that she had reviewed his
25 email response, but due to his failure to comply with company policy by taking the drug test,
26 Respondent was terminating him. Tr. 279-80. Saephan asked for his final paycheck, was told it
27 was already in the mail, and Gilfillan escorted him out of the facility. Tr. 280.
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1 Bankston did not materially contradict Saephan's testimony. Tr. 960-62. She testified
2 that after receiving Saephan's email response, she met with President and Vice President Chris
3 and Kyle Paxson, who decided to terminate him for failing to show up for his drug test, and that
4 Manager Gilfillan had no involvement in the decision. Tr. 960-62.

5 **9. October 21: Respondent Falsely Accuses Martinez of Failing to Clock**
6 **Out**

7 The employees clock in and out for each shift and lunch break using an electronic
8 timekeeping system that Respondent installed sometime around August (previously they did not
9 punch in or out). Tr. 420-21. Each pay period, Manager Gilfillan has each employee sign a
10 print-out of their timesheets for the two-week pay period to show they agree with the hours
11 reported. Tr. 499. At around 10:00 a.m. on October 21, Manager Gilfillan approached Martinez
12 with a timesheet with circled blank spaces for October 7 and 14, and pointed out that the clock-
13 out times were missing. Tr. 498-504; GC Ex. 21. Martinez said that was strange, because he
14 always punched in and out, that the employees all line up to clock out together, and that Alvarez
15 is always standing at the time clock watching them do so, so he should ask Alvarez about it. *Id.*
16 Gilfillan said, okay, no problem, I'm going to put you down for the normal clockout time of 3:30
17 p.m. (15:30), initial it, and have you sign it. *Id.* Martinez then reminded him that employees
18 worked overtime on October 14. *Id.* Gilfillan looked at another employee's time card, which
19 showed the overtime, so he noted a clock out time of 5:00 p.m. (17:00), initialed it, and had
20 Martinez sign it. *Id.* Martinez thought all was well and went about his work. *Id.* Gilfillan
21 corroborated Martinez' testimony after initially testifying that Martinez had approached him
22 about the missed punches, rather than vice versa. Tr. 841-43, 854-57; GC Ex. 21.

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26 It turns out all was not well. At about 3:20 p.m., as the employees were cleaning up for
27 the day, Gilfillan told Martinez that Human Resources Manager Bankston wanted to talk to him
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1 in the office, but wasn't sure what it was about. Tr. 492-98. No one was present for the meeting
2 but Martinez and Gilfillan, with Bankston on speaker phone. *Id.* Gilfillan testified that he had
3 no knowledge of the alleged infraction.¹⁶ Tr. 834-35. Bankston informed Martinez that she was
4 going to give him a write-up for failing to clock out on October 7 and 14. Tr. 834-35; GC Ex.
5 25, Resp. Ex. 35. Martinez asked if she had talked to Alvarez, who could confirm that he had
6 clocked out, because he was standing right there at the time. Tr. 492-98. Bankston said she did
7 not have to talk to Alvarez because he did not have any authority over clocking out; it was the
8 employee's responsibility, and she did not need to ask Alvarez anything because she had the
9 proof she needed in black and white right in front of her. *Id.* Bankston said the time-keeping
10 program does not make mistakes, it was Martinez' mistake, and this had never happened before
11 with anybody else. *Id.* Martinez mentioned that the time clock had failed to record his time at
12 least once before, and Gilfillan had approached him with a similar time sheet showing a missed
13 punch, but Gilfillan initialed it after Martinez reminded him that the two of them were talking
14 together when he punched out and there was no problem. *Id.* He told her to ask Gilfillan about
15 it, he's sitting right here. *Id.* Bankston responded that she wouldn't ask Gilfillan or anybody
16 because all she needed was in front of her. *Id.* at 497.

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20 Martinez then asked Bankston if she had reviewed the video, which he said would show
21 him punching out. Tr. 492-98. Bankston said, no, she did not need to review the video and she
22 was not going to talk to Alvarez because she had all the proof she needed. *Id.* After protesting
23 some more about Bankston's unwillingness to investigate, Martinez stated that they were trying
24 to get rid of him because of the Union. *Id.* Bankston responded that if he had no further

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26 ¹⁶ When Bankston received the timesheets from Gilfillan showing the missed punches, she asked him if he
27 was aware of any mechanical issues with the time clock, but did not ask for specifics about Martinez' two
28 missed punches. Tr. 908-12. She noted that no other millworkers had missed punches during the time
period and concluded Martinez had failed to clock in or out. Tr. 908-09, 914-17.

1 questions about the write-up, she was done with him. *Id.* Martinez said he had a lot more
2 questions, but she wasn't answering them and he was not going to sign the write up or submit a
3 response after Bankston confirmed that she was the only one who was going to review it. *Id.*
4 Bankston did not materially contradict Martinez' testimony. Tr. 917-20.

5 **10. November 25: Respondent Videotapes Picketing Employees**

6 The Union engaged in further picketing during the lunch break at the Suisun City facility
7 on November 25, with Union Representatives Pock, Moses Villeda, Kurt Ferreira, and Fidel
8 Chavez, along with Respondent's former employee Bobby Saephan and current employee
9 Francisco Martinez. Tr. 104-05, 110-11, 527-31, 873-83. During the picketing, Manager
10 Gilfillan, on Vice President Paxson's instruction, set up a video camera just outside the gate that
11 was trained on the picketers. Tr. 104-05, 110-11, 829-31, 873-83. The video footage lasts just
12 under eighteen minutes, and captures Martinez and four other picketers from the time the camera
13 was set up until it was shut down. Tr. 873-83; GC Ex. 30.
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16 **11. December 10: Respondent Falsely Accuses Martinez of Stealing 17 Confidential Information and Engaging in Excessive Restroom 18 Breaks and Cellphone Use**

19 On December 10, Gilfillan called Martinez into his office and said Bankston wanted to
20 talk to him on the phone about a fax she had just sent, but he was not sure what it was about. Tr.
21 508-09. It was yet another written warning. Tr. 509-10; GC Ex. 26. Bankston said she was
22 giving him a final written warning because they suspected that he was giving information from
23 the company to people outside of the company, that he was taking excessive breaks and using the
24 bathroom and his phone too much, and that his production was diminishing since he started
25 working there.¹⁷ *Id.* She asked if he had any questions, and he said he had a lot of questions,
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28 ¹⁷ Notably, in the days leading up to the September 2 Union petition, both Manager Gilfillan and Foreman Alvarez told Martinez that they were impressed with his work and wanted to promote him to work as

1 which he began asking. Tr. 510-14. He asked why no one had ever told him about all these
2 things he was supposedly doing wrong, and who came up with all of this. *Id.* She said it was no
3 one's responsibility but yours to do your job, and management came up with it. *Id.* He asked,
4 who in management, Gilfillan or Alvarez, who told you this? *Id.* She just said, management, so
5 he continued to press, saying that no one had said anything to him about any of this. *Id.*
6 Martinez asked Gilfillan if he knew anything about it, and Gilfillan said, no. *Id.* Gilfillan
7 testified that he had no personal knowledge of the alleged infraction. Tr. 838-39.
8

9 Martinez pointed out that the warning says it has already been discussed with
10 management, but Gilfillan doesn't know anything about it, and that he thought it was just her
11 trying to get rid of him because he supports the Union. Tr. 510-14. Bankston did not respond,
12 so he asked what the reference to the drawing was about. *Id.* Bankston said that a couple of
13 months before, Alvarez told Gilfillan that Martinez was trying to steal a drawing from Alvarez'
14 clipboard. *Id.* Martinez said, you say Alvarez told you that? He never said anything to me
15 about it. *Id.* When Bankston did not respond, Martinez said he never stole anything, why would
16 he need a drawing, he's been doing this work all his life and doesn't need a drawing. *Id.* He said
17 he only takes breaks with everyone else, only goes to the bathroom twice a day, and asked her if
18 Gilfillan had told her about all the times Martinez complained about the bathroom, and said you
19 literally have to hold your breath when inside the bathroom. *Id.*¹⁸ When she said he had not,
20 Martinez said, that's funny, because every time he has complained about the toilet, he says he is
21 going to call you (Bankston) because you are in charge. *Id.* Bankston asked if he had any more
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25 Alvarez' assistant and "right-hand man" and take over for Alvarez when he was on vacation. Tr. 414-18,
26 531-33. Not surprisingly, that promotion never materialized. Tr. 531-33.

27 ¹⁸ Gilfillan confirmed that Martinez had complained about the toilet on two occasions, and each time he
28 reported Martinez' concerns to Bankston. Tr. 754-57.

1 questions, and he said he had a lot, but she wasn't answering them. *Id.* Bankston said she was
2 done with him, told Gilfillan to give him a copy of the warning and hung up. *Id.* Martinez told
3 Gilfillan he was not going to sign the warning, and asked Gilfillan if he (Gilfillan) was going to
4 sign it, and Gilfillan said, no. Tr. 514.

5 Bankston did not materially contradict Martinez' testimony, although she recalled telling
6 him that the report of the missing drawing was from a couple of weeks earlier, not months, and
7 she admitted that she simply relied on the reports she received, without looking at the available
8 video or talking to Alvarez or Gilfillan about the matter. Tr. 931-34, 988-92.

10 Martinez showed Alvarez a copy of the warning on his way out, and said that Bankston
11 told him that Alvarez said he (Martinez) had stolen a drawing from Alvarez. Tr. 515. When
12 Alvarez responded that he never said that, Martinez said, don't tell me, tell them! *Id.* Over
13 subsequent conversations, Alvarez told Martinez that he (Alvarez) spoke with Gilfillan and
14 Bankston (by phone) about Martinez' December 10 warning, and told them that he had never
15 said Martinez had stolen a drawing from his clipboard, and that Martinez was one of the most, if
16 not the most, productive of all the millworkers, but that the rest of the conversation was just
17 "bullshit." Tr. 516-20. The two concluded that Bankston was probably referring to a simple
18 handwritten drawing showing where to drill holes in a piece of plywood that Alvarez had given
19 to Martinez for a project, that Martinez had folded up and put in his pocket after he figured out
20 what he needed to do, then returned it to Alvarez. Tr. 520-27. Alvarez told Martinez that when
21 he gave the drawing to Gilfillan, Gilfillan asked him why it was folded, and Alvarez responded
22 that he did not know, Martinez gave it to him like that. *Id.* Martinez drew from memory what
23 he recalled the drawing to be. GC Ex. 27.
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1 **E. Respondent Maintains Overbroad Rules**

2 From the time it opened the new lumberyard in Suisun City until it issued a new
3 employee handbook in January 2016 (*See* Tr. 887-91; Resp. Ex. 56), Respondent maintained the
4 following rules in its employee handbook applicable to its employees:

- 5 (a) A requirement that employees do their jobs pleasantly, cooperate with
6 management, and report any problems or questions to management (Page 7: What
7 Squires Lumber Company, Inc. Expects From You);
8
9 (b) A restriction against “discussing or sharing information regarding Squires
10 Lumber’s business with the media (print, radio, or television) . . . except by the
11 President and CEO” (Page 10: Code of Ethics);
12
13 (c) Prohibitions against unauthorized disclosure of company information, verbal
14 abuse, unauthorized use of company property, falsification of company records,
15 provoking a fight, using abusive language, removing company property, and
16 recording the time of another employee (Pages 29-30: Prohibited Conduct); and
17 (d) Prohibitions against disclosing information about Respondent, its
18 owner/proprietor, its suppliers, its customers, “or perhaps even fellow employees,”
19 and states that any breach will not be tolerated and legal action may be taken by
20 the company (Page 35: Confidentiality).
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22 Tr. 187-88; GC Ex. 11. Respondent’s new handbook modified most of the prohibitions specified
23 above (*See* Resp. Ex. 56 at 10, 20, and 63-64), and specifies that employees have the right to
24 discuss their own wages, hours, and working conditions amongst themselves and to third parties
25 unrelated to Respondent, and that Respondent does not consider such information confidential
26 “among [Respondent’s] employees.” (Resp. Ex. 56 at 20).
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1 **F. General Counsel Issues Complaint; Respondent Posts Notices to Employees**
2 **But Does Not Repudiate Unfair Labor Practice Allegations**

3 Respondent issued the first of the Complaints in this case on December 31, 2015. GC
4 Ex. 1(cc). On January 6, 2016, Respondent posted two Notices to Employees of their rights
5 under the National Labor Relations Act and outlined certain conduct that Respondent would not
6 engage in with respect to those rights, without further comment to employees. Tr. 773-77; Resp.
7 Exs. 31, 48, and 49. There is no evidence that Respondent has otherwise repudiated the alleged
8 unfair labor practices.

9 **III. CREDIBILITY**

10 As noted above, much of the testimony of Respondent’s witnesses corroborated the
11 testimony of the General Counsel’s witnesses. Each of the General Counsel’s witnesses testified
12 competently and consistently during both direct and cross-examination, and much of their
13 testimony was corroborated by documentary evidence and, in Francisco Martinez’ case, detailed
14 contemporaneous notes. As a current employee of Respondent, Martinez’ testimony is entitled
15 to additional weight, as the Board has recognized it is unlikely that current employees would
16 testify falsely against their employer as it would be contrary to their pecuniary and other self-
17 interest. *See, e.g., Natico Inc.*, 302 NLRB 668, 689 (1991); *Bohemia, Inc.*, 266 NLRB 761, 764
18 n.13 (1984); *Federal Stainless Sink*, 197 NLRB 489, 481 (1972); *Gateway Transp., Inc.*, 193
19 NLRB 47, 48 (1972). While there may have been some minor differences in the employees’
20 recollections of certain events, such minor differences tend to enhance, rather than retract from,
21 witness credibility, as they are the natural consequence of different perspectives and the varying
22 personal impact issues have on individuals. *Id.*; *H.B. Zachry Co.*, 319 NLRB 967 (1995);
23 *Publishers Printing Co., Inc.*, 317 NLRB 933 (1995); *Gerig’s Dump Trucking, Inc.*, 320 NLRB
24 1017 (1996); *Lott’s Elec. Co.*, 293 NLRB 297 (1989).
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1 Former temporary employee Shayne Phillips’ testimony regarding Labor Consultant
2 Pasalagua’s threat that Respondent would “get rid of” the union supporters if it had to was
3 detailed and not contradicted. Manager Vargas, the only witness Respondent called on the point,
4 admitted that he couldn’t remember much about the meeting. Respondent’s failure to call
5 Pasalagua warrants “[a]n adverse inference[, which] may properly be drawn regarding any
6 matter about which a witness is likely to have knowledge, if a party fails to call that witness to
7 support its position and the witness may reasonably be assumed to be favorably disposed to the
8 party . . . Also, from the failure of a party to produce material witnesses or relevant evidence
9 without satisfactory explanation, the trier of the facts may draw an inference that such testimony
10 or evidence would be unfavorable to that party.” *Dino and Sons Realty Corp.*, 330 NLRB 680,
11 689 n.11 (2000); citing *7-Eleven Food Store*, 257 NLRB 108 (1981); *Publishers Printing Co.*,
12 233 NLRB 1070 (1977); *Martin Luther King Sr. Nursing Center*, 231 NLRB 15 (1977);
13 contrasting *Goldsmith Motors Corp.*, 310 NLRB 1279 fn. 1 (1993); *Property Resources Corp.*
14 285 NLRB 1105 fn. 2 (1987), *enfd.* 863 F.2d 964 (D.C. Cir. 1988).

17 **IV. ANALYSIS**

18 As set forth below, Respondent waged a campaign of unfair labor practices immediately
19 after all three of its then directly-employed millworkers presented it with a petition authorizing
20 the Union to represent them for the purposes of collective bargaining. Now, only one of those
21 three employees remains employed. Respondent’s unfair labor practices have created a
22 workplace climate of fear and retaliation for those who dare openly support the Union, making
23 the possibility of a fair Board election unlikely, if not impossible, making a *Gissel* bargaining
24 order necessary to effectuate the desires of the majority of the directly-employed millworkers to
25 be represented by the Union effective September 2, the day Respondent received the Union
26 petition and embarked on its course of unlawful conduct.
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1 **A. Foreman Caleb Alvarez is a Supervisor or Agent**

2 While Foreman Alvarez is not directly responsible for any of Respondent’s alleged unfair
3 labor practices, he did communicate many of the various retaliatory and unilateral changes to the
4 employees. Further, as Respondent failed to call him as a witness, his supervisory or agency
5 status makes a number of statements he made, as reported by employee witnesses, admissions by
6 a party-opponent that would otherwise be considered hearsay. *See* Federal Rule of Evidence
7 801(d)(2). Finally, his status as a supervisor or agent renders moot Respondent’s argument that
8 he should be included in the bargaining unit to determine the Union’s majority status as of
9 September 2. As set forth below, the evidence shows that Alvarez was a supervisor and/or agent
10 of Respondent within the meaning of the Act as of September 2.¹⁹

11 **1. Alvarez’s Supervisory Status**

12 Section 2(11) of the Act defines “supervisor” as any individual having authority, in the
13 interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign,
14 reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances,
15 or effectively to recommend such action, if in connection with the foregoing the exercise of such
16 authority is not of a merely routine or clerical nature, but requires the use of independent
17 judgment. 29 U.S.C. § 152(11). An individual need only exercise one of the functions
18 enumerated in Section 2(11) to be found to be a supervisor. *See NLRB v. Kentucky River*
19 *Community Care, Inc.*, 532 U.S. 706, 713 (2001). The burden of proof lies with the party
20 asserting that an individual is a supervisor. *Id.* at 710-712.

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26 ¹⁹ The September 2 date is the relevant date for determining whether a *Gissel* bargaining order is warranted.
27 His status may have changed since then, given Respondent’s September 18 announcement that he was no
28 longer a supervisor and his even further belated conversion from salaried to hourly wages about January 1,
 2016.

1 Where the possession of any one of the powers listed in Section 2(11) is not conclusively
2 established, the Board looks to secondary indicia to determine supervisory status. *Sams Club, a*
3 *Division of Wal-Mart Stores, Inc.*, 349 NLRB 1007, 1013-14 (2007). Those indicia include the
4 individual's job title or designation and authority to grant time off, *Monarch Federal Savings &*
5 *Loan*, 237 NLRB 844, 845 (1978), enfd. 615 F.2d 1354 (3d Cir. 1980); and higher compensation
6 and the perceptions of others as to the individual's authority, *General Security Services Corp.*,
7 326 NLRB 312 (1998), enfd. 187 F.3d 629 (8th Cir. 1999). *Id.* However, when there is no
8 evidence that an individual possesses any one of the statutory indicia, the secondary indicia are
9 insufficient by themselves to establish supervisory status. *Id.*, citing *J. C. Brock Corp.*, 314
10 NLRB 157, 159 (1994).

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12 Here, there is no question that, as of September 2, Foreman Alvarez was responsible for
13 assigning and directing work to the millworkers. The authority to assign or responsibly direct
14 other employees does not confer supervisory status unless its exercise requires the use of
15 independent judgment. *See, e.g., Property Markets Group*, 339 NLRB 199, 204-206 (2003).
16 Manager Gilfillan, the only other manager and admitted supervisor based out of the Suisun City
17 facility, gave Alvarez free reign to run production in the lumber yard, and testified that he was
18 not even aware of what Alvarez did on a daily basis, making it clear that Alvarez necessarily
19 exercised independent judgment in so doing.
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22 There is also strong secondary indicia of Alvarez' supervisory status as of September 2.
23 The millworkers clearly believed he was a supervisor, which is supported by Alvarez' frequent
24 comments that he did have such authority, Manager Gilfillan's comments on September 18 that
25 Alvarez no longer had hiring or firing authority, Alvarez's higher compensation, which also
26 came in the form of a salary as opposed to an hourly wage like the millworkers, his status as
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1 “exempt,” his freedom from clocking in or out, his monitoring of employees’ clocking in and
2 out, his ability to permit or deny access to the office sink, his instructions to employees that they
3 could no longer remove their hardhats on break unless at the break table or in their vehicles, his
4 daily communication with President and Vice-President Paxson to keep them abreast of
5 production and labor relations matters (specifically, employee striking and picketing activity),
6 his presence during new-hire meetings, his possession of keys to the facility and access to office
7 areas, which contained proprietary information that the rank-and-file millworkers did not have
8 access to, his access to a special parking area, and Gilfillan putting him in charge of the keys and
9 the temporary employees the morning of the October 16 strike.
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11 Therefore, Foreman Alvarez’s responsibility to direct and assign work to employees,
12 coupled with the aforementioned secondary indicia, establishes that Alvarez was, at all material
13 times, a supervisor within the meaning of Section 2(11) of the Act.
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15 **2. Alvarez’s Agency Status**

16 In addition, or in the alternative, Foreman Alvarez was clearly an agent of Respondent.
17 “The Board applies common law principles when examining whether a person is an agent of the
18 employer. Agency is established when there is actual, or express, authority to engage in the
19 conduct. Actual authority refers to the power of an agent to act on his principal's behalf when
20 that power is created by the principal's manifestation to him. That manifestation may be either
21 express or implied. Agency may also be established by a showing of apparent authority, which
22 results from a manifestation by the principal to a third party that creates a reasonable basis for
23 the latter to believe that the principal has authorized the alleged agent to perform the acts in
24 question.” *Toering Electric Co.*, 351 NLRB No. 18 (2007)(internal citations omitted). “Under
25 the doctrine of apparent authority, the test for determining whether an employee is an agent is
26 whether, under all circumstances, the employees would reasonably believe that the employee in
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1 question was reflecting company policy and speaking and acting for management.” *Star Color*
2 *Plate Service*, 279 NLRB 576, 576 (1986). Where an employer presents an employee as a
3 “conduit for transmitting information” between management and the rank-and-file, the
4 employee’s statements are attributable to the employer. *Debber Electric*, 313 NLRB 1094, 1095
5 n. 6 (1994). *See also Dentech Corp.*, 294 NLRB 924, 925 (1989) (by putting a rank-and-file
6 employee in a position where other employees could “reasonably believe” s/he spoke on
7 management’s behalf, the employer has vested the employee with apparent authority to act as an
8 agent).

10 As set forth above, the millworkers clearly believed that Foreman Alvarez spoke and
11 acted for management and reflected company policy. Their belief is certainly reasonable, given
12 Alvarez’s expressions of Respondent’s rules and policies, such as the office sink access and hard
13 hat rules, his role in soliciting overtime work, his access to keys and confidential areas, the
14 explicit control Manager Gilfillan gave him over the activities of the temporary employees
15 during the morning of the October 16 strike, and his comments to millworkers about bringing
16 them on as direct hires and his own hiring and firing authority.

18 **B. Respondent Threatens Employees with Job Loss, Arrest of Union Supporters**
19 **and Picketers, and Engages in Unlawful Surveillance in Violation of the Act**

20 Section 8(a)(1) of the Act prohibits employers from interfering with, restraining or
21 coercing employees in the exercise of their rights guaranteed in Section 7 of the Act. 29 U.S.C.
22 Sec. 158 (a)(1). It is well established that an employer violates Section 8(a)(1) of the Act if it
23 communicates to employees that by supporting a union they jeopardize their job security, wages,
24 or other working conditions. *Metro One Loss Prevention Serv.*, 356 NLRB No. 20, slip op. at 1
25 (2010). Here, on about September 10, Labor Consultant Ricardo Pasalagua, in the presence of
26 Manager Vargas, told a group of temporary employees that Respondent would “*get rid of them*,
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1 *if they had to,*” expressly referring to the three employees who signed the Union petition on
2 September 2. Tr. 139-41. Given the context, this was an unlawful threat of job loss. *See NLRB*
3 *v. Jamaica Towing Co.*, 632 F.2d 208, 212 (2d Cir. 1980)(threats of job loss for union support
4 unlawful, may justify *Gissel* bargaining order).

5 Respondent further committed Section 8(a)(1) violations of the Act when on October 16
6 and 19 it attempted to cause the arrest of both employees and non-employees who were picketing
7 outside the gate of Respondent’s facility in protest of its unfair labor practices. GC Ex. 10.
8 Because the picketers included Respondent’s off-duty employees on both occasions (striking
9 employees Martinez and Saephan on October 16, suspended employee Saephan on October 19),
10 who unquestionably had a right to picket outside of Respondent’s facility, Respondent
11 unlawfully interfered with their rights to engage in union activity on the exterior of Respondent’s
12 facility by calling the sheriff’s department, in violation of Section 8(a)(1). *See Tri-County*
13 *Medical Center*, 222 NLRB 1089 (1976) and progeny (off-duty employees have access rights to
14 the exterior of their employer’s facility to engage in activity protected by Section 7 of the Act).

15 Respondent’s calling the sheriff’s department also violated the Act with respect to the
16 non-employee union organizers who were picketing on October 16 and 19. In *Lechmere, Inc. v.*
17 *NLRB*, the Supreme Court held that an employer may lawfully bar non-employee union
18 organizers from private property (unless the non-employees are unable to reach the employees
19 through usual channels). 502 U.S. 527 (1992). However, “[i]n cases in which the exercise of
20 Section 7 rights by nonemployee union representatives is assertedly in conflict with a
21 respondent’s private property rights, there is a threshold burden on the respondent to establish
22 that it had, at the time it expelled the union representatives, an interest which *entitled* it to
23 exclude individuals from the property [emphasis in original].” *Indio Grocery Outlet*, 323 NLRB
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1 1138, 1141-42 (1997), enfd. by 187 F.3d 1080 (9th Cir. 1999), quoting *Food for Less*, 318
2 NLRB 646, 649 (1995), affd. in relevant part by 95 F.3d 733 (8th Cir. 1996). *See, e.g., Payless*
3 *Drug Stores*, 311 NLRB 678 (1993), enf. denied on other grounds by unpublished decision (9th
4 Cir. May 8, 1995); and *Bristol Farms*, 311 NLRB 437, 438 (1993). “In the absence of such a
5 showing there is in fact no conflict between competing rights requiring an analysis and an
6 accommodation under *Lechmere, supra.*” *Indio Grocery Outlet*, 323 NLRB at 1141-42, quoting
7 *Food for Less*, 318 NLRB at 649.
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9 In determining whether an adequate property interest has been shown, the Board looks to
10 the law that created and defined the employer's property interest, because it is state law, not the
11 Act, that creates and defines the employer's property interest. *Bristol Farms*, 311 NLRB at 438.
12 Thus, an employer cannot exclude individuals exercising Section 7 rights if the state law would
13 not allow the employer to exclude the individuals without violating Section 8(a)(1) of the Act.
14 *Id.*; *see also Johnson & Hardin Co.*, 305 NLRB 690 (1991) and *Fashion Valley Shopping*
15 *Center*, 343 NLRB 438 (2004). This applies to threats to arrest, requests to arrest, and attempts
16 to cause arrest, whether successful or not. *Indio Grocery Outlet*, 323 NLRB at 1142.
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18 Here, under California law, unlawful trespass “shall not be applicable to persons engaged
19 in lawful labor union activities which are permitted to be carried out on the property by the . . .
20 National Labor Relations Act.” California Penal Code, Section 602(o). Therefore, even if
21 Respondent’s lease of the Suisun City property gave it a right to exclude trespassers from its
22 property generally, California state law specifically exempted the Union representatives here, as
23 they were engaged in lawful labor activities permitted under the National Labor Relations Act,
24 making Respondent’s calls to the sheriff an unlawful attempt to have them removed, in violation
25 of Section 8(a)(1) of the Act. *See Indio Grocery Outlet*, 323 NLRB at 1141-42 (the Board found
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1 that under a different section of California trespass law, the Respondent did not have a right to
2 exclude the union agents from the walkway in front of its store and from its parking lot, and that
3 it would not have possessed such a right even if it had possessed complete ownership of the
4 walkway and parking lot).

5 Finally, on November 25, Respondent engaged in unlawful surveillance of employees
6 engaged in protected picketing when it set up the video camera and recorded the picketing
7 activity. The Board and federal courts have long held that surveillance of employees by an
8 employer violates the Act, even if employees are not aware of it. *NLRB v. Grower-Shipper*
9 *Vegetable Ass'n*, 122 F.2d 368 (9th Cir. 1941); *Ivy Steel & Wire, Inc.*, 346 NLRB 404 (2006).
10 While an employer may observe employees engaging in Section 7 activities in an open and
11 public manner on or near its property, it must do so without coercion and in a manner that is not
12 “out of the ordinary.” *Wal-Mart Stores, Inc.*, 350 NLRB 879, 882-83 (2007).
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15 Photographing or videotaping employees as they engage in protected concerted activity
16 violates Section 8(a)(1), absent a legitimate justification reasonably based in fact. *Trailmobile*
17 *Trailer, LLC*, 343 NLRB 95, 96 (2004). Although employers have the right to maintain security
18 measures necessary to the furtherance of their legitimate business interests during union activity,
19 an employer engaged in photographing and videotaping such activity has the burden to
20 demonstrate that it had a reasonable basis to anticipate misconduct by employees. *Id.*, citing
21 *National Steel & Shipbuilding Co.*, 324 NLRB 499, 499 (1997), *enfd.* by 156 F.3d 1268 (D.C.
22 Cir. 1998). An employer must demonstrate a reasonable basis beyond a “mere belief” that
23 misconduct may occur to justify anticipatory photography or videotaping. *Washington Fruit &*
24 *Produce Co.*, 343 NLRB 1215, 1217-18 (2004), citing *FW Woolworth Co.*, 310 NLRB 1197
25 (1993). *Compare Town and Country*, 340 NLRB 1410, 1414-15 (2004)(where employer
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1 justified in photographing and documenting picketing, where picketers had previously blocked
2 entrances and impeded vehicles, supporting a reasonable belief that misconduct could recur).

3 Here, Respondent cannot point to any reasonable belief that any misconduct would occur
4 during the picketing on November 25. There was no alleged misconduct during prior picketing,
5 and the sheriff's officers ultimately let the picketers continue on October 16 and 19. Even if it
6 were credible that Manager Gilfillan did not realize employee Francisco Martinez was
7 participating during his lunch break, which it is not, given Martinez' obvious appearance in the
8 video from its start to finish, Respondent's feigned ignorance provides no defense.
9

10 **C. Respondent Retaliates Against Employees in Violation of Section 8(a)(3) of**
11 **the Act for Organizing a Union**

12 **1. Retaliatory Changes in Working Conditions**

13 The workplace changes Respondent made after learning its employees wanted union
14 representation had one obvious purpose: to send its employees the message that there are
15 negative consequences for supporting a union. These include: (1) prohibiting employees from
16 removing hard hats while on break unless they are sitting at the break table or in their personal
17 vehicles; (2) temporarily removing the portable toilet from outdoors to inside the building near
18 the millworkers' break and work areas; (3) refusing to allow millworkers to use the indoor sink
19 to wash their hands before meal and rest breaks; (4) locking its office door during business
20 hours; (5) closing its external gates during business hours; and (6) failing or refusing to directly
21 hire a millworker to replace Bobby Saephan, instead relying on temporary millworkers to
22 perform the work Saephan once performed. While many of these changes seem relatively minor
23 when standing alone, when taken as a whole, and in the context of the Union organizing drive
24 and Respondent's overall unlawful conduct, it is apparent that they were implemented in order to
25 discourage employees from supporting the Union, in violation of Section 8(a)(3) and (1) of the
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1 Act. *See, e.g., Invista*, 346 NLRB 1269, 1271 (2006) (timing of new restriction on which break
2 areas employees could use indicated nexus between rule and organizing campaign; restriction
3 unlawful); *See also Southern Pride Catfish*, 331 NLRB 618, 625 (2000) (employer violated
4 Section 8(a)(1) by creating a new rule restricting breaks in response to an organizing campaign);
5 *Xidex Corp.*, 297 NLRB 110, 111 (1989), *enfd.* by 924 F.2d 245, 245 (D.C. Cir., 1991)(in
6 context of the employer’s other unfair labor practices, including withdrawing recognition from
7 the union and threatening to transfer work traditionally performed by its union-represented
8 employees to another facility, a single day transfer of an employee was more than *de minimus*,
9 and required a traditional board remedy).

11 2. Respondent Disciplines and Fires Employees for Supporting the 12 Union

13 Section 7 of the Act provides that “[e]mployees shall have the right to self-organization,
14 to form, join, or assist labor organizations, to bargain collectively through representatives of their
15 own choosing, and to engage in other concerted activities for the purpose of collective-
16 bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Section 8(a)(3) of the Act
17 provides that “[I]t shall be an unfair labor practice for an employer by discrimination in regard to
18 hire or tenure of employment to . . . discourage membership in any labor organization . . .” [29
19 U.S.C. §158 (a)(3)]. It is axiomatic that the discharge of an employee in retaliation for union
20 activity violates Section 8(a)(3) of the Act [29 U.S.C. §158 (a)(3)], and is said to go “to the very
21 heart of the Act.” *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

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24 In discriminatory discharge cases such as this, the Board uses the burden-shifting scheme set
25 forth in *Wright Line*²⁰ to determine whether the discharge of an employee violates Section 8(a)(3)

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28 ²⁰ *Wright Line, a Division of Wright Line Inc.*, 251 NLRB 1083 (1980) 455 U.S. 989 (1982)(*Wright Line*).

1 of the Act. *Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 919 (9th Cir.
2 2006)(*Healthcare Employees*).

3 Under *Wright Line*, the Board requires that the General Counsel make a prima
4 facie showing sufficient to support the inference that protected conduct was a
5 ‘motivating factor’ in the employer’s decision. Once this is established, the
6 burden will shift to the employer to demonstrate that the same action would have
7 taken place even in the absence of protected conduct. While the General
8 Counsel retains the ultimate burden of persuasion, “once the General Counsel
establishes that anti-union animus was a motivating factor, the employer bears
the burden of establishing any affirmative defense such as the inevitability of
termination.”

9 *Healthcare Employees*, 463 F. 3d at 919, citing *Wright Line*, 251 NLRB at 1089, and quoting
10 *Schaeff Inc. v. NLRB*, 113 F.3d 264, 267 n. 5 (D.C.Cir.1997).

11 Because an employer will seldom admit that it was motivated by anti-union animus when
12 it made its adverse employment decision, circumstantial evidence is sufficient to establish anti-
13 union motive. *Healthcare Employees*, 463 F.3d at 919, citing *Shattuck Denn Mining Corp. v.*
14 *NLRB*, 362 F.2d 466, 470 (9th Cir.1966)(“Actual motive, a state of mind, being the question, it
15 is seldom that direct evidence will be available that is not also self-serving.”); *New Breed*
16 *Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.1997); *Folkins v. NLRB*, 500 F.2d 52, 53
17 (9th Cir.1974) (per curiam). Factors such as the employer’s knowledge of employee union
18 activity, the employer’s expressed hostility toward its employees’ union activities, the
19 commission of other unfair labor practices, and the timing of the adverse action in proximity to
20 the employees’ union activities create an inference of unlawful motive. *Transportation*
21 *Management Corp.*, 462 U.S. at 403-04 (1985); *NLRB v. Brooks Camera, Inc.*, 691 F.2d 912,
22 916-917 (9th Cir. 1982); *Golden Day Schools, Inc. v. NLRB*, 644 F.2d 834, 837-838 (9th Cir.
23 1981).

1 As set forth below, the General Counsel has made out a *prima facie* case by establishing
2 that Saephan's and Martinez's union activities were a motivating factor in Respondent's
3 decisions to discipline or fire them, and Respondent cannot show that it would have taken these
4 adverse actions absent the employees' Union activity.

5 **a. Respondent Knew of Saephan's and Martinez's Union**
6 **Activities**

7 Both Saephan and Martinez openly supported the Union by signing and delivering to
8 Respondent a petition authorizing the Union to represent them for purposes of collective-
9 bargaining with Respondent, the ultimate form of union activity. They also submitted to
10 Respondent numerous petitions seeking various workplace improvements, they wore Union
11 shirts at work, they went on strike, and the picketed, all of which Respondent witnessed
12 firsthand, thereby satisfying the elements of union activity and Respondent's knowledge thereof.
13

14 **b. Respondent Was Openly Hostile to the Union**

15 Respondent's anti-union animus is rampant. Labor Consultant Pasalagua's threat to
16 employees that it would fire the three millworkers for their Union support makes this one of
17 those rare cases with clear and direct evidence of anti-union animus. Further, the circumstantial
18 evidence of Respondent's animus is abundant. The timing of the Respondent's unlawful actions,
19 which commenced immediately upon its receipt of employees' petition for Union representation,
20 is alone sufficient to show its anti-union animus. *Golden Day Schools, Inc.*, 236 NLRB 1292,
21 NLRB (1978), enfd. 644 F.2d 834, 837-838 (9th Cir. 1981); *Reno Hilton Resorts*, 326 NLRB
22 1421(1998), enfd. 196 F.3d 1275, 1283 (D.C. Cir. 1999); *Rain-Ware, Inc.*, 263 NLRB 50 (1982),
23 enfd. 732 F.2d 1349, 1354 (7th Cir. 1984)("Timing alone may suggest anti-union animus as a
24 motivating factor in an employer's action"). Manager Gilfillan told employees that Respondent
25 was a non-union company and did not want the Union involved, and Owners Chris and Kyle
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1 Paxson told employees the same, and bragged about defeating union organizing efforts at the
2 Colton facility for years. *See Vemco, Inc.*, 304 NLRB 911 (1991), enfd. in relevant part 989 F.2d
3 1468, 1473-75 (6th Cir. 1993)(anti-union statements, even if lawful, serve as background
4 evidence of animus). Respondent’s commission of the numerous other unfair labor practices at
5 issue here further establishes its anti-union animus. *Richardson Bros. South*, 312 NLRB 534,
6 534 (1993)(commission of other unfair labor practices can establish animus).
7

8 **c. Respondent’s Proffered Reasons for Disciplining and Firing**
9 **the Union Supporters Were False and Pretextual**

10 Respondent has proffered seemingly benign explanations for each disciplinary action that
11 fail to withstand scrutiny and are simply not true, which not only further demonstrates
12 Respondent’s animosity towards the Union and the employees who support it, it also gives rise to
13 the inescapable conclusion that Respondent’s anti-union animus was the driving force behind
14 those decisions. *See Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d at 470 (with evidence of
15 pretext, the factfinder may not only properly infer that there is some other motive, but “that the
16 motive is one that the employer desires to conceal—an unlawful motive—”); *Wright Line*, 251
17 NLRB at 1088, n.12 (“The absence of any legitimate basis for an action, of course, may form
18 part of the proof of the General Counsel’s case.”).

19
20 Respondent’s repeated failure to conduct even a perfunctory investigation into the
21 underlying facts of each event leading to the discipline of the Union supporters, shown by
22 Bankston’s refusal to ask Manager Gilfillan or Foreman Alvarez’ for their direct knowledge
23 about the underlying facts or to review video to confirm or disprove the alleged misconduct, is
24 clear evidence of pretext. *See Clinton Food 4 Less*, 288 NLRB 597, 598 (1988)(termination of
25 vocal union supporter based on complaints from two customers unlawful where employer failed
26 to investigate or consider employee’s positive work history); *Shattuck Denn Mining Corp. v.*
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1 *NLRB*, 362 F.2d at 470. In each situation, Respondent clearly seized on evidence it believed it
2 could use to justify taking action against the Union supporters, and ignored exonerating
3 evidence, such as the lack of management communication (and understanding) regarding
4 mandatory overtime, and employee Saephan's repeated attempts to comply with Respondent's
5 drug testing requests, and its knowledge that Saephan was on strike the last time that Respondent
6 sent him to take a drug test, knowledge which it had undisputedly acquired by the time it decided
7 to suspend him and later fire him, further demonstrating its discriminatory motive.
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9 Finally, in each instance, the Union-supporting employees did not engage in the
10 misconduct for which they were accused. With respect to the overtime discipline, Respondent
11 failed to inform them that Foreman Alvarez' simply asking them if they were available to work
12 overtime was not just a request, but a mandate to work. *See* Tr.238-40, 466-67, 928-31. There is
13 no dispute that Respondent *could have* required or mandated the employees to work overtime,
14 both under its employee handbook policy and under California law. However, Respondent failed
15 to give the employees any indication, on October 13 or any other occasion, that it was requiring
16 them to work overtime until after the fact when it seized on the opportunity to discipline the two
17 remaining Union supporters. This deviation from past practice is further evidence of
18 Respondent's unlawful motive. *See Birch Run Welding & Fabricating*, 269 NLRB 756 (1984),
19 *enfd.* 761 F.2d 1175, 1181 (6th Cir. 1985) (noting that "an employer's deviation from past
20 practice" is persuasive evidence of an unlawful motive); *Transp. Mgmt. Corp.*, 256 NLRB 101,
21 (1981), *enf. denied* by 674 F.2d 130 (1st Cir. 1982), denial reversed and enforcement granted by
22 462 U.S. at 404 (highlighting employer's departure from its usual practice); *Hunter Douglas, Inc.*
23 *v. NLRB*, 804 F.2d 808, 814 (3d Cir.1986) (same), cert. denied, 481 U.S. 1069 (1987);
24 *Merchants Truck Line, Inc. v. NLRB*, 577 F.2d 1011, 1016 (5th Cir. 1978)(same); *JAMCO*, 294
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1 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir.)(unpublished), cert. denied 502 U.S.
2 814 (1991).

3 Respondent seized upon unsubstantiated hearsay when it sent Saephan to take the drug
4 test in the first place, thereby revealing its unlawful intent. It is also clear that Respondent had
5 no rational basis to then suspend and fire employee Saephan for refusing to take a drug test, as he
6 immediately complied with each of Respondent's orders, going from closed testing facility to
7 closed testing facility and keeping in constant communication with Respondent, even on the
8 morning of October 16 before going on strike. It certainly is not Saephan's fault that the
9 facilities either did not provide the requested tests or were closed. While he did not comply with
10 Respondent's final request that he go to yet another facility to take a drug test, he had no
11 obligation to do so while on strike, which is core activity protected by Section 7 of the Act that
12 necessarily includes the protected right not to work or follow an employer's orders. 29 U.S.C. §
13 152(3)(defining "employee" to include "any individual whose work has ceased as a consequence
14 of, or in connection with, any current labor dispute or because of any unfair labor practice"); 29
15 U.S.C. § 163 ("Nothing in this Act ... shall be construed so as either to interfere with or impede
16 or diminish in any way the right to strike . . .").

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20 Respondent knew or should have known Saephan was on strike before the workday
21 began on October 16. The employees and Union representatives made multiple attempts to give
22 Respondent the strike petition before and after 7:00 a.m., and finally succeeded when Martinez
23 slid a copy of the petition under Gilfillan's office door as the police were arriving, by 8:24 a.m.,
24 the Union had faxed copies of the strike notice to Respondent at both facilities, and Gilfillan
25 admitted seeing Saephan on the picket line by 8:30 a.m. *See* GC Exs. 4-6, 16; Resp. Ex. 15. Its
26 feigned ignorance and willful decision to stick its head in the sand is further evidence of its
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1 unlawful motive, and does not shield it from liability or constructive knowledge that Saephan
2 was on strike when it attempted to send him yet again to take a drug test. Respondent does not
3 dispute that it knew he was on strike by that afternoon when it decided to suspend him, making
4 its claimed ignorance as irrelevant as it is unbelievable. When Saephan returned from the one
5 day strike on October 19, Respondent could have simply requested that Saephan attempt to take
6 the drug test, but instead it chose to suspend him, and later that same day to fire him, further
7 revealing its unlawful motive. *See Rose Hills Mortuary, L.P.*, 324 NLRB 406, 414 (1997); enfd.
8 mem., 203 F.3d 832 (9th Cir. 1999) (unpublished) (employer could not show that it had uniform
9 progressive discipline system that it was obliged to follow); *Norton Audubon Hospital*, 341
10 NLRB 143, 151 (2004), enfd. 156 Fed. Appx. 745 (6th Cir. 2005)(not selected for
11 publication)(pretext shown through harshness of discipline compared to the offense and
12 compared to employer’s less harsh treatment of other employees for comparable errors).
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15 With respect to Martinez’ October 21 discipline for allegedly failing to clock out on two
16 occasions, he asserted that he did, in fact, clock out on those occasions. Manager Gilfillan
17 verified that he was at work on both occasions and initialed off on his time cards, which Human
18 Resources Manager Bankston would have learned had she bothered to ask Gilfillan or reviewed
19 the video footage.
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21 Finally, with respect to Martinez’ December 10 discipline for allegedly stealing a
22 drawing, taking excessive breaks and phone calls, and declining productivity, Martinez credibly
23 denied that he had engaged in any of the alleged misconduct, Foreman Alvarez denied that he
24 had ever reported that Martinez had stolen a drawing, and Respondent failed to produce any
25 supporting evidence of the misconduct. It is possible that Respondent will argue that Manager
26 Gilfillan’s anecdotal opinion that Martinez frequently used the portable toilet is evidence
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1 supporting that portion of the discipline. Tr. 837-38. That offers little support for the discipline,
2 given the fact that Gilfillan never addressed the issue with Martinez before, and that he told
3 Martinez that he had no knowledge of the reasons for the discipline. Tr. 510-14.

4 In each situation, Respondent was not interested in the truth. It was, however, keenly
5 interested in getting rid of the Union supporters, as Labor Consultant Pasalagua prophesized
6 during his September 10 meeting with the temporary millworkers. Even if Respondent had
7 actually believed in good faith that the employees actually engaged in the misconduct of which
8 they were accused (which it would be hard pressed to establish), that mistaken belief provides no
9 defense. *KNTV Inc.*, 319 NLRB 447, 454 (1995)(an employer’s “mistaken belief provides no
10 defense.”), citing *Jhirmack Enterprises*, 283 NLRB 609, 610 (1987).

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13 **d. Respondent Cannot Show That It Would Have Disciplined or
Fired the Union Supporters Absent Their Union Activity**

14 Having established that employees Martinez’s and Saephan’s protected Union activity
15 was a motivating factor in Respondent’s decisions to discipline or fire them, the burden shifts to
16 Respondent, who must prove it would have taken the same adverse employment action, even in
17 the absence of the employee’s protected activity. This Respondent cannot do. An employer
18 cannot carry its burden merely by showing that it also had a legitimate reason that *could have*
19 justified the discipline; rather, it must persuade that it *would have* issued the discipline absent the
20 protected conduct “by a preponderance of the evidence.” *Hunter Douglas, Inc.*, 277 NLRB 1179,
21 1179 (1985), review denied, enfd. 804 F.2d 808 (3d Cir. 1986), cert. denied 481 U.S. 1069
22 (1987), citing *Wright Line*, 251 NLRB 1083; *Roure Bertrand Dupont, Inc.*, 271 NLRB 443
23 (1984); and *Transp. Mgmt. Corp.*, 462 U.S. 393 (1983). If an employer fails to satisfy its burden
24 of persuasion, or if its proffered justification fails to withstand scrutiny, a violation of the Act is
25 established. *Hunter Douglas, Inc.*, 277 NLRB at 1179, citing *Bronco Wine Co.*, 256 NLRB 53
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1 (1981); *Shattuck Denn*, 362 F.2d 466, 470 (9th Cir. 1966); *Parts Depot, Inc.*, 332 NLRB 670,
2 671-72 (2000), enfd. mem., 24 F. App'x 1 (D.C. Cir. 2001). Here, Respondent cannot meet its
3 burden and its proffered justifications fail to withstand scrutiny.

4 First, as discussed above, the strong evidence that Respondent's reasons for disciplining
5 or firing the two Union supporters were pretextual and unworthy of belief rebuts any attempts by
6 Respondent to show that it would have taken the disciplinary actions, absent the employees'
7 union activity. *KNTV, Inc.*, 319 NLRB at 452 (finding that false and pretextual nature of
8 employer's justification for terminating employee sufficient to rebut any defense that it would
9 have taken the same action absent the employee's protected activity), citing *Transp. Mgmt.*
10 *Corp.*, 462 U.S. 393 (1983); *Cell Agricultural Mfg. Co.*, 311 NLRB 1228 fn. 3 (1993); and
11 *Shattuck Denn Mining Corp.*, 362 F.2d at 470. As the Board stated in *Road Trucking Company,*
12 *Inc.*:

15 A finding of pretext defeats any attempt by the Respondent to show that it would
16 have discharged the discriminate[e]s absent their union activities. This is because
17 where 'the evidence establishes that the reasons given for the Respondent's action
18 are pretextual—that is, either false or not in fact relied upon—the Respondent fails
19 by definition to show that it would have taken the same action for those reasons,
20 absent the protected conduct, and thus there is no need to perform the second part of
21 the *Wright Line* analysis.' *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)
(citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981)). See also *Sanderson*
Farms, Inc., 340 NLRB 402 (2003).

22 342 NLRB 895, 897 (2004).

23 Moreover, Respondent cannot point to any other discipline to show that it has a practice
24 of issuing similar discipline for similar conduct, and cannot point to a progressive discipline
25 policy that it was obligated to follow in an attempt to show that it would have issued the
26 discipline absent the employees' Union activity. See *Rose Hills Mortuary, L.P.*, 324 at 414
27 (employer could not show that it had uniform progressive discipline system that it was obliged to
28

1 follow); *See Bally's Atlantic City*, 355 NLRB 1312 (2010)(failure to announce zero-tolerance
2 policy dooms employer defense).

3 Because Respondent is unable to show, let alone persuade, that it *would have* issued the
4 aforementioned disciplinary actions absent employees Martinez' and Saephan's Union activity, it
5 cannot overcome the General Counsel's showing that their Union activity was a motivating
6 factor in Respondent's disciplinary actions. *See Healthcare Employees*, 463 F. 3d at 919.

8 **D. The Nature of Respondent's Unlawful Conduct Warrants a Bargaining 9 Order**

10 The Board will order an employer to recognize and bargain with a union when highly
11 serious and pervasive (what it calls "hallmark") violations of the Act such as threats of discharge
12 and actual discharge of employees,²¹ as well as other violations such as threats of arrest,
13 unlawful discipline, and retaliatory changes in working conditions,²² render traditional Board
14 remedies unlikely to restore the "laboratory conditions" required to conduct a free and fair union
15 election. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)(Supreme Court upheld the Board's
16 authority to issue a remedial bargaining order based on union authorization cards from a majority
17 of employees, rather than an election, when the employer commits unfair labor practices so
18 serious that it is all but impossible to hold a fair election, even with traditional Board
19 remedies).²³

22 ²¹ Highly coercive unfair labor practices constitute "hallmark" violations of the Act that frequently warrant
23 imposition of a bargaining order. *Exchange Bank*, 264 NLRB 822, 824 fn. 12 (1982), *enfd.* 732 F.2d 60
24 (6th Cir. 1984).

25 ²² These "hallmark" violations include actual or implied threats of plant closure or other loss of employment,
26 and discharge or other discrimination against union adherents. *Jamaica Towing Co.*, 247 NLRB 353
27 (1980), *enfd.* 632 F.2d 208, 212 (2d Cir. 1980).

28 ²³ The *Gissel* Court identified two situations that warrant a bargaining order. Category I cases are those
"exceptional" cases involving "outrageous and pervasive unfair labor practices" where the unfair labor
practices are of "such a nature that their coercive effects cannot be eliminated by the application of
traditional remedies, with the result that a fair and reliable election cannot be had." *Id.* at 613-614.

1 In determining the propriety of a bargaining order, the Board will examine the
2 seriousness of the violations and the pervasive nature of the conduct, considering such factors as
3 the number of employees directly affected by the violations, the size of the unit, the extent of the
4 dissemination among employees, and the identity and position of the individuals committing the
5 unfair labor practices. *Garvey Marine Inc.*, 328 NLRB 991, 993 (1999), enfd. by 245 F.3d 819
6 (D.C. Cir. 2001). The bargaining unit here consists of all regular, full-time millworkers directly
7 employed by Respondent at its Suisun City, California, facility (the bargaining unit), who
8 numbered three on September 2 when Respondent received the first Union petition and
9 embarked on its unlawful anti-Union campaign on September 2, and currently number two.²⁴

11 Here, Respondent's threats of job loss for Union supporters, and later making good on the
12 threat by firing of one of the only two remaining Union supporters, are independently highly
13 coercive hallmark violations that standing alone render a fair election unlikely with use of
14 traditional Board remedies. *See Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57
15 (2011), enfd. by 498 Fed. App'x 45 (D.C. Cir. 2012)(unpublished decision), post-*Noel Canning*
16 mandate issued by 771 F.3d 812 (D.C. Cir. 2014) (discharge of one employee in thirteen
17 employee unit, coupled with other unlawful conduct, supported *Gissel* bargaining order);
18 *Jamaica Towing.*, 632 F.2d at 212–13 (2d Cir.1980).

21 Indeed, Respondent's violations here, in such a small potential bargaining unit, are the
22 type of pervasive and severe unfair labor practices that frequently justify *Gissel* bargaining

24 Category II cases are "less extraordinary cases marked by less pervasive practices which nonetheless still
25 have the tendency to undermine majority strength and impede the election processes." *Id.* at 614.

26 ²⁴ The Union's majority support from Respondent's directly employed millworkers as of September 2 would
27 remain intact even if Foreman Alavarez is found not to be a supervisor or agent and therefore a part of the
28 bargaining unit. The section below addresses Respondent's frivolous affirmative defense that the
bargaining unit must also include the temporary workers and/or the driver.

1 orders.²⁵ The Board has issued a *Gissel* bargaining order where the discharge of only one
2 employee amounted to the termination of 25 percent of the employees in the bargaining unit,
3 with Court approval. *NLRB. v. Bighorn Beverage*, 614 F.2d 1238, 1243 (9th Cir.1980); *see also*
4 *Balsam Village Mgmt. Co.*, 273 NLRB 420, 420 (1984) (bargaining order was “clearly
5 warranted” to remedy the “unlawful discharge of an entire bargaining unit, lock, stock and
6 barrel, for the express purpose of avoiding the statutory bargaining obligation”). Here,
7 Saephan’s discharge on October 20 represented the termination of 33 percent of the original
8 bargaining unit of three direct millworkers employed by Respondent on September 2, and 50
9 percent of the bargaining unit employees employed by Respondent on October 20. Given the
10 small size of the bargaining unit, and the fact that directly hired full-time millworkers work
11 closely with the temporary workers, there can be little doubt that all three of the Unit employees
12 were directly affected by the threats made to the temporary millworkers. Indeed, both Martinez
13 and Saephan testified that they heard about the threat of job loss from the temporary workers,
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17 ²⁵ *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57 *supra*, slip op. at 10 (“[t]he gravity and
18 coercive impact of all the violations are heightened by the relatively small size of the unit (13 employees)
19 and by the involvement of the Respondent's highest management officials), citing *Traction Wholesale*
20 *Center Co.*, 328 NLRB 1058, 1076-1078 (1999), *enfd.* 216 F.3d 92, 107-108 (D.C. Cir. 2000) (enforcing
21 bargaining order in light of magnitude of employer's unlawful conduct, small unit of 20 employees, and
22 involvement of employer's owners). *See also* *Rubin ex rel. NLRB v. Vista Del Sol Health Servs., Inc.*, 80 F.
23 Supp. 3d 1058, 1100 (C.D. Cal. 2015) (Court considered 46 person unit a small unit), quoting *Scott ex rel.*
24 *NLRB v. Stephen Dunn & Associates*, 241 F.3d 652, 665 (9th Cir. 2001); *NLRB v. Bighorn Beverage*, 614
25 F.2d at 1243 (“The probable impact of unfair labor practices is increased,” and a bargaining order is
26 therefore more appropriate “when a small bargaining unit ... is involved”). *See* *Hambre Hombre Enters.,*
27 *Inc. v. NLRB*, 581 F.2d 204, 207 (9th Cir. 1978) (issuance of a *Gissel* order appropriate in a forty-four-
28 person bargaining unit in which twenty-seven employees signed authorization cards where the employer
discharged one union supporter and engaged in surveillance of a union meeting; union lost election
eighteen to ten); *NLRB v. Anchorage Times Publ'g Co.*, 637 F.2d 1359, 1363–70 (9th Cir. 1981) (affirming
Gissel bargaining order where 97 out of 181 unit-employees signed cards and employer discharged one
employee who was noncommittal about voting anti-union, threatened to replace employees with
technology, granted wage increases to fifteen percent of the unit just prior to election, engaged in
interrogations, and created the impression of surveillance); *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 47–
48, 50–52 (9th Cir. 1970) (enforcing *Gissel* order in twenty-four-person unit in which seventeen employees
signed cards, where employer discharged employee who served as union’s election observer, promised
benefits, threatened discharge and plant closure, and assisted employees with revoking cards).

1 and current direct millworker Van Loo was employed as a temporary millworker at the time of
2 the September 10 meeting where the threat was made, and there is no evidence that he was not
3 present. The small size of the unit here is a factor that heavily weighs in favor of a bargaining
4 order.

5 Moreover, Respondent, “embarked on a clear course of unlawful conduct” designed to
6 undermine support for the Union immediately after it learned of the employees' union activities.
7 Within hours of receiving the petition on September 2, Respondent changed its practice of
8 leaving the gates and office door open and now keeps the gates and office door locked. In the
9 days that followed, Respondent took other actions to make employees’ working conditions more
10 onerous, such as imposing the new hard hat rule and moving the portable toilet inside the
11 warehouse near their break table. The Board has found that unlawful conduct in response to
12 union activity similar to Respondent’s imposition of more onerous working conditions here may
13 justify a bargaining order. *See Donovan v. NLRB*, 520 F.2d 1316, (2d Cir. 1975), *cert. denied*,
14 423 U.S. 1053, (1976); *MPC Rest. Corp. v. NLRB*, 481 F.2d 75, (2d Cir. 1973); *Pembrook*
15 *Mgmt.*, 296 NLRB 1226 (1989); *NLRB v. Eagle Material Handling*, 558 F.2d 160 (3d Cir. 1977);
16 *Ideal Elevator Corp.*, 295 NLRB 347 (1989); *Camvac Int'l*, 288 NLRB 816 (1988).

17 Further, the swiftness of Respondent’s unlawful conduct, which started on the very day
18 Respondent learned that its employees desired Union representation, goes well beyond
19 suspicious, making patently obvious Respondent’s unlawful intent to nip the union organizing
20 campaign in the bud. The Board has recognized that impact of such violations are “magnified”
21 under such circumstances as it sends “the unequivocal message that it was willing to go to
22 extraordinary lengths in order to extinguish the union organizational effort,” and because “it is
23 reasonable to infer that such a message will have a lasting effect on the unit employees' exercise
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1 of their right to organize” and justifies a *Gissel* bargaining order. *M.J. Metal Products*, 328
2 NLRB 1184, 1185 (1999).²⁶

3 Lastly, the perpetrators of the unfair labor practices, Manager Gilfillan, HR Manager
4 Bankston and Labor Consultant Pasalagua, are high-ranking officials or, in the case of Pasalagua,
5 an expert hired by Respondent for the specific purpose of communicating Respondent’s
6 opposition to unionization. There has been no change in management, in the Respondent’s
7 position on dealing with the Union, or in any other circumstances that would mitigate against a
8 *Gissel* bargaining order. The Union’s numerous charges have failed to stem the onslaught of
9 unfair labor practices, and Respondent has not repudiated or disavowed any of the allegations,
10 demonstrating a likelihood that violations will recur and rain down upon Martinez, the last open
11 union supporter standing.
12

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14 In sum, Respondent’s unfair labor practices described above are so pervasive, their
15 effects so serious and substantial in character, especially given the small unit and that high
16 ranking officials committed the violations, that it is not possible to conduct a fair election.
17 Respondent's swift and serious response to its employees’ unionization efforts, beginning the day
18 its millworkers first presented it with a Union petition, renders a fair election impossible with
19 traditional Board remedies. Therefore, a *Gissel* bargaining order is necessary to remedy the loss
20 of majority support for the Union and the unlikelihood that a fair Board election can be held
21 caused by Respondent’s unfair labor practice barrage. Respondent’s bargaining obligation
22 attached as of September 2, which is “the date it embarked on its course of unlawful conduct”
23 designed to thwart its employees’ desire for union representation. *Chosun Daily News*, 303
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26 ²⁶ See *Bakers of Paris*, 288 NLRB 991, 992 (1988) (holding that the coercive effect of an unfair labor practice
27 is increased when violations begin as soon as the employer has knowledge of union campaign), enforced,
28 929 F.2d 1427 (9th Cir. 1991). See also *Cassis Management Corp.*, 323 NLRB 456, 459 (1997)(coercive
impact of discharges “increased by virtue of the precipitate and reflexive nature of the discharges).

1 NLRB 901, 901 at n.3 (1991), citing *Trading Port, Inc.*, 219 NLRB 298, 301 (1975). *See also*
2 *Jasta Mfg. Co.*, 246 NLRB 48 (1979), *enfd.* by 634 F.2d 623 (4th Cir. 1980).

3 **E. The Bargaining Unit of All Millworkers Directly Employed by Respondent is**
4 **Appropriate**

5 In an effort to defeat the Union’s showing of majority support as of September 2 and
6 therefore avoid its bargaining obligation, Respondent has asserted an affirmative defense in its
7 Answer to the Complaint that the proposed bargaining unit of millworkers directly employed by
8 Respondent is not appropriate because it fails to include Respondent’s driver, Foreman Alvarez,
9 and the seven temporary millworkers who Respondent also employed on September 2. GC Ex.
10 1(rr) and (tt); Resp. Ex. 55. Respondent’s argument is unavailing.

11
12 *Section 9(b) of the Act* states that the Board “shall decide in each case whether . . . the
13 unit appropriate for the purposed of collective bargaining shall be the employer unit, craft unit,
14 plant unit, or subdivision thereof.” The Board has broad discretion in determining whether a
15 unit is appropriate. *NLRB v. Action Automotive*, 469 NLRB 490, 494 (1985), quoting *NLRB v.*
16 *Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944). A petitioned-for unit need only be *an*
17 appropriate unit for collective-bargaining. It need not be *the most* appropriate unit, or what could
18 become the ultimate unit. *International Bedding Co.*, 356 NLRB No. 168 (May 31, 2011), citing
19 *Morand Bros. Beverage*, 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951); *Overnite*
20 *Transportation*, 322 NLRB 723 (1996)(“[t]he plain language of the Act clearly indicates that the
21 same employees of an employer may be grouped together for purposes of collective bargaining
22 in more than one unit”). “[I]t is irrelevant that some other larger or smaller unit might also be
23 appropriate or most appropriate.” *International Bedding Co.*, *supra*, quoting *Tallahassee Coca-*
24 *Cola Bottling Co.*, 168 NLRB 1037, 1038 (1967), *enfd.* 409 F.2d 201 (5th Cir. 1969).
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1 When an issue of bargaining unit appropriateness is raised, the Board begins with the
2 petitioned-for unit, and if deemed appropriate, the inquiry ends, rendering irrelevant a party's
3 argument that the unit would be more appropriate if it excluded or included an additional group
4 of employees. *See The Lundy Pacing Co.*, 314 NLRB 1042, 1044 (1994)(factors that supported
5 adding a group of employees to a petitioned-for unit did not mean that they must be included in
6 order to constitute an appropriate unit); *Indiana Refrigerator Lines*, 157 NLRB 539 (1966)("the
7 fact that the drivers and maintenance employees might also separately constitute appropriate
8 units does not preclude a finding that both groups together also constitute an appropriate unit");
9 *Heublein, Inc.*, 119 NLRB 1337, 1339 (1958)(Board finds appropriate both combined and
10 separate units of production and maintenance employees). Only if the petitioned-for unit is
11 deemed inappropriate for collective-bargaining purposes will the Board consider alternate unit
12 proposals. *Overnite Transportation, supra* ("[t]he Board's declared policy is to consider only
13 whether the unit requested is an appropriate one, even though it may not be the optimum or most
14 appropriate unit for collective bargaining").

17 To determine whether the group of employees in a petitioned-for unit constitutes an
18 appropriate unit, the Board must determine whether the employees share a sufficient
19 "community of interest" for purposes of collective bargaining. It is a totality of circumstances
20 test based on the analysis of a number of factors, none of which are singularly dispositive,
21 including: (1) common skills, training, duties, and functions; (2) common management and
22 supervision; (3) common work locations; (4) the degree of interchange, integration, and contact
23 amongst the employees; (5) the wages, benefits, working hours, and general working conditions
24 of the employees; and (6) any historical bargaining involving the employees. *Overnite*
25 *Transportation, supra* at 724; *Canal Carting*, 339 NLRB 969 (2003). A petitioner's desire in
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1 regard to unit composition and scope is also entitled to significant weight, so long as it is not
2 based on an arbitrary grouping of employees. *International Bedding Co.*, 356 NLRB No. 168
3 (2011); *Airco, Inc.*, 273 NLRB 490, 494 (1984); *Moore Business Forms, Inc.*, 204 NLRB 552
4 (1973). To establish that a bargaining unit is not appropriate because it fails to include certain
5 groups or classifications of employees, the Respondent has the burden to show that the Unit is
6 inappropriate because the excluded employees have an “overwhelming community of interest
7 with the included employees.” *Specialty Healthcare and Rehabilitation Center of Mobile*, 357
8 NLRB No. 83 (2011), *enfd. by* 727 F.3d 552 (6th Cir. 2013). *See also FedEx Freight, Inc. v.*
9 *NLRB*, __F.3d__, 2016 WL 859971, *4-7 (8th Cir. March 7, 2016).

11 With respect to the driver, Respondent presented little, if any, evidence about his job
12 duties, interaction with the millworkers, or other working conditions, certainly not enough to find
13 an “overwhelming community of interest” with the directly employed millworkers. With respect
14 to Foreman Alvarez, as a supervisor of Respondent as of September 2, he is explicitly excluded
15 from inclusion in any bargaining unit under Section 2(3) of the Act. Even if he is not found to be
16 a supervisor, his working conditions were too different from the rest of the millworkers (salaried,
17 exempt from clocking in or out, special access and privileges, etc.) for him to share an
18 “overwhelming” community of interest with the directly employed millworkers he oversaw.
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20 Regardless, even if he were included in the bargaining unit as of September 2, the Union still
21 enjoyed the majority support of three out of four millworkers.
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23 With respect to the temporary millworkers, while they certainly share a community of
24 interest with the directly employed millworkers, that interest is not “overwhelming,” as they are
25 not subject to Respondent’s employee handbook or disciplinary system, are paid different
26 amounts by different employers, and typically have far less tenure with Respondent than do the
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1 directly employed millworkers. Even if the temporary millworkers did share an overwhelming
2 community of interest as of September 2, their inclusion is inappropriate because Respondent has
3 failed to establish that it is a joint employer of the temporary employees, along with the
4 temporary agencies who provide them. See *Riverdale Nursing Home, Inc.*, 317 NLRB 881
5 (1995); *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000)(overruled on other grounds by *Oakwood*
6 *Care Center*, 343 NLRB 659 (2004))(Where two or more employers that are otherwise
7 independent legal entities, by contract or otherwise, exert significant control over the same
8 employees—where from the evidence it can be shown that they share or co-determine those
9 matters governing essential terms and conditions of employment—such as hiring firing, directing
10 work functions, establishing hours and shifts, determining compensation, day-to-day supervision,
11 uniforms, record-keeping forms, setting work rules, etc.—they constitute ‘joint employers’
12 within the meaning of the Act). Moreover, even if it could show that it is a joint employer of the
13 temporary employees, their inclusion in the bargaining unit would be inappropriate because
14 Respondent has failed to show that the temporary agencies have given their consent to bargain
15 alongside of Respondent over a combined unit of millworkers solely employed by Respondent
16 and employees jointly employed by Respondent and the respective staffing agencies for such a
17 unit to be appropriate. *Oakwood Care Center*, 343 NLRB 659 (2004).

21 **F. Respondent Made Unilateral Changes to Employee’s Working Conditions in**
22 **Violation of §8(a)(5) of the Act**

23 Section 8(a)(5) of the Act makes it an unfair labor practice [for an employer] to refuse to
24 bargain collectively with the designated representatives of its employees. 29 U.S.C. Sec. 158
25 (a)(5). Given the need for a *Gissel* bargaining order here, as shown above, Respondent violated
26 Section 8(a)(5) of the Act by making unilateral changes to its hard hat policy and hiring policy
27 by failing or refusing to fill Bobby Saephan’s vacated direct millworker position, instead relying
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1 on temporary millworkers to perform his work, without first notifying and bargaining with the
2 Union.

3 Of the many retaliatory changes, these two also rise to the level of being material,
4 substantial, and significant. *See Road Sprinkler Fitters Local 699 v. NLRB*, 681 F.2d 11, 24-25
5 (D.C. Cir 1982)(workplace changes must be “material, substantial, and significant” in order to
6 trigger a bargaining obligation under Section 8(a)(5) of the Act); *Flambeau Airmold Corp.*, 334
7 NLRB 165 (2001) (A unilateral change in represented employees' terms and conditions of
8 employment is a mandatory subject of bargaining and is unlawful if the change is “material,
9 substantial and significant.”); *In re Mitchellace, Inc.*, 321 NLRB 191, 193 (1996) (discussion and
10 examples of Board decisions as to whether an alleged change is “material, substantial, and
11 significant”). The fact that the millworkers were threatened with discipline for violating the new
12 hard hat restriction establishes that it is material, substantial, and significant. *See Ferguson*
13 *Enterprises, Inc.*, 349 NLRB 617, 618 (2007)(where a threat or imposition of discipline
14 accompanies a unilateral change, the Board will find a violation without separately
15 analyzing whether the change is otherwise material, substantial, or significant, because the
16 threat or imposition of discipline establishes that the employer itself views the changes at
17 issue as material , substantial, and significant); *King Soopers, Inc.* , 340 NLRB 628 (2003);
18 *Postal Service*, 341 NLRB 684, 687 (2004); *Flambeau Airmold Corp.*, 334 NLRB at 166,
19 and cases cited therein.
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23 It is well-established that material or substantial changes to employees’ working
24 conditions, made without first notifying and bargaining with the union, are prohibited after a
25 *Gissel* bargaining obligation has attached. *Road Sprinkler Fitters Local 699 v. NLRB*, 681 F.2d
26 11,24-25 (D.C. Cir 1982). Further, bargaining about the effects of any changes must occur
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1 sufficiently before actual implementation of the decision to make the changes so that the union is
2 not presented with a “fait accompli.” *Komatsu Am. Corp.*, 342 NLRB 649, 649 (2004). There is
3 no dispute that Respondent did not provide the Union with notice and an opportunity to bargain
4 over the decision and effects of the aforementioned unilateral changes to working conditions
5 before implementing them after its bargaining obligation attached on September 2, rendering
6 them unlawful. *See Parts Depot, Inc.*, 332 NLRB 670, 674 (2000) (unlawful layoff employees
7 and granting general wage increase after *Gissel* bargaining obligation attached), *enforced*, 24 F.
8 App'x 1 (D.C. Cir. 2001); *Lapeer Foundry & Mach., Inc.*, 289 NLRB 952, 954 (1988) (employer
9 violated Section 8(a)(5) and (1) by unilaterally laying off seven employees for economically-
10 motivated reasons after *Gissel* bargaining obligation attached). Manager Vargas’s purported lack
11 of awareness of the practice of exempting the entire break period from the hardhat requirement
12 provides no defense, as Managers Gilfillan and Foreman Alvarez knew of the practice and
13 implicitly, if not explicitly, condoned it. *J.P. Stevens & Co., Inc.* 239 NLRB 738, 741
14 (1978)(higher level official’s ignorance of law or non-enforcement of a rule does not shield
15 employer from liability or responsibility for unilateral change), citing *Tiidee Products, Inc.*, 176
16 NLRB 969, 976 (1969) and *H. J. Heinz Company v. N.L.R.B.*, 311 U.S. 514, 519-521 (1941).

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20 **G. Respondent Maintained Overbroad Rules that Interfere With Employees’
Right to Engage in Section 7 Activity**

21 The mere maintenance of a work rule that reasonably tends to chill employees in the
22 exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Martin Luther Memorial*
23 *Home, Inc.*, 343 NLRB 646 (2004), citing *Lafayette Park Hotel*, 326 NLRB 824 (1998). A rule
24 will be unlawful if it:
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- 26 (1) explicitly restricts activities protected by Section 7 (*see Our Way*, 268 NLRB 394
27 (1983) (rule prohibiting employee solicitation that is not by its terms limited to
working time, unlawful);
28 (2) employees would reasonably construe the language to prohibit Section 7 activity;

- (3) the rule was promulgated in response to union activity; or
- (4) the rule has been applied to restrict the exercise of Section 7 rights.

Martin Luther Memorial Home, Inc., supra. Ambiguous rules must be construed against the promulgator of the rule. *Lafayette Park Hotel, supra,* and *Norris/O'Bannon*, 307 NLRB 1236 (1992). The rules alleged in the Complaint are unlawful because employees would reasonably construe them to prohibit Section 7 activity. While Respondent has since modified the rules and removed the language as unlawful, thus obviating the need for an affirmative order to rescind them, it has not self-cured them in the manner prescribed by the Board, as discussed below.

H. Respondent Has Not Repudiated Its Unlawful Conduct

Based on its amended Answer and response to the General Counsel’s granted Motion for a Bill of Particulars, Respondent asserts as its Twelfth Affirmative Defense that it has fully remedied the alleged unfair labor practices after the initial Complaint in these cases issued on December 31 by: (1) voluntarily posting the Board’s poster entitled “Employee Rights Under the National Labor Relations Act” near the timeclock on January 5, 2016; (2) voluntarily posting “on a nonadmission basis” a “Notice to Employees” describing their rights under the Act and that it would not violate them, also on January 5, 2016; and (3) by implemented a new and revised Employee Handbook that removes the allegedly unlawful provisions and specifically states: "Nothing in this Handbook will be interpreted or applied in a way that would interfere with the rights of employees to self- organize, form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities." GC Ex. 1 (gg), (hh), (jj), (nn), (pp), (qq), (rr), (tt), and (uu); Resp. Exs. 31, 38, 48, 49, and 56.

The General Counsel presumes that the legal basis for this defense is set forth in *Passavant Memorial Area Hospital*, and its progeny, which provides that under certain circumstances an employer may relieve himself of liability for unlawful conduct by repudiating

1 the conduct. 237 NLRB 138 (1978). To be effective, however, such repudiation must be
2 “timely,” “unambiguous,” “specific in nature to the coercive conduct,” and “free from other
3 proscribed illegal conduct.” *Id.* Furthermore, there must be adequate publication of the
4 repudiation to the employees involved and there must be no proscribed conduct on the
5 employer's part after the publication. *Id.* And, finally, the Board has pointed out that such
6 repudiation or disavowal of coercive conduct should give assurances to employees that in the
7 future their employer will not interfere with the exercise of their Section 7 rights. *Id.*

8 While laudable that Respondent posted and published the aforementioned notices to
9 employees and revised its unlawful rules, there is no evidence that it has repudiated its unlawful
10 conduct: to the contrary, it has refused to admit that it engaged in any such conduct, it has not
11 rescinded the unlawful changes or disciplines, it has not offered union supporter Bobby Saephan
12 his job back, and it has not agreed to recognize and bargain with the Union. Moreover, the
13 posting of the notices in January 2016 was untimely, as it came after the Complaint issued and
14 more than three months after it committed the first of its unfair labor practices back in early
15 September 2015. Therefore, its thinly veiled attempt to avoid liability for its misconduct
16 provides it with no defense under the law. *See Passavant Memorial Area Hospital, supra.*

17 **V. EMPLOYEES ARE ENTITLED TO SEARCH FOR WORK EXPENSES**

18 To remedy an unlawful firing, a respondent must be ordered to cease and desist its
19 unlawful activity, post a notice, offer reinstatement to the discriminatees, and make the
20 employee whole for any loss of earnings. With regard to the make whole remedy,
21 discriminatees are entitled to reimbursement of expenses incurred while seeking interim
22 employment, where such expenses would not have been necessary had the employee been
23 able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955);
24 *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased
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1 transportation costs in seeking or commuting to interim employment;²⁷ the cost of tools or
2 uniforms required by an interim employer;²⁸ room and board when seeking employment
3 and/or working away from home;²⁹ contractually required union dues and/or initiation fees, if
4 not previously required while working for a respondent;³⁰ and/or the cost of moving if
5 required to assume interim employment.³¹
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7 Until now, however, the Board has considered these expenses as an offset to a
8 discriminatee's interim earnings, rather than calculating them separately. This has had the
9 effect of limiting reimbursement for search-for-work and work-related expenses to an amount
10 that cannot exceed the discriminatees' gross interim earnings. See *W. Texas Utilities Co.*, 109
11 NLRB 936, 939 fn.3 (1954) ("We find it unnecessary to consider the deductibility of [the
12 discriminatee's] expenses over and above the amount of his gross interim earnings in any
13 quarter, as such expenses are in no event charged to the Respondent."); see also *N Slope*
14 *Mech.*, 286 NLRB 633, 641 fn.19 (1987). Thus, under current Board law, a discriminatee
15 who incurs expenses while searching for interim employment, but is ultimately unsuccessful
16 in securing such employment, is not entitled to any reimbursement for expenses. Similarly,
17 under current law, an employee who expends funds searching for work and ultimately obtains
18 a job, but at a wage rate or for a period of time such that his/her interim earnings fail to
19 exceed search-for-work or work-related expenses for that quarter, is left uncompensated for
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23 ²⁷ *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).

24 ²⁸ *Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees*, 338 NLRB
at 50; *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965).

25 ²⁹ *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

26 ³⁰ *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

27 ³¹ *Coronet Foods, Inc.*, 322 NLRB 837 (1997).
28

1 his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet
2 their statutory obligations to seek interim work³² but who, through no fault of their own, are
3 unable to secure employment or who secure employment at a lower rate than interim
4 expenses.

5
6 Aside from being inequitable, this current rule is contrary to general Board remedial
7 principles. Under well-established Board law, when evaluating a backpay award, the
8 "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.*, 356
9 NLRB No. 8, slip op. at 3 (2010). This means the remedy should be calculated to restore "the
10 situation, as nearly as possible, to that which would have [occurred] but for the illegal
11 discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also *Pressroom*
12 *Cleaners & Serv. Employees Intl Union, Local 32*, 361 NLRB No. 57, slip op. at 2 (2014)
13 (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-
14 related expenses fails to make discriminatees whole inasmuch as it excludes from the backpay
15 monies spent by the discriminatee that would not have been expended but for the employer's
16 unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those
17 discriminatees who are affected most by an employer's unlawful actions-i.e., those employees
18 who, despite searching for employment following the employer's violations, are unable to
19 secure work.
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22 It also runs counter to the approach taken by the EEOC and the United States
23 Department of Labor. See *Enforcement Guidance: Compensatory and Punitive Damages*
24 *Available under § 102 of the Civil Rights Act of 1991*, Decision No. 915.002, at *5, available
25

26 ³² *In Re Midwestern Pers. Servs., Inc.*, 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a
27 discriminatee must make reasonable efforts to secure interim employment.").

1 at 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, ALJ CASE NO. 90-ERA-
2 30, 2001 WL 168898, at*29 (Feb. 9, 2001), aff'd *Georgia Power Co. v. U.S. Dep't of Labor*,
3 No. 01-10916, 52 Fed. Appx. 490 (Table) (11th Cir. 2002).

4 In these circumstances, a change to the existing rule regarding search-for-work and
5 work-related expenses is clearly warranted. In the past, where a remedial structure fails to
6 achieve its objective, "the Board has revised and updated its remedial policies from time to
7 time to ensure that victims of unlawful conduct are actually made whole." *Don Chavas, LLC*,
8 361 NLRB No. 10, slip op. at 3 (2014). In order for employees truly to be made whole for
9 their losses, the Board should hold that search-for-work and work-related expenses will be
10 charged to a respondent regardless of whether the discriminatee received interim earnings
11 during the period.³³ These expenses should be calculated separately from taxable net backpay
12 and should be paid separately, in the payroll period when incurred, with daily compounded
13 interest charged on these amounts. See *Jackson Hosp. Corp.*, 356 NLRB No. 8, slip op. at 1
14 (interest is to be compounded daily in backpay cases).

18 VI. CONCLUSION

19 Based on the foregoing, the General Counsel respectfully requests that Your Honor find
20 that Respondent violated Section 8(a)(1), (3) and (5) of the Act as alleged, order Respondent to
21 recognize and bargain in good faith with the Union as the representative of the millworkers it
22 directly employees, to reinstate Bobby Saephan, to rescind the unlawful disciplines, to rescind
23 the unlawful workplace changes at the Union's request, to rescind its unlawful rules, to cease and
24 desist from threatening employees with job loss for supporting the Union and attempting to cause
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26 ³³ Award of expenses regardless of interim earnings is already how the Board treats other non-
27 employment related expenses incurred by discriminatees, such as medical expenses and fund
28 contributions. *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 at *2 (1953).

1 the arrest of individuals engaged in lawful picketing activity, to read any Notice issued in this
2 case to its employees, and to grant all other appropriate relief to remedy Respondent's unfair
3 labor practices.
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7 DATED AT San Francisco, California, this 1st day of April, 2016.

8 /s/ Matthew C. Peterson

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