

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29

DEEP DISTRIBUTORS OF GREATER N.Y.,  
D/B/A IMPERIAL SALES, INC.

Case 29-CA-157108

and

HENRY HERNANDEZ, an Individual

and

DEEP DISTRIBUTORS OF GREATER N.Y.,  
D/B/A THE IMPERIAL SALES, INC.

Case 29-CA-147909

and

UNITED WORKERS OF AMERICA,  
LOCAL 660

and

DEEP DISTRIBUTORS OF GREATER N.Y., D/B/A  
THE IMPERIAL SALES, INC.

Case 29-RC-146077

and

UNITED WORKERS OF AMERICA,  
LOCAL 660

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COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF  
THE ADMINISTRATIVE LAW JUDGE

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## ISSUES PRESENTED

1. Whether the ALJ was biased.
2. Whether the record evidence supported Respondent's claim that a cyclical work slowdown caused the termination of Jose Wilfredo Argueta, Jose Michel Torres, and Jose Martin Torres;
3. Whether the evidence supported the ALJ's finding that Amjad Malik was a supervisor;
4. Whether Union agent Gilberto Mendoza engaged in threatening and physical misconduct at the election and whether employees witnessed such conduct;
5. Whether Respondent should have been permitted to present evidence that the FLSA suit was brought in bad faith;
6. Whether the evidence adduced at trial supported ALJ Davis' finding that Respondent's Counsel Zabell threatened employees at the hearing.

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Answering Brief in response to and in opposition to the Respondent's Exceptions to the Decision of the Administrative Law Judge.

### **BACKGROUND**

On May 6, 2016<sup>1</sup>, Administrative Law Judge Steven Davis issued his Decision and Recommended Order wherein he found that Deep Distributors of Greater NY Inc. d/b/a The Imperial Sales, Inc., herein called Respondent, unlawfully terminated employees Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes and Augustin Sabillon because of their protected concerted activity and their activities on behalf of United Workers of America, Local 660, herein called the Union, in violation of Section 8(a)(1) and (3) of the Act. Judge Davis also found that Respondent violated Section 8(a)(1) of the Act by: (1) giving employees the impression that their Union activities were under surveillance; (2) threatening employees with unspecified reprisals if they chose the Union as their collective bargaining representative; (3) telling employees that it would be futile for them to select the Union as their collective bargaining representative; (4) threatening employees with discharge if they chose the Union as their collective bargaining representative; (5) interrogating employees about their involvement in filing a Fair Labor Standards Act lawsuit; (6) implementing new work rules and

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<sup>1</sup> On May 25, 2016, the Administrative Law Judge, upon motion by Counsel for the General Counsel, modified his original order thereby adding certain enhanced remedies that were not included in his original order. All references to the ALJ's order shall mean this modified order.

discipline for the use of cell phones and lateness; (7) threatening employees with legal action in retaliation for participating in a Board hearing and because of their Union activity; and (8) threatening to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes. Further, Judge Davis overruled Respondent's objections to the conduct of the election in Case No. 29-RC-146077 and ordered that the Union be certified as the collective bargaining representative of Respondent's warehouse employees.

To remedy Respondent's unfair labor practices, Judge Davis ordered Respondent to cease and desist from engaging in such misconduct "in any other manner," reinstate with back pay the terminated employees, expunge the discharges from the employees' personnel files, rescind the newly implemented work rules about cell phones and lateness, provide the Union, upon request, with periodic, updated lists of the names and addresses of its employees, post Notice to Employees in English and Spanish, at its facility, that detail the actions that Respondent must take to remedy the violations found, hold meetings during times scheduled to ensure the widest possible audience where Respondent's officers, or in the alternative, a Board Agent, reads the Notice to Employees aloud and publish the Notice to Employees in three publications of local interest for a period of time determined by the Regional Director.<sup>2</sup>

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<sup>2</sup> ALJ Davis did not order, as requested by CGC, that Respondent hold training sessions for its employees, during paid work time, informing them of their rights under the Act and also conduct training sessions for its supervisors and managers on compliance with the Act. General Counsel files, herewith, under separate cover, a limited Cross Exception, requesting that the Order be modified to include these remedies.

On June 22, 2016, Respondent filed Exceptions to the Administrative Law Judge's Decision and Order. Overall, in its Exceptions, Respondent argues that ALJ Davis was biased and dishonest and engaged in a conspiracy with Counsel for the General Counsel to find violations of the Act where the record evidence did not support such violations. Although Respondent set forth 51 exceptions, Respondent's brief provided argument on the following issues only, which touch upon some of the exceptions:

1. Whether the ALJ was biased;
2. Whether the record evidence supported Respondent's claim that a cyclical work slowdown caused the termination of Jose Wilfredo Argueta, Jose Michel Torres, and Jose Martin Torres;
3. Whether the evidence supported the ALJ's finding that Amjad Malik was a supervisor;
4. Whether Union agent Gilberto Mendoza engaged in threatening and physical misconduct at the election and whether employees witnessed such conduct;
5. Whether Respondent should have been permitted to present evidence that the FLSA suit was brought in bad faith;
6. Whether the evidence adduced at trial supported ALJ Davis' finding that Respondent's counsel Zabell threatened employees at the hearing.

For the reasons set for below, the majority of Respondent's exceptions are not supported by any argument or evidence and are without merit and should be rejected in their entirety.

## ARGUMENT

Respondent's Exceptions are without merit. Respondent said it best in its brief where it acknowledged that its arguments are "circuitous" and evidence an extreme amount of "vitriol." Rather than argue the facts or law, Respondent primarily resorts to name-calling, conspiracy theories, and outrageous accusations of dishonesty and bias in an effort to refute the well-founded findings and conclusions of the Administrative Law Judge. The arguments set forth in Respondent's brief are vague and difficult to follow. Respondent cites little case law and transcript testimony.

Further, Respondent failed follow the Board's Rules in filing exceptions by failing to state a ground upon which it takes the exception. In its Brief, Respondent provided argument in just six general areas: bias of ALJ Davis, the terminations of Jose Wilfredo Argueta, Jose Michel Torres, and Jose Martin Torres, the supervisory status of Amjad Malik, the alleged physical misconduct by Gilberto Mendoza, the alleged bad faith filing of the FLSA suit, and attorney Zabell's threats to employees on the first day of hearing. Further complicating matters is that Respondent does not articulate in his brief which exception correlates to what particular argument in its Brief nor does Respondent articulate in what way the ALJ erred with respect to each exception or how this error materially affected the ALJ's decision. Under such circumstance, CGC is left to respond to what each exception appears to argue. This answering brief will attempt to decipher Respondent's exceptions by addressing the main points raised by each exception.

**1. The Administrative Law Judge Was Not Biased Against Respondent: Exceptions 2, 14, 16, 18, 20, 27 and 32**

In its Brief in Support of Exceptions, Respondent argues that the Administrative Law Judge was biased against it. It argues that this bias was shown when the Administrative Law Judge “disregarded concerns for safety in his hearing room, preventing counsel from seeking police intervention when his client was being threatened,” that the Administrative Law Judge referenced his years as an administrative law judge and Board attorney, “feigned an inability to hear when relevant testimony was elicited” and asked Respondent’s counsel questions and then derided him for his answers to those questions.

Respondent’s claim of bias is unfounded and should be rejected. Contrary to Respondent’s spurious claims, the ALJ’s Decision firmly shows that the ALJ’s evidentiary rulings were sound and that he relied on probative record evidence to make his findings of fact and conclusions of law.

Respondent’s claim that the Judge demonstrated a lack of concern for their safety is absurd and false. On December 11, 2015, the second day of hearing, Respondent’s counsel became irate when Gilberto Mendoza, the president of the Charging Party Union, Local 660, entered the hearing room. Even though there was no evidence that Mendoza made threats of any kind, Judge Davis, in order to address any possible concern of Respondent, obtained assurances from Mendoza and his counsel that he would not threaten or otherwise intimidate Counsel or his clients. (Tr. 224) Notwithstanding the fact that Mendoza posed no threat to counsel or his client, counsel called the New

York City Police Department. (Tr. 226) Counsel's behavior was so disruptive and outrageous that the examination could not continue and ALJ Davis broke for an extended lunch hour. During this time, Counsel for the General Counsel arranged for officers from the Federal Protective Service to come to the hearing room in order to keep Respondent's Counsel in line. Thus, while Respondent's counsel manufactured the disruption, Federal Protective Service officers were, in fact, present in the hearing room through the end of the hearing.

Respondent's claim of bias in this regard is false. Moreover, the ALJ does not even cite this incident in his decision which shows that the incident in no way factored into his decision-making. Rather, ALJ Davis focuses on the testimony and weight of evidence which shows that Respondent's contention is without merit.

Respondent also claims that the ALJ showed bias by repeatedly referencing his time as a judge and attorney with the Board. Respondent misrepresents the record by failing to explain the Judge's references to his experience in the context in which he made them. Respondent did not include any examples in its Brief but the record shows that the ALJ's comments were made in response to Respondent's counsel's outrageous conduct, which included spurious accusations of conspiracy and misconduct by the CGC and ALJ Davis. Besides the incident described above, such conduct included Counsel often accusing Counsels for General Counsel as engaging in criminal behavior, including a rant in which he stated that CGC knew that the discriminatees were undocumented but still tried to get Respondent to settle the

case by reinstating those employees. (Tr. 1419-1425 ) The ALJ reprimanded Counsel, stating that Counsel's accusation was one of the most outrageous he'd heard in all of his years of service. (Tr. 1429) Thus, ALJ Davis' references to his years of service were not a sign of any bias; instead, when viewed in the context in which they were said, it is clear that the Judge made these remarks in response to the repeated outrageous conduct by Respondent's Counsel.

In Exceptions 14, 18, 20 and 32 Respondents seems to argue that ALJ Davis showed bias when he granted CGC's motion for sanctions under *Bannon Mills*, 146 NLRB 611 (1964) and took certain adverse inferences because Respondent failed to comply with General Counsel's subpoena. Prior to trial, Respondent was served with a subpoena that requested financial records, personnel records of the discriminatees, and other documents relevant to the complaint, including copies of newly implemented rules that were signed by other employees. Respondent failed to comply with the subpoena and instead lodged spurious accusations against the CGC that the CGC was hiding documents that were handed over. (Tr. 476, 735) On the second day of trial, December 11, 2016, ALJ Davis denied Respondent's motion to quash the subpoena and ordered Respondent to produce the materials by December 21, 2016. At trial, Respondent's counsel represented that it had complied with the subpoena. However, the record clearly reflects that while Respondent had provided just three summaries of some of its financial records, it had failed to provide the entire summaries and the underlying documents used to compile them. (Tr. 1258-1259) Contrary to Respondent's claim, the imposition of sanctions by the

ALJ was justified and not the result of any bias. ALJ Davis noted that Rule 1006 of the Federal Rules of Evidence “states that the contents of voluminous writings which cannot conveniently be examined in court may be presented in the form of a summary, but that the originals shall be made available for examination. “ I ruled that it was the Respondent’s obligation to produce the documents. I noted that Zabell stated that the data was available, and if reports had to be created to produce the data they should have been created.” (ALJD pg. 9 in. 9-18)

Thereby, Respondent was obligated to produce the documents as required by the subpoena. As noted by the Administrative Law Judge in *McAllister Towing & Transportation Co.*, 341 NLRB 394, 417 (2004) “[a] subpoena is not an invitation to comply at a mutually convenient time. . It is an exercise of the Board’s power under Section 11 of the Act. Respondent was compelled to produce documents when directed to do so. This is particularly so where, as here, Respondent has been in possession of the subpoenas well in advance of trial.” The record evidence shows that Respondent failed to comply with the subpoena for over 45 days past the opening of the hearing and for more than 30 days after the ALJ’s explicit direction to provide them. In this regard, ALJ Davis appropriately granted General Counsel’s motion to preclude Respondent from making any argument based on financial information that was not provided. Respondent’s unfounded claim that ALJ Davis issued that decision because of bias should be rejected.

In Exception 16, Respondent seems to argue that ALJ Davis showed bias by not allowing Respondent’s Counsel access to a recording that was made of Respondent’s manager threatening employees. As was firmly detailed in the

Decision, Respondent was given a copy of the recording and its transcript so that it could inspect the recording and produce evidence that it was inaccurate (ALJD Pg. 11 ln. 47.) and was also afforded the opportunity to inspect the recording device (Tr. 354, ALJD. Pg. 11 ln 47-50). Respondent's counsel was given an opportunity to not only cross-examine the witness Sabillon, who made the recording, (Tr. 376-406), but also to re-cross-examine him as well. (Tr. 408-410.) Given that Respondent clearly had ample opportunity to inspect the recording device, and since Respondent stipulated to the evidence contained on the recording device (Tr. 354, lines 1-24 and page 355, lines 1-9.), Respondent's exception has no merit and is yet another misrepresentation to the Board.

Respondent's argument that the ALJ Davis was biased against it is without merit. The ALJ's conduct of the hearing in no way reflected any bias against Respondent and his decision in no way reflected bias. Rather, the record shows that the ALJ exhibited extraordinary tolerance and patience toward Respondent's counsel's outrageous, unprofessional and disrespectful behavior during the course of the hearing and that the Judge's decision was based upon the evidence presented. Respondent's exceptions based upon this premise should be rejected in their entirety.

**2. The Evidence Amply Supports the Administrative Law Judge's Credibility Resolutions: Exceptions 7,8, 9, 13 15,21,22,23,24,25,26, 27, 39,40,41,42,43,44, and 45**

ALJ Davis determined to credit witnesses for the CGC over Respondent's witnesses. (ALJD pg. 18-19) As is common in a majority of cases, the credibility

of the witnesses was crucial to the outcome of this matter. ALJ Davis amply supported his finding that Respondent's witnesses were not credible. There was more than enough evidence to support his finding that CGC witnesses "testified in a forthright, believable manner." (ALJD pg. 18). It is axiomatic that the Board gives broad deference to and will not overturn an administrative law judge's credibility findings unless it is convinced by a clear preponderance of the evidence that those credibility resolutions are incorrect<sup>3</sup>

A vast majority of Respondent's exceptions appear to contend that the ALJ erred in his credibility resolutions. Respondent argues that ALJ Davis ignored its witnesses testimony that showed that it did not engage in any unlawful conduct. Respondent repeatedly characterizes its witnesses' testimony and its evidence as "uncontroverted" or "undisputed." However, a review of the record of the hearing clearly shows that any such testimony was challenged or refuted by other evidence or testimony elicited during the hearing. In its exceptions, Respondent is asking the Board to accept its version of facts over that found by the ALJ.

A. Evidence Supports ALJ Determination to not credit Respondent's Witnesses

The ALJ did not credit Respondents witnesses General Manager Tony Bindra, Owner Danny Bindra, or Warehouse Manager Herb Miller. The ALJ pointed to significant inconsistencies, contradictions and flat out untruths in their

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<sup>3</sup> *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951); *Upper Great Lakes Pilots, Inc.*, 311 NLRB 131 (1993); *Storer Communications, Inc.*, 297 NLRB 269, fn.2 (1982).

testimony. These issues were not relegated to minor issues but rather to significant details or facts.

For example, with respect to Respondent Witness Miller, ALJ Davis noted that Miller initially testified that he did not threaten employees with discharge if they continued to support the Union or that they would have to strike if they voted for the Union. Miller also denied stating that the employees would lose their jobs for the Union or that Respondent would bring in new workers if they voted for the Union. (Tr. 257-279, ALJD pg. 11 in 15-22) However, a recording of a meeting Miller held with the employees clearly showed that he had made these, as well as other unlawful statements. (GC Ex10(b). ALJD pg. 10-11) ALJ Davis also pointed out that "Miller testified flatly that the only question he recalled asking is if the workers knew how much they would have to pay in union dues." (ALJD 11 ln. 24-25). Thus, the ALJ properly discredited Miller because of his blatantly contradictory testimony and his apparent willingness to lie in order to bolster Respondent's defense.

Regarding Tony Bindra, the ALJ properly found his testimony to be unreliable. ALJ Davis found Bindra to be evasive and often contradicted himself during his examination by CGC. For example, at various times Bindra stated that he did not work for Respondent then that he did, and initially denied that his brother Danny was the owner of Respondent. When asked whether he signed contracts on behalf of Respondent, Bindra initially feigned knowing what a contract was, and then conceded that he did indeed sign contracts on behalf of Respondent. (Tr. ALJD pg. 18-19) The ALJ pointed to Bindra's contradictions

when testifying about the status of supervisor Amjad Malik, specifically finding that Bindra initially stated that Malik did sign purchase orders then, after an objection by Respondent's counsel, said he did not. (Tr. 603-604, ALJD pg. 4 In. 44-45) Finally, ALJ Davis noted that Bindra, on examination by CGC, initially stated that Jose Michel Torres, Jose Martin Torres and Jose Wilfredo Argueta were terminated and not laid off (Tr. 659) but then changed his testimony on examination by Respondent's counsel to that they were laid off. (Tr. 694-700, ALJD pg. 8 In. 13-14). Accordingly, the Judge did not err in discrediting Tony Bindra; instead, the Judge's finding was appropriately based on Bindra's own contradictory testimony.

The ALJ did not credit Owner Danny Bindra's testimony either. The ALJ determined that Danny Bindra was not reliable based on his finding that Counsel for the General Counsel tried to stop Respondent's counsel from threatening employees at the outset of the hearing. The ALJ noted that all of the witnesses state that CGC did tell Counsel to "Stop" when he threatened to report them to Immigration. Bindra denied the CGC said "stop" to Counsel. The ALJ determined that the weight of the evidence showed that CGC did say stop and Bindra testimony was not credible. (ALJD pg. 19 )

Respondent argues in its exceptions that Danny Bindra and Herb Miller each gave reliable testimony that was supported by other witnesses. These witnesses were Tony Bindra, Danny Bindra and Herb Miller who were all found not to be credible. It offers nothing more to bolster Danny Bindra's or Herb Miller's credibility. In short, Respondent relies on the testimony of the two other

unreliable witnesses to find the third reliable. Respondent's claims that the Judge erred by discrediting these witnesses must be rejected.

B. The Evidence Supports The ALJ's Crediting of CGC witnesses

The ALJ correctly credited the testimony of Counsel for the General Counsel's witnesses. He found, based on their demeanor, that the witnesses testified honestly and believably and that they gave detailed, corroborative testimony, occasionally using English words that were said to them despite Spanish being their primary language. (ALJD pg. 18, ln. 18-29)

In its Exceptions, Respondent argues that the witnesses gave false and contradictory statements. For example, it argues that Jose Wilfredo Argueta should not be believed because he stated that the December 9, 2015, incident in which Respondent's counsel made unlawful threats to employees occurred in a different hearing room with the ALJ present. The ALJ, however, took this into consideration and found that although Argueta was mistaken in what room the incident occurred and in that the ALJ was not present, he was not mistaken in what Counsel said, which was the critical issue. (ALJD pg. 16-17) Further, the ALJ found that other witnesses corroborated Argueta's testimony that Counsel actually made the unlawful threats. (ALJD pg. 28 ln 36)

Respondent also argues that because the witnesses' primary language is Spanish, they could not possibly understand what was being said in English so the ALJ should not have credited their testimony. For example, Respondent argues in its Brief that Henry Hernandez was not believable because he admitted

at hearing that he did not understand the words that come out of counsel's mouth as he was asking questions. (R. Brief pg. 12 citing to Tr. 61) However, at trial Hernandez went on to explain that he clearly understood on December 9, 2016, Respondent's counsel saying "report" and "immigration" because everyone knows what the word "Immigration" means. (Tr. 1447) ALJ Davis found Hernandez to be credible citing that Hernandez readily admitted that he does not understand much but does know some English so he understood Counsel's threats. (ALJD pg. 17 ln. 17) Further, Judge Davis noted that all CGC witnesses testimony was mutually corroborative.

The ALJ's determination to credit Counsel for the General Counsel's witnesses over that of Respondent's is supported by the record. Respondent offers no evidence that would show that the ALJ's determination was erroneous. The Board has repeatedly held that it will defer to the administrative law judge's credibility determinations unless "the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950). Respondent proffered no such evidence in its exceptions or brief. Meanwhile, Judge Davis based his credibility findings upon the demeanor of the witnesses as they testified, their mutually corroborative testimony and his weighing of all the evidence. Judge Davis cited numerous instances of Respondent witnesses' contradictions, evasiveness and inconsistencies on key matters. As articulated in his decision and supported by the record, ALJ Davis had more than adequate bases for

discrediting Respondent's witnesses. All exceptions challenging the ALJ's credibility determinations were incorrect should be rejected.

**3. Respondent Failed to Establish that the Administrative Law Judge Erred in Not Allowing It to Present Evidence of Bad Faith in the filing of the FLSA Suit: Exception 17**

Respondent argues that the ALJ erred when he did not allow it to put on evidence that the discriminatees filed a Fair Labor Standards Act (FLSA) lawsuit in bad faith. It contends that it should have been allowed to ask questions about why the suit was filed because that would explain why manager Tony Bindra's questioning the employees was not an unlawful interrogation. This contention is without merit.

As noted by the ALJ in his decision, and conceded by Respondent in its Exceptions, the filing of a group lawsuit is *per se* protected activity. (ALJD at 24, line 24-25 and cases cited, Respondent Brief pg. 8.) Respondent argued at trial that the filing of such lawsuit loses protection if done in bad faith. (citing *Leviton Mfg. Co., Inc. v. NLRB*, 486 F.2d 686 (1973)) First, it should be noted that current Board law does not follow *Leviton*. Moreover, contrary to Respondent's claim, ALJ Davis allowed Respondent to put into evidence a letter from the employees' attorney in the FLSA suit that it claimed supported its position (R. Ex. 5).

In its Brief, Respondent argues that it should have been allowed to question the discriminatees about the filing of lawsuit, claiming that the letter indicated that the suit was filed in bad faith. Respondent further argues that if the suit was filed

in bad faith, then manager Tony Bindra was allowed to question the employees about the lawsuit, because he knew it to be falsely filed. However, as correctly pointed out by the ALJ in his decision, the letter in no way shows that the lawsuit was filed in bad faith. The Judge found that by the letter, plaintiffs' counsel merely wanted to amend the suit to give a more accurate accounting of the disputed hours. (ALJD pg. 24 In 59-50) The letter did not say that the lawsuit was being withdrawn or that any part was being deleted in any manner. It merely asked for Respondent's consent to make the amendments. Such amendments and corrections to lawsuits are routinely made without any inkling of bad faith, so it is truly perplexing that Respondent's counsel would claim otherwise. To allow Respondent to question employees about the filing of this suit would be nothing more than allowing a fishing expedition. Therefore, the ALJ did not err in precluding Respondent from questioning witnesses about the filing of the lawsuit. Exceptions based on this argument should be dismissed.

**4. The Record Evidence Supports The ALJ Decision That Respondent Violation of Section 8(a)(1) and 8(a)(3) of the Act: Exceptions 3,10,11,12,18,19,20,29,31,32,34,36,37,38,46,48**

Respondent basically contend that ALJ Davis' Conclusions of Law were all wrong. Respondent's general statement that the allegations of the Amended Consolidated Complaint "have been soundly rebuffed by the credible testimony of the witnesses for both the Complainants and Respondent" (R. Brief pg. 15) in no way substantiates this claim. To the contrary, the ALJ found that the credible testimony showed that violations occurred.

A. The ALJ Correctly Found that the Record Evidence Does Not Show that a Work Slowdown Caused the Discharges of Jose Wilfredo Argueta, Jose Michel Torres and Jose Martin Torres

The ALJ properly determined that Respondent's defense that it laid off the three employees not because of their Union activity but because it traditionally lays off employees the first quarter of every year due to work slowdown was without merit. ALJ Davis examined all the evidence presented including the testimony of Respondent's Manager Tony Bindra and Warehouse Manager Herb Miller, the handful of documents presented by Respondent, and the testimony of the employee witnesses. The record supports the ALJ's finding that Respondent failed to substantiate its defense and that, instead, the employees were unlawfully discharged.

As noted in his decision, the ALJ found that although Respondent claims that employees are laid off every year due to financial slowdown, Respondent failed to provide credible evidence of this slowdown. CGC subpoenaed Respondent's financial records in anticipation of this defense but as discussed above, Respondent failed to comply with it. The ALJ granted CGC's *Bannon Mills* motion based upon this failure (ALJD pg. 9 In. 12-18) and took an adverse inference that had such records been provide, they would not have supported Respondent's defense. (ALJD pg. 9 In. 25-27) Further, as also discussed above, ALJ Davis could not credit the testimony of Miller or Bindra. As stated in the decision, Bindra first stated that the employees were terminated and then, upon cross examination, stated that they were laid off. (ALJD pg. 22 In 27 ) Finally, Respondent proffered a document that it argued showed a list of

employees that it claims it laid off for the past three years. Argueta and the Torres brothers are named in the document. (GC Ex. 20) When asked why each person on the list was laid off, GM Tony Bindra testified that he did not know if they were actually laid off or terminated. (Tr. 769) The ALJ, in his Decision, noted that Bindra admitted that the person who prepared the list simply dragged down the words "laid off" when inputting the reasons for the individual's separation. (Tr. 356, ALJD pg. 8 In. 19 ). Therefore, the document was unreliable as it does not differentiate between laid off employees and those who were terminated. The ALJ also noted that the discharges came over two months after the alleged Christmas slowdown was to have occurred, and therefore was less likely to be caused by the slowdown as opposed to the employees Union activity which occurred only two weeks before their termination. (ALD pg.22 In 38-39) Respondent did not offer any additional evidence at the hearing to explain why employees were terminated right after they engaged in protected activity.

In its exceptions, Respondent argues that the testimony of Bindra and the three documents provided were sufficient to establish its defense. The ALJ examined this defense and found it meritless for the reasons stated above. Respondent offers nothing more than a bare assertion that the ALJ should have credited this evidence over the credited testimony of the employees without providing any evidence or rationale for this declaration.

In short, the record amply supports the ALJ's finding that Respondent's defense was a pretext. Respondent's exceptions to the ALJ finding in this regard should be rejected.

**B. The ALJ Correctly Found that Amjad Malik is a Supervisor**  
**Exception 5**

The record evidence supports ALJ Davis' determination that Amjad Malik is a Supervisor under Section 2(11) of the Act. Section 2(11) of the Act states that a supervisor is an:

Individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

The exercise of one of these indicia is sufficient to find an individual a supervisor. Employees credibly testified that they report to Malik. Michel Torres testified that when he was hired, Tony Bindra told him that Malik is his supervisor. Both Torres and Argueta testified that Malik assigns them work, approved leave and that when Warehouse Manager Herb Miller is away, Malik is in charge. (Tr. 414, 821, 822) The ALJ noted these as factors in finding Malik a supervisor in his decision. (ALJD pg. 19 In. 34-39) Further, Judge Davis noted that Warehouse Manager Miller conceded that Malik was his main helper. (Tr. 1376, ALJD pg. 19 In. 35)

Respondent excepts to this finding, again without offering any argument other than that the ALJ should have credited its witnesses testimony. Ironically,

ALD Davis did, to some extent, credit Respondent's witnesses when he noted that Miller conceded that Malik was his main helper and that Bindra testified that Malik is entrusted with a key to the room where valuable goods are kept. (ALJD pg. 5 In. 2) However, these statements only bolster the testimony of the employee witnesses who contend that Malik is a supervisor. Respondent argues that the ALJ did not factor in that the employees viewed Malik differently because he did not speak Spanish. This argument is meritless in that this factor does not determine one way or another Malik's supervisory status. Even if Malik spoke Spanish and held this position of trust, assigned work and was in charge when Miller is absent, he would still be a supervisor.

Respondent's exception should be rejected.

**5. The Evidence Supports the ALJ's Finding that Union President Mendoza Did Not Engage in Objectionable Conduct at the Election (Exceptions 24, 41, 42, 43, 44)**

The ALJ found that Mendoza's conduct at the Election was not objectionable and that certain ballots should be opened and counted and the Union certified if they prevail. (ALJD pg. 39 In. 11-14) There is abundant record evidence to support these findings.

The ALJ credited the testimony of Mendoza and Respondents' witnesses establishing that Mendoza got into a verbal confrontation with Respondent's representatives. (ALJD pg. 36 In. 22-26) The ALJ found that while mere pushing and shoving took place, it did not escalate to the level argued by Respondent. The ALJ did not credit Respondents' witnesses who stated that the confrontation

lasted for 3 minutes or more. (Tr. 1324, 1374) Instead, he credited employees witness Argueta who was acting as the Union observer and testified that the incident lasted only a few seconds. (Tr. 860) The ALJ noted that a Board agent intervened and then conducted the election, which further bolstered to Argueta's claim that the incident only lasted a few seconds and then the election took place. Further, the ALJ credited Mendoza's stated reason for the confrontation, that he wanted to verify, as per the stipulated election agreement, that surveillance cameras were turned off. Mendoza's testimony was further bolstered by Miller's initial testimony that the conflict was about the surveillance camera. (Tr. 308, 317, ALJD 36 ln. 3) The evidence showed that the Bindras and its Counsel also played a role in the confrontation in that they tried to block Mendoza from verifying that the cameras were off so both sides may be at fault. (ALJD pg. 37 ln 32-37) The ALJ then credited the witnesses who, with the exception of Argueta, all stated that they were not present to witness the event. He discounted Herb Miller's and Danny Bindra's testimony that many, if not all the witnesses were present. (ALJD 37 Ln. 16-19) The ALJ finally found that employees did not learn of the event until after the election, so its results could not have been effected by the incident. (ALJD 36 pg. ln29-30) He relied upon the credited testimony of Henry Hernandez in making this decision.

The ALJ found that given all the circumstances of the incident, Mendoza did not engage in objectionable conduct. In sum, only one employee was present for an incident that lasted only a few seconds. Further, Respondent

showed that it was not powerless against the Union by standing up to Mendoza. In this regard, the decision is supported by the evidence.

Respondent argues in its Brief that its witnesses testimony that Mendoza made threatening gestures that employees saw should have been credited. It also states that employees testified that they had heard of the incident. Again, the ALJ found Respondent's witnesses unreliable and the employee witnesses all testified that they did not hear of the incident until after the election. Accordingly, Respondent's exception is meritless and should be rejected.

**6. The Judge Correctly Found that the Terminations of Henry, Hernandez, Roberto Reyes, Javier Reyes, Marvin Hernandez, Augustine Sabillon, Jose Wilfredo Argueta, Jose Martin Torres and Jose Michel Torres violated the Act: (Exceptions 10,11,19, 20, 29, 31, 32, 34, 36, 37, 38, and 48)**

In his decision, ALJ Davis set forth the standard established in *Wright Line*, 251 NLRB 1083 (1980), to show that anti-Union animus was a motivation in the discharge of employees. Michel Torres and Argueta were Union supporters. (Tr. ALJD pg. 21 In 7) The record evidence established that Respondent knew that Michel Torres and Argueta were Union supporters via the comment by supervisor Malik to Michel Torres and Argueta that he knew they were Union supporters. (Tr. 426, 827, ALJD pg. 21) Manager Miller also established that he knew of Union activity when he told employee Reyes that he knew that "the one that is hanging out with the Union is Alex [Argueta]" (Tr. 895-896, ALJD 21, In 22-23) Further, Judge Davis relied on the fact that Miller did not deny making this statement. (ALJD In 23) Supervisor Malik was not called by Respondent either to

23) Supervisor Malik was not called by Respondent either to rebut making these comments. Thus, Respondent knowledge is established by the record evidence.

Respondent's anti-Union animus is established by the many unlawful anti-Union statements made by Miller at a meeting with employees. (Tr. 257-279 ALJD 21 ln. 42-45) Respondent's animus is also established by supervisor Malik creating the impression of surveillance by telling Argueta and Michel Torres that he knew they were with the Union. (Tr. 426, 827 ALJD pg. 21 ln 51) In this regard, a *prima facie* case was established. The ALJ correctly found that Respondent failed to rebut the *prima facie* case.

Respondent argues that its evidence overcomes CGC *prima facie* showing. In its Brief in support, Respondent argues that the testimony of Tony Bindra and certain documents, GC Ex. 15, 16 and 17, show that there was a financial and workplace history of layoffs in the first quarter of every year and that the three employees were thus justifiably laid-off, not terminated, and it should not have been found to have violated the Act. However, as described above, Tony Bindra was found not to be credible. His testimony on this subject was evasive and contradictory. (ALJD pg. 18 ln 50) In addition, the documents cited by Respondent were found to be insufficient to establish an adequate defense and Respondent's failure to comply with a subpoena led to sanctions. (ALJD pg. 22, ln. 27-32) The ALJ determined that since Bindra testimony was unreliable and the documents did not establish that the employees were laid-off for any lawful reason, CGC had met its burden. Thus, Respondent's reliance on Bindra's

testimony and the documents it chose to provide to the CGC in its exception, is misplaced.

Respondent also argues that the five other employees discharged on July 21, 2015, were let go because they failed to sign an acknowledgment that they'd received newly implemented work rules. However, the ALJ found that the rules were unlawfully implemented in retaliation for the employees filing the FLSA lawsuit. (ALJD pg. 26 ln 5-32) The ALJ noted that even though safety was a concern at Respondent's previous location in Syosset, no such written rules were implemented until the suit was filed. (ALJD pg. 26 ln. 42) Further, the rules were not implemented until seven weeks after Respondent moved to its new location in Bethpage. Moreover, although Respondent claimed that all other employees signed the work rules, Respondent's own documentation showed that only nine (9) out of about thirty-two (32) employees actually signed the new work rules. Thus, the five employees who participated in the FLSA suit were clearly disparately treated, since the remaining twenty-three (23) employees who did not sign the work rules remained employed. The ALJ found this evidence persuasive to show that the work rules were implemented as a direct result of employees' protected activities and used to terminate the workers who engaged in protected activities.

The ALJ relied on overwhelming probative record evidence to support the conclusion that General Counsel met its burden of proving that the termination were unlawful and that Respondent failed to prove that it would have fired the discriminatees even absent their protected concerted and Union activity.

Respondent presents no argument to support any of these exceptions. For this reason, the exceptions should be rejected.

**7. The ALJ Had Sufficient Evidence to Find that Respondent's Counsel Threatened employees at Hearing (Exceptions 39 and 40)**

The ALJ correctly found, and the record evidence supports, that Respondent's Counsel threatened to report employees to Immigration. Employee witnesses Jose Wilfredo Argueta, Henry Hernandez, Roberto Reyes, Javier Reyes and Marvin Hernandez all testified that they heard Counsel make these threats to them while they were seated in a hearing room waiting for the hearing to commence. Union agents Mendoza and Wester Febres also credibly testified that they heard Counsel say that the employees would be reported to Immigration.

In making his finding, the ALJ relied on the mutually corroborative testimony of these witnesses. All of the witnesses, who do not speak English as a first language, all stated that Respondent's counsel said that he would report them to Immigration and that they would "not get a penny" (Tr. 964, 1084-1085, 1149, 1446-1447). The ALJ rejected Respondent's defense to this allegation, which was based almost exclusively on the testimony of Danny Bindra, whom the ALJ correctly discredited. (ALJD pg. 28 ln 45) Judge Davis also properly considered that Respondent's Counsel – who was alleged to have made the unlawful threats - did not testify to deny that conduct. (ALJD pg. 28 Ln 45-46)

Respondent excepts to the Judge's finding. Respondent argues that

because most of the employees do not speak English their recitation of an English conversation should not have been credited. It also argues that Argueta stated that the incident took place in another hearing room and that the ALJ was present, so his testimony should have been discounted. However, as noted by the ALJ in his decision, the witnesses all corroborated Argueta and testified as to what they heard and they all state that Counsel made the same or a very similar statements despite the language barrier. (ALJD pg. 16 ln 24-26). Argueta's belief that the ALJ was present and that it took place in another room is inconsequential because the other witnesses all understood when Respondent's counsel said that he was going to report them to Immigration. This point is further driven home by the testimony of Henry Hernandez who stated that he understood counsel to say that he was going to report them to Immigration because he understood the word "report" and "everyone knows what the word "Immigration" means. (Tr. 1447) Further, the employees all testified that counsel was directing its comments to them. Employee Roberto Reyes stated that counsel pointed to them while calling them criminals. (Tr. 933, ALJD pg. 17 Ln 12) Thus, the employees all understood counsel to be speaking to them when discussing Immigration.

The credible evidence shows that Respondent's counsel made the threats as alleged. The ALJ based his finding on the mutually corroborative, detailed testimony of the employee witnesses and Respondent's counsel's failure to testify to deny the conduct. The ALJ did not err in finding that Respondent's counsel threatened the employees as alleged.

**8. The ALJ Had Sufficient Evidence to Find that Respondent made Statements that Violate 8(a)(1)**

The evidence supports the ALJ finding that certain statements by Respondent violated Section 8(a)(1) of the Act. Judge Davis based his findings on the credible testimony of CGC's witnesses and in some instances, recordings clearly showing Respondent making them. (GC Ex. 10(b)).

As noted above, none of Respondent's witnesses were found to be credible. Their denials of making these statements were found to be untrue. Of note is Warehouse Manager Miller who was soundly impeached by a recording of him threatening employees. Witnesses for CGC, however, were found to have testified openly and honestly. Based upon his credibility determinations, the ALJ appropriately found that the evidence showed that Respondent made statements in violation of Section 8(a)(1):

**9. Respondent's Remaining Exceptions Should be Denied as they are unsupported, vague, and fail to state any proper grounds upon which to overrule the ALJ's findings (Exceptions 1, 3, 4, 6, 17, 28, 30, 35, 47, 49-51)**

These exceptions are vague and confusing and constitute nothing more than statements. For example, exception 4 states "The ALJ's findings that Miller was in charge of a discreet area of the Warehouse." This is not a proper exception. Respondent has given no details that would explain to what Respondent excepts. It may relate to the supervisory status of Amjad Malik, but it is impossible to tell since the exception is not discussed in the brief. Exception 6 concerns the filing of the petition which is not in dispute. Exception 17 is convoluted and confusing. Inasmuch as it mentions the FLSA suit, this has been

addressed earlier in this Answering Brief. Exceptions 29 and 30 fail to state any grounds for an exception to the ALJ's findings. Finally, Exceptions 49-51 state nothing more than that Respondent excepts to the remedies and the Order. Respondent offered no evidence or argument on these exceptions.

For all of the forgoing reasons, Respondent's remaining exceptions should be dismissed in their entirety.

### CONCLUSION

For all of the reasons cited above, Counsel for the General Counsel respectfully requests that the Board reject and dismiss each of Respondent's Exceptions. It is urged that the Board adopt each and every of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Remedy and any further remedy deemed just and proper.<sup>4</sup> It is further requested that the Administrative Judge's Order be modified pursuant to Counsel for the General Counsel's Cross-Exception filed herewith.

Respectfully submitted,

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Henry J. Powell

*/s/*

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<sup>4</sup> As noted previously, CGC is also filing a limited Cross Exception, urging that the ALJ's Order be modified to include two (2) additional remedies.