

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

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ADVANCEPIERRE FOODS, INC.,

“Respondent”

and

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 75, AFFILIATED  
WITH THE UNITED FOOD AND COMMERCIAL  
WORKERS, INTERNATIONAL UNION,

“Charging Party”

Cases 9-CA-153966  
9-CA-153973  
9-CA-153986  
9-CA-154624  
9-CA-156715  
9-CA-156746  
9-CA-159692  
9-CA-160773  
9-CA-160779  
9-CA-162392

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**RESPONDENT ADVANCEPIERRE FOODS, INC.’S EXCEPTIONS TO THE  
DECISION OF ADMINISTRATIVE LAW JUDGE DAVID I. GOLDMAN**

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Respectfully submitted,

*/s/ Keith P. Spiller*

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Pursuant to the National Labor Relations Board’s Rules and Regulations, Respondent AdvancePierre Foods, Inc. (“APF” or “Company” or “Respondent”) hereby submits the following Exceptions to the Decision and Recommended Order (“Decision”) of Administrative Law Judge David I. Goldman (“ALJ”) in the above-captioned case, and as more fully set out in its Brief in Support of Exceptions, requests that the Board reject or modify the following findings of fact, conclusions of law and remedies in the Decision:<sup>1</sup>

1. The ALJ’s conclusion that Renee Chernock (“Chernock”), in response to learning of the Union campaign, directed Mandy Ramirez (“Ramirez”) to post a copy of the Company’s solicitation/distribution policy. (ALJD 8:24-26). This conclusion is contrary to record evidence.
2. The ALJ’s conclusion that APF’s notice on its front door that the Company had a solicitation/distribution policy violates the Act. (ALJD 14:10-25). This conclusion is contrary to record evidence and controlling law.
3. The ALJ’s conclusion that APF’s 2001 solicitation policy (G.C. Ex. 25) was not mistakenly maintained and enforced. (ALJD 14: n. 18). This conclusion is contrary to record evidence and controlling law.
4. The ALJ’s determination that APF’s ongoing videotaping its employees was in violation of Section 8(a)(1) of the Act. (ALJD 15:6-14). This conclusion is contrary to controlling law.
5. The ALJ’s conclusion that Ramirez’s review of prior videotape on which Carmen Cotto (“Cotto”) distributed Union literature was unlawful under Section 8(a)(1) of

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<sup>1</sup> APF simultaneously filed herewith its Brief in Support of Exceptions to the ALJ’s Decision. Citations to the ALJ’s Decision will be designated by “ALJD” and followed by the cited page and/or line numbers. Citations to record documents will be designated as “G.C. \_\_\_\_\_,” “UN. \_\_\_\_\_,” and “R. \_\_\_\_\_.”

the Act. (ALJD 15:15-17). This conclusion is contrary to record evidence and controlling law.

6. The ALJ's failure to accept as the "true motive" for disciplining Cotto (and allegedly Sonya Guzman ("Guzman")) the Company's reliance on the 2001 policy. (G.C. 25) (ALJD 16:5-25). This failure is contrary to record evidence and controlling law.
7. The ALJ's conclusion that the Company's enforcement of the 2001 (G.C. 25) policy against Cotto and Guzman was a pretext designed to cover a direct effort to punish union activity. (ALJD 16:21-25). This conclusion is contrary to record evidence and controlling law.
8. The ALJ's failure to address or give consent consideration, analysis, and/or weight to the lack of union animus under the *Wright Line* test in connection with the discipline to Cotto and alleged discipline to Guzman. (ALJD 16:27-51). This failure is contrary to record evidence and controlling law.
9. The ALJ's conclusion that the disciplining of Cotto violated Section 8(a)(1) and (3) of the Act. (ALJD 15:39-40). This conclusion is contrary to record evidence and controlling law.
10. The ALJ's factual determination that APF issued discipline to Guzman. (ALJD 12:20-26; n. 15). This determination is contrary to record evidence and controlling law.
11. The ALJ's decision not to credit the testimony of Ramirez and Chernock concerning whether Guzman was verbally disciplined. (ALJD 12:20-26). This decision is contrary to record evidence.

12. The ALJ's decision to credit, rely on, and/or place weight on Guzman's testimony concerning the events of June 9, 2015. (ALJD 10-18). This decision is contrary to record evidence.
13. The ALJ's determination that APF did not effectively repudiate its discipline to Cotto. (ALJD 17:4-34). This determination is contrary to record evidence and controlling law.
14. The ALJ's failure to apply the *Bourne* factors as per *Westwood Health Care Center*, 330 NLRB 935, 939 (2000) to resolve whether the questioning of Cotto was coercive and therefore violative of the Act. (ALJD 18:1-19; n. 20). This failure is contrary to controlling law.
15. The ALJ's determination that the questioning of Cotto by Ramirez and Chernock was illegal interrogation in violation of Section 8(a)(1) of the Act. (ALJD 18:1-18). This determination is contrary to record evidence and controlling law.
16. The ALJ's conclusion under the *Wright Line* analysis that union animus was present in the discipline of Cotto. (ALJD 18:1-18). This conclusion is contrary to record evidence and controlling law.
17. The ALJ's failure to consider the admitted spoliation by Guzman of the claimed written notice of rescission in accessing her credibility. (ALJD 14-18). This failure is contrary to record evidence and controlling law.
18. The ALJ's failure to give adequate consideration, analysis, and/or weight to the fact that APF is a food manufacturer and operates under strict governmental regulation and inspection requirements in connection with his decision concerning APF's audit

of clipboards. (ALJD 19:8 to 23:39). This failure is contrary to record evidence and controlling law.

19. The ALJ's refusal to accept APF's defense that its GMP audit on June 8, 2015 was pursuant to the enforcement of a neutral GMP production rule. (ALJD 22:6 to 23:39). This refusal is contrary to record evidence and controlling law.
20. The ALJ's decision that the GMP's of APF were presumptively invalid due to the policies being a "content neutral ban" on personal items in the workplace. (ALJD 22: n. 30). This decision is contrary to record evidence and controlling law.
21. The ALJ's conclusion that the clipboard search and confiscation of union cards constitute an unlawful surveillance in violation of Section 8(a)(1) of the Act. (ALJD 22:6-10). This conclusion is contrary to record evidence and controlling law.
22. The ALJ's failure to give adequate consideration, analysis, and/or weight to APF's defense that it would have conducted a GMP audit regardless of the content of the materials reported in employee clipboards. (ALJD 23:1-39). This failure is contrary to record evidence and controlling law.
23. The ALJ's refusal to recognize that the right to engage in union activity on the floor of a food manufacturing plant does not necessarily supersede the food manufacturer's food safety obligations and right to promulgate reasonable food safety rules. (ALJD 19-23). This refusal is contrary to record evidence and controlling law.
24. The ALJ's decision that Ronnie Fox ("Fox") received a verbal warning for violating the outdated solicitation policy. (G.C. 25). (ALJD 23:16-39). This failure is contrary to record evidence.

25. The ALJ's determination that APF's issuance of discipline to Fox violated Section 8(a)(3) of the Act. (ALJD 22:6-23:39). This determination is contrary to record evidence and controlling law.
26. The ALJ's determination that Ramirez's mere attempt to locate a publicly broadcast radio program constitutes unlawful surveillance in violation of Section 8(a)(1) of the Act. (ALJD 31:10-32). This determination is contrary to record evidence and controlling law.
27. The ALJ's determination that Ramirez's of a non-employee's public Facebook page constitutes unlawful surveillance in violation of Section 8(a)(1) of the Act. (ALJD 31:10-32). This determination is contrary to record evidence and controlling law.
28. The ALJ's decision to apply the "curious" line of cases (*Astro Shapes, Inc.*, 317 NLRB 1132 (1995) and *Dadco Fashions*, 243 NLRB 1193 (1979)) to Ramirez's clicking on the Facebook page of a non-employee when her curiosity concerned the identity of that non-employee rather than curiosity about union activity. (ALJD 31:13-32). This decision is contrary to record evidence and controlling law.
29. The ALJ's decision to find coerciveness in Ramirez's clicking on the Facebook page of a non-employee. (ALJD 31: n. 40). This decision is contrary to record evidence and controlling law.
30. The ALJ's conclusion that Ramirez surveilled in violation of Section 8(a)(3) of the Act when she never actually observed any concerted or protected activity in viewing the LaMega website and Facebook page. (ALJD 31:10-32). This conclusion is contrary to record evidence and controlling law.

31. The ALJ's refusal to consider that the two individuals who participated in the LaMega broadcast wanted to disseminate their message to the general public. (ALJD 31:10-32). This reference is contrary to record evidence and controlling law.
32. The ALJ's failure to give adequate consideration, analysis, and/or weight to the undisputed fact that when Ramirez clicked on the Facebook page of Trujillo, her motivation could not possibly have been to surveilling employee or to investigate employees union activities because she did not recognize Trujillo as an employee. (ALJD 31:10-32). This failure is contrary to record evidence and controlling law.
33. The ALJ's failure to give adequate consideration, analysis, and/or weight to Ramirez's testimony as to her motivations on clicking the Trujillo icon, in the absence of any evidence to contradict her stated facts or motivation. (ALJD 31:10-32). This failure is contrary to record evidence and controlling law.
34. The ALJ's conclusion that because Ramirez was advised that "a lady named Diana" participated in the radio broadcast, that Ramirez knew or should have known that the participant was Diana Concepcion "Diana" before she investigated Yazzmin Trujillo. (ALJD 34:29-35). This conclusion is contrary to record evidence and controlling law.
35. The ALJ's conclusion that Ramirez knew Trujillo supported the Union was factually and legally incorrect. (ALJD 32). This conclusion is contrary to record evidence.
36. The ALJ's conclusion that Concepcion was told by APF that it was the surveillance of the union radio show and the person who liked the radio show that resulted in

further adverse action against her. (ALJD 32). This conclusion is contrary to record evidence.

37. The ALJ's failure to conclude that Ramirez's subsequent suspicion that Concepcion was likely the same person as Yazzmin Trujillo did not taint her initial click on the Trujillo Facebook icon. (ALJD 31:10-32). This failure is contrary to record evidence.
38. The ALJ's distinguishing of the *Chemtronics, Inc.* 236 NLRB 178 (1978) line of cases. (ALJD 32: n. 41). This is contrary to record evidence and controlling law.
39. The ALJ's failure to recognize that the information that came to Ramirez's attention concerning Diana Concepcion raised a credible concern about Concepcion's identity. (ALJD 33:1-34:35). This failure is contrary to record evidence and controlling law.
40. The ALJ's failure to recognize that constructive knowledge of the potential unauthorized status of an employee is sufficient to trigger an obligation to investigate by exercising "reasonable care" to discern the employee's status to work in the United States. (ALJD 33:1-34:35). This failure is contrary to record evidence and controlling law.
41. The ALJ's conclusion that Ramirez's actions in taking reasonable care to investigate Concepcion's status to work lawfully in the United States were "wholly discretionary." (ALJD 33:1-34:35). This conclusion is contrary to record evidence and controlling law.
42. The ALJ's failure to give adequate consideration, analysis, and/or weight to the undisputed facts that APF was the subject of several ICE audits, one of which

deprived it of almost half of its skilled workforce in a recently-purchased North Carolina facility. (ALJD 32-38). This conclusion is contrary to record evidence and controlling law.

43. The ALJ's conclusion that APF's request for documentation from Concepcion was motivated by union animus. (ALJD 35:1-38:9). This conclusion is contrary to record evidence and controlling law.
44. The ALJ's failure to consider that APF treated Concepcion better than two non-supporters of the Union under almost identical circumstances. (ALJD 32-38). This failure is contrary to record evidence and controlling law.
45. The ALJ failed to correctly apply the *Wright Line* analysis to the Concepcion request for documentation and subsequent suspension. (ALJD 32-38). This failure is contrary to record evidence and controlling law.
46. The ALJ's conclusion that the General Counsel met its *prima facie* showing under the *Wright Line* analysis as to the request for documentation and subsequent suspension of Concepcion. (ALJD 32-38). This conclusion is contrary to record evidence and controlling law.
47. The ALJ's failure to give adequate consideration, analysis, and/or weight to the undisputed fact that APF's VP of HR instructed Ramirez to follow past practice and ignore Concepcion's Union support with respect to requesting documentation from her to confirm her identity. (ALJD 32-38). This failure is contrary to record evidence and controlling law.

48. The ALJ misconstrued the email sent by Ramirez to Aardema and the context in which that email was sent. (ALJD 35:18–21). This is contrary to record evidence and controlling law.
49. The ALJ’s conclusion that, in applying the *Wright Line* analysis, “one must include in that the Respondent’s suspicion -- whether correct or not -- that Diana Concepcion (and not Yazzmin Trujillo) -- had ‘liked’ the LaMega Facebook posting about the union radio broadcast.” (ALJD 34:33–35). This conclusion is contrary to record evidence.
50. The ALJ’s conclusion that APF cannot prove it would have requested documentation from Concepcion in the absence of her protected activity. (ALJD 38:1-9).
51. The ALJ’s failure to give adequate consideration, analysis, and/or weight to the compelling evidence of historical past practices that were almost identical to the Concepcion situation. (ALJD 38: n. 45). This failure is contrary to record evidence and controlling law.
52. The ALJ’s misplaced reliance upon *Super Shuttle of Orange County, Inc.*, 339 NLRB 1 (2003). (ALJD 36:1-37:4). This reliance is contrary to record evidence and controlling law.
53. The ALJ’s failure to properly consider APF’s affirmative defense under the *Wright Line* analysis that Concepcion was treated the same way if not better as other employees who were not Union supporters. (ALJD 38:1-9). This failure is contrary to record evidence and controlling law.

54. The ALJ's failure to give adequate consideration, analysis, and/or weight to the undisputed fact that the General Counsel offered no evidence of animus toward Concepcion of disparate treatment. (ALJD 32-38). This failure is contrary to record evidence and controlling law.
55. The ALJ's decision that APF's assessment of a single attendance point to Maldonado violated Section 8(a)(1) of the Act, in light of the fact that was around yes because there was no corroborated evidence that Maldonado informed APF that she was absent due to her participation in the strike. (ALJD 39-42). This decision is contrary to record evidence and controlling law.
56. The ALJ's decision to exclude the asterisks on the July 17 daily call-in sheet. (R. 36; ALJD 40:24-35). This decision is contrary to controlling law.
57. The ALJ's conclusion that the lack of an asterisk on the July 17 call-in sheet (R. 36) constituted hearsay. (ALJD 45-47). This failure is contrary to record evidence and controlling law.
58. The ALJ's decision to credit the testimony of Maldonado over that of Ramirez about Maldonado's calling in on July 17 and about an alleged subsequent meeting concerning her attendance points. (ALJD 41:5-11). This failure is contrary to record evidence.
59. The ALJ's failure to give adequate consideration, analysis, and/or weight to APF's treatment of the nine employees who did call off on July 17 using the union call off strike script. (ALJD 41:15-42:23). This failure is contrary to record evidence and controlling law.

60. The ALJ's failure to give adequate consideration, analysis, and/or weight to the undisputed fact that APF had decided to implement the CATS program before the Union drive began. (ALJD 53:34-55:29). This failure is contrary to record evidence and controlling law.
61. The ALJ misinterpreted the testimony of Ronnie Fox and Mandy Ramirez concerning the Company's reply to his CATS form on attendance policy changes. (ALJD 54:28-33). This is contrary to record evidence.
62. The ALJ's conclusion that APF impliedly promised to remedy grievances in connection with CATS. (ALJD 53:34-55:29). This conclusion is contrary to record evidence and controlling law.
63. The ALJ's proposed Remedies. (ALJD 57-60). The Remedies are contrary to record evidence and controlling law.
64. The ALJ's recommended Order. (ALJD 61-63). The Order is contrary to record evidence and controlling law.

Dated this 25th day of July, 2016.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 25, 2016, I electronically filed the foregoing through the National Labor Relations Board website ([www.nlr.gov](http://www.nlr.gov)).

I further certify that a copy of the foregoing was served via U.S. Mail on July 25, 2106 on the following:

Garey Lindsay  
Regional Director  
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I further certify that a copy of the foregoing was served upon the following via email on July 25, 2016:

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