

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

ADVANCEPIERRE FOODS, INC.

and

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

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09-CA-153973
09-CA-153986
09-CA-154624
09-CA-156715
09-CA-156746
09-CA-159692
09-CA-160773
09-CA-160779
09-CA-162392

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION AND ITS BRIEF FILED IN SUPPORT THEREOF**

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I. INTRODUCTION

This case is before the Board on Respondent's exceptions to the Administrative Law Judge's decision, which issued on June 27, 2016. In his decision, Administrative Law Judge David I. Goldman concluded that Respondent violated Section 8(a)(1) and (3) by various misconduct, including maintaining and enforcing an unlawful and overly-broad solicitation/distribution policy; unlawfully issuing a verbal disciplinary warning to employees Carmen Cotto, Sonja Guzman, and Ronnie Fox, in retaliation for their union activities; unlawfully interrogating an employee about the union activity of a coworker; unlawfully engaging in surveillance of employees' union activity by searching their clipboards for union authorization cards; unlawfully engaging in surveillance of employees' union activity by searching for evidence of their union activity online and searching suspected union sympathizers' Facebook pages; unlawfully demanding that employee Diana Concepcion document her identity, in retaliation for her union activity; unlawfully suspending Diana Concepcion indefinitely for her failure to comply with an unlawfully motivated demand that she document her identity; unlawfully assessing employee Jessenia Maldonado an attendance point for her participation in protected and concerted activity; unlawfully instructing employees that their pay is considered personal and confidential and is not to be shared with other employees; and, unlawfully soliciting grievances and impliedly promising employees increased benefits and improved terms and conditions of employment in order to discourage employees from supporting a union. (ALJD 56) ^{1/} For the reasons set forth

^{1/} References to the Administrative Law Judge's Decision will be designated as (ALJD __); references to Respondent's exceptions and brief in support thereof will be designated as (R. Except. __) and (R. Br. __) respectively; references to the trial transcript will be designated as (Tr. __); references to the General Counsel's exhibits will be

herein, Respondent's 64 exceptions are without merit and Judge Goldman's factual findings, analysis and legal conclusion are accurate.^{2/}

II. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND A VIOLATION OF SECTION 8(a)(1) BASED ON RESPONDENT'S UNLAWFUL SURVEILLANCE OF EMPLOYEE CARMEN COTTO AS SHE DISTRIBUTED UNION LITERATURE IN THE BREAKROOM

Respondent excepts to the Administrative Law Judge's determination that the videotaping of employees engaged in union activity in the cafeteria and Mandy Ramirez's subsequent review of the videotape was unlawful surveillance in violation of Section 8(a)(1) of the Act. Respondent argues that viewing the videotape was not unlawful because Ramirez was operating in a "customary manner." An employer's mere observation of open, public activity on or near its property does not constitute unlawful surveillance. *Roadway Package System*, 302 NLRB 961 (1991) However, "an employer may not do something 'out of the ordinary' to give employees the impression that it is engaging in surveillance of their protected activities." *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003). The Board has held that an increase in the number of security guards and time spent watching activities of union organizers went beyond "mere observation" and was deemed unlawful. *Villa Maria Nursing and Rehabilitation Center, Inc.*, 335 NLRB 1345, 1353 (2001). The Board also found videotaping and photographing of union organizers and employees who were handbilling at employer's premises unlawful. *Titan Wheel Corporation of Illinois*, 333

designated as (GC __); and, references to Respondent's exhibits and the Union's exhibits are designated as (R __) and (U __), respectively.

^{2/} With the Exception of certain conclusions covered by Counsel for the General Counsel's limited cross exceptions filed under separate cover.

NLRB 190 (2001); see also, *Dayton Hudson Corp.*, 316 NLRB 477, 488-489 (1995).

Respondent cites *Wackenhut Corp.*, 348 NLRB 1290, 1299 (2006) for the proposition that pulling videotape to investigate an incident raised by an employee is not surveillance. However, in *Wackenhut Corp.*, the employer made a statement that he would review camera footage to review whether employees were engaged in union activity in work areas and clarified that it was okay to talk about the union in non-work areas. Thus, the employer was stating it would review videotape in furtherance of the enforcement of a valid no solicitation policy. Moreover, it was uncontested that the employer's security business included surveillance of the property in question and the employer legitimately responded to security breaches and violations of its work rules and policies.

In the present case, the Administrative Law Judge correctly found that Ramirez's review of the videotape was unlawful surveillance in violation of Section 8(a)(1) of the Act because Ramirez was not watching the video in furtherance of any legitimate business activity such as enforcing a valid work rule or looking out for security breaches. After the inception of the Union campaign, Respondent increased its use of cameras, installing additional cameras in the freezer-warehouse and the grinding areas. (Tr. 562) Ramirez provided no testimony as to the regularity of when she examined videotape of the employee breakroom. Renee Chernock testified that Ramirez only reviews footage of the breakroom in response to complaints about violations of work rules or policies. (Tr. 506) Here, no work rule or policy violation was reported to Ramirez. Instead, Ramirez reviewed the June 8 video footage of Cotto passing out papers to employees in the cafeteria in response to a report of union activity – that an employee was handing out union literature in the breakroom. (Tr. 505, 506, 545) The video footage she reviewed was not live or observed accidentally. (Tr. 545) As a result of that unlawful viewing, Respondent confronted Cotto about the incident and issued her discipline for engaging in union activity. (Tr. 546) Thus,

the Administrative Law Judge correctly found that Ramirez's viewing was prompted by a report of union activity in the breakroom, a non-work area, and correctly found that the surveillance went beyond "mere observation." See *Frontier Hotel & Casino*, 323 NLRB 815 (1997) (holding that turning parking-lot videos to watch handbilling, without justification, constituting unlawful surveillance). Based on the foregoing, the Administrative Law Judge also correctly included in his Order language reflecting the found violation, and traditional remedies in support thereof.

III. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND A VIOLATION OF SECTION 8(a)(1) BASED ON RESPONDENT'S UNLAWFUL INTERROGATION OF EMPLOYEE CARMEN COTTO ABOUT THE UNION ACTIVITY OF A COWORKER

Respondent excepts to the Administrative Law Judge's alleged failure to apply the *Bourne* factors, per *Westwood Health Care Center*, 330 NLRB 935, 939 (2000), to resolve whether the question of Cotto was coercive and therefore violative of the Act, to the Administrative Law Judge's determination that questioning of Cotto by Ramirez and Chernock was illegal interrogation in violation of Section 8(a)(1) of the Act, and to the Administrative Law Judge's recommended remedies and Order resulting from that alleged failure. To the contrary, the Judge correctly described the standard to be used in determining whether an interrogation is unlawful on page 18 of the ALJD and specifically cited the *Bourne* factors in footnote 20 of the ALDJ. The Judge considered the background and history of hostility to union organizing at, among other places, page 16, lines 13-1, and page 23, line 35 (discussing Respondent's hostility and animus toward union organizing). The Judge considered the background of the specific instance on page 18, lines 14-15 ("In the midst of unlawfully disciplining her for union activity, they ask about whether another employee was also engaged in the same activity...") (ALJD 18:14-15). The Judge also considered the nature of the information sought, i.e., whether the supervisor sought

information on which to base adverse action against individual employees, when he noted that Respondent asked about whether another employee was also engaged in the same activity. (ALJD 18:14-15) With respect to factor three, Respondent implicitly agrees that the Judge considered this factor by identifying Chernock and Ramirez as two top officials. Although Respondent maintains that they were not because Ramirez had only recently been promoted, the timing of her promotion to one of the top HR official positions is irrelevant. Respondent does not explain why it does not deem Renee Chernock a top HR official. With respect to the place and method of interrogation, the Administrative Law Judge considered such factor when he indicated that Cotto was “called off the shop floor into the HR office.” (ALJD 18:14)

Moreover, the *Bourne* factors support the conclusion of unlawful interrogation. Chernock asked Cotto whether Guzman had given out union papers. (Tr. 226) At the time of the questioning, Respondent had a demonstrated hostility towards union activity, given, among many other acts, the anti-union meetings and literature. (Tr. 128, 129, 266, 318, 579) Chernock was overtly seeking information about Guzman so as to discipline her. Plus, not only was the Director of HR, Chernock, conducting the questioning of Cotto, but another manager well up Respondent's hierarchy, Ramirez, was present as well. (Tr. 320, 342) As noted above, the questioning took place in the HR Office, where Cotto had been called, and it was Cotto's first time being called to HR in her 27 years of employment. (Tr. 223) While Cotto provided a truthful response to the question, at that time she was an open and ardent support of the Union. Thus, she was a leader of the organizing campaign and this was apparent in many ways, including that she was pictured in the widely disseminated union flyers. (Tr. 49-52, 93, 316, 365, 1069) Taken as a whole, these circumstances establish that this questioning constituted an unlawful interrogation.

Finally, as the Judge correctly noted, the *Bourne* factors are not to be mechanically applied

in each case. Thus, even if the judge had not considered the factors individually, the circumstances of Cotto's interrogation, taken as a whole, indicate that it was unlawful. Given the above, the Administrative Law Judge also correctly included in his Order language reflecting the unlawful interrogation, and traditional remedies in support thereof.

IV. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND VIOLATIONS OF SECTIONS 8(a)(1) AND (3) BASED ON RESPONDENT'S MAINTAINING AN UNLAWFUL AND OVERLY BROAD SOLICITATION/DISTRIBUTION POLICY AND ENFORCING THE POLICY BY UNLAWFULLY ISSUING A VERBAL DISCIPLINARY WARNING TO EMPLOYEES CARMEN COTTO AND SONJA GUZMAN, IN RETALIATION FOR THEIR UNION ACTIVITIES

Respondent excepts to the Administrative Law Judge's conclusion that the 2001 solicitation policy under which Carmen Cotto was disciplined was not mistakenly maintained and enforced; to the Administrative Law Judge's failure to accept as the true motive for disciplining Cotto and Guzman Respondent's reliance on the 2001 policy; to the Administrative Law Judge's conclusion that the enforcement of the 2001 policy against Cotto and Guzman was a pretext designed to cover a direct effort to punish union activity; to the Administrative Law Judge's alleged failure to address, analyze or weigh the lack of animus under the *Wright Line* test; to the conclusion under *Wright Line* that union animus was present in the discipline of Cotto; to the Administrative Law Judge's conclusion that disciplining Cotto violated Section 8(a)(1) and (3) of the Act; to the Administrative Law Judge's determination that Respondent issued discipline to Sonia Guzman; to the Administrative Law Judge's decision not to credit the testimony of Ramirez and Chernock concerning whether Guzman was verbally disciplined; to the Administrative Law Judge's decision to credit Guzman's testimony concerning the events of June 9, 2015; to the Administrative Law Judge's alleged failure to consider spoliation by Guzman of the written notice of rescission in assessing her credibility, the Administrative Law Judge's determination that

discipline was not effectively repudiated, and the Administrative Law Judge's recommended remedies and order.

Many of Respondent's exceptions above are based on what Respondent perceives to be the Administrative Law Judge's erroneous determinations of credibility and disregard of certain evidence and testimony. Respondent argues that the Judge's credibility determinations are not based on witness demeanor and are therefore flawed. Respondent further argues that they are inconsistent with the Administrative Law Judge's findings about each witness's testimony. Contrary to Respondent's claims, the Administrative Law Judge's findings that Respondent violated the Act as set forth in his Conclusions of Law are overwhelmingly supported by both the record evidence and Board law. It is beyond question that the credibility resolutions of administrative law judges should be given a great deal of weight and should be overturned only "where the clear preponderance of all the relevant evidence convinces the Board that they are incorrect." *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). Here, the Judge correctly credited the testimony of the General Counsel's witnesses over those of Respondent and found that Respondent violated the Act based on his determination of credibility and a preponderance of all relevant evidence. With respect to Guzman, for example, the Administrative Law Judge found that she was "a credible and strong witness." (ALJD 13:44)

Moreover, it is well settled that where demeanor is not determinative, an administrative law judge may properly base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, "and reasonable inferences which may be drawn from the record as a whole." *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996). Here, the Administrative Law Judge's credibility findings crediting Guzman and Cotto over Ramirez and Chernock are bolstered by the preponderance of all relevant evidence, which

establishes that Respondent maintained an unlawful and overly broad solicitation/distribution policy, and enforced such policy by unlawfully issuing a disciplinary warning to employees Carmen Cotto and Sonja Guzman in retaliation for their union activities.

The Administrative Law Judge correctly found that Respondent maintained and enforced an unlawful solicitation/policy. On May 13, Ramirez posted on Respondent's bulletin board a policy stating that: "no employee is permitted to distribute literature for any such purpose at any time in employee work areas or work corridors." (Tr. 514, 534, GC 25) That policy, which prohibited distribution of literature at any time not only in work areas but in work corridors as well, is overbroad. The term "any time" clearly includes non-working time, and the policy-bifurcating its geographical coverage to both "work areas" and anything other than work areas clearly includes non-working areas. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962). Respondent doubled down after the inception of the Union campaign, posting a new sign on one of the facility's entrances reading: "AdvancePierre Foods has a non-solicitation and non-distribution policy." (Tr. 136, 284, 647, GC 13) At no time did Respondent even attempt to convey an intent to clearly permit solicitation during break times or other non-work periods *Ichikoh Mfg.*, 312 NLRB 1022 (1993).

With respect to Respondent's exceptions concerning its maintenance and enforcement of the unlawful 2011 solicitation/distribution policy and the solicitation/distribution policy posted on the facility's door, the Administrative Law Judge correctly noted that Respondent's assertions that it was "mistakenly" maintained or enforced is not accurate or relevant, and does not change the fact that the policy was maintained and enforced for nearly a month. (ALJD 14 fn. 18) The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *American Freightway Co.*, 124 NLRB 146,

147 (1959); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339, fn. 3 (2000) (employer's misunderstanding of the law not relevant to assessing unlawful interference under 8(a)(1)).

The Administrative Law Judge also correctly found that Respondent unlawfully disciplined Cotto and Guzman based on this unlawful policy, which it used as a pretext for its efforts to squelch, punish, and discriminate against union activity in violation of Section 8(a)(1) and (3) of the Act under a *Wright Line* analysis. (Tr. 143-145, 223-225, 232, 320, 342, 506-507, 546, 577, 762, JX 1, ALJD 15-16). Strangely, Respondent excepts to both the Administrative Law Judge's alleged failure to address or give weight to the lack of animus in disciplining Cotto, and also the conclusion under *Wright Line* that union animus was present in Cotto's discipline. (R. Except. 8 and 16) The Administrative Law Judge correctly found that there was Union animus under *Wright Line* in targeting Guzman and Cotto for distributing union literature in a non-work area during non-work time because they were targeted because of complaints that the two were engaging in union activity, and it occurred during the same time frame that Respondent was cracking down on union activity in the facility. (ALJD 16: 41-51). Moreover, Respondent made its hostility toward unionization clear with anti-union meetings, literature, language in its handbook, and other unfair labor practices in support of its efforts to squelch the union organizing drive. (Tr. 128, 129, 266, 318, 579, GC 35, ALJD 56).

Finally, Respondent excepts to the Administrative Law Judge's findings that it did not sufficiently repudiate its unlawful actions. The Administrative Law Judge's findings are correct. While Respondent did rescind *some* discipline it had issued, it was not before news of the discipline of those employees had already spread through the facility (Tr. 145, 322). Plus, during the meetings wherein Respondent revoked the discipline issued to Cotto and Guzman it did not

provide employees with the new policy and, therefore, failed to unambiguously repudiate the old policy applied to Cotto and Guzman. (Tr. 248, 323, 556, GC 48) Moreover, no effort was made to communicate with employees generally about the previously posted incorrect policy or even about the change in the policy whether through employee meetings; or issuance of an updated handbook. Respondent never informed the workforce in any regard that it had handed out incorrect distribution policies to several employees. (Tr. 193, 251, 323, 475, 638, 645, 883-884) Moreover, the Administrative Law Judge correctly noted that there was no repudiation of Ronnie Fox's disciplinary warning, or any assurances to Guzman or Cotto that it would not interfere with their Section 7 rights in the future. Finally, there was no admission or even implicit acknowledgement of unlawful conduct by Respondent which necessary for a proper repudiation under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) (ALJD 17). Thus, Respondent's purported repudiation was not timely, unambiguous, specific in nature to the coercive conduct, or free from other proscribed illegal conduct in accordance with *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978); and the Administrative Law Judge correctly found that Respondent did not sufficiently repudiate its unlawful conduct. Based on the foregoing, the Administrative Law Judge correctly included in his Order language reflecting the unlawful conduct described *supra*, and included traditional remedies in support thereof.

V. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND VIOLATIONS OF SECTION 8(a)(1) BASED ON RESPONDENT'S UNLAWFULL SURVEILLANCE OF EMPLOYEES' UNION ACTIVITY BY SEARCHING THEIR CLIPBOARDS FOR UNION AUTHORIZATION CARDS

Respondent excepts to the Administrative Law Judge's alleged failure to give adequate consideration to the fact that Respondent is a food manufacturer that operates under strict government regulation and inspection requirements in considering the lawfulness of its clipboard

audit, the Administrative Law Judge's refusal to accept Respondent's defense that its June 8 audit was pursuant to a neutral GMP production rule, the Administrative Law Judge's decision that the GMP's were presumptively invalid due to the policies being a "content neutral ban" on personal items in the workplace; the Administrative Law Judge's conclusion that the clipboard search and confiscation of union cards constituted unlawful surveillance in violation of Section 8(a)(1) of the Act; the Administrative Law Judge's alleged failure to give adequate consideration and weight to Respondent's defense that it would have conducted a GMP audit regardless of the content of the materials reported in employee clipboards; the Administrative Law Judge's alleged 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; and the Administrative Law Judge's recommended remedies and order.

The Administrative Law Judge correctly found that Respondent's clipboard audit constituted unlawful surveillance. To establish a claim of unlawful surveillance, it must be shown that an employer observed employees in some way that was "out of the ordinary," and thereby coercive. *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Id.* The Board has held that searches of employees' effects amount to surveillance when they are motivated by the desire to find union-related documents. See *Rich's Precision Foundry, Inc.*, 250 NLRB 1317 (1980) (finding a search of an employee's locker violated Section 8(a)(1) of the Act where the object of the search was a union-related document); *Hospital of the Good Samaritan*, 315 NLRB 794 (1994) (finding that searches of employees' bags as they entered work had an inhibiting effect

on lawful union activity and violated Section 8(a)(1) of the Act). The Board has also found that confiscating employees' union literature violates Section 8(a)(1) of the Act because it interferes with employees' protected right to receive union literature. *Alle-Kiski Medical Center*, 339 NLRB 361 (2003); *Romar Refuse Removal*, 314 NLRB 658 (1994). Further, confiscation is unlawful even where the union literature was unlawfully distributed. *Id.*, *NCR Corp.*, 313 NLRB 574 (1993).

Although Respondent, in its brief in support of its exceptions, maintains that the search of employee clipboards was motivated by a content neutral concern about food safety, the record evidence shows, and the Administrative Law Judge correctly found, that it was motivated by anti-union animus. The clipboard searches were first discussed in a meeting between Respondent's supervisors regarding authorization cards. (Tr. 519-20) Respondent decided to conduct a GMP audit as a result of that meeting. (Tr. 520, 573) Respondent began conducting clipboard audits only after the Union campaign began. (Tr. 124, 140, 281-282, 297, 373, 465, 479) As a result of the meeting Respondent, for the first time, searched through employees' papers in their clipboards as part of its GMP audit. (Tr. 194) This was also the first time Respondent conducted such searches outside of the presence of the employee to whom the clipboard belonged. (Tr. 195) While Respondent found several violations of GMPs during its audit (lotion for example), it did not confiscate these items. (Tr. 372, 467) Neither did it confiscate other papers unrelated to immediate work, such as employee check stubs. (Tr. 372) Other than discipline issued to Fox for violating Respondent's distribution policy, Respondent did not issue any employees discipline as a result of this audit. (Tr. 556-57) Prior to the search, Respondent never informed employees it was a violation of GMPs to possess union authorization cards. (Tr. 169, 301)

Moreover, at least one employee, an open union supporter, had his clipboard checked twice. (Tr. 140-43, 149) Upon finding union authorization cards in Fox's clipboard, Bishop

confiscated those cards. (Tr. 143) Cox and Bishop told Ramirez that they had found union cards in Fox's clipboard and gave the cards to Ramirez. (Tr. 547, 678) Bishop does not typically bring confiscated items to Ramirez. (Tr. 683) Ramirez is not typically made aware of clipboard audits. (Tr. 547) As a result of that search and confiscation, Fox was sent to HR and issued discipline for violating Respondent's distribution policy, not for violating any GMPs. (143, 196)

In its brief in support of its exceptions, Respondent complains that the Administrative Law Judge's decision would prevent food manufacturers from maintaining strict quality food manufacturing standards. However, the evidence established that employees regularly keep other papers such as check stubs in their clipboards, and Respondent's witnesses were unable to sufficiently explain how a Union authorization card is more dangerous to food safety than other papers which are allowed on the floor. Moreover, the Administrative Law Judge correctly made clear that even absent a finding that a rule prohibiting personal items on the floor was invalid, or that GMP audits indeed occurred in the past, the unlawfully motivated search still interfered with employees' union activities, and in conducting the searches and confiscating the Union materials, Respondent violated Section 8(a)(1) of the Act. (ALJD 22: 19-22, fn. 30, 31; 23:1-17) Based on the foregoing, the Administrative Law Judge correctly included in his Order language reflecting the unlawful conduct described *supra*, and included traditional remedies in support thereof.

VI. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND A VIOLATION OF SECTION 8(a)(1) AND (3) BASED ON RESPONDENT UNLAWFULLY ISSUING A VERBAL DISCIPLINARY WARNING TO EMPLOYEE RONNIE FOX, IN RETALIATION FOR HIS UNION ACTIVITY

In addition to its exceptions listed in Section V, *supra*, Respondent also excepts to the Administrative Law Judge's decision that Ronnie Fox received a verbal warning for violating the Employer's unlawful policy, the Administrative Law Judge's determination that Respondent's

discipline of Fox violated Section 8(a)(1) and (3) of the Act; and the Administrative Law Judge's recommended remedies and order based on these decisions and determinations.

The Administrative Law Judge correctly found that Fox was unlawfully issued a verbal disciplinary warning in retaliation for his union activity and not because he violated any GMPs. First, Ramirez gave sworn testimony that Fox's discipline was an enforcement of the distribution policy. (Tr. 548-549) Fox also testified that Respondent informed himself that he was disciplined for a violation of the distribution policy. (Tr. 143-145) Second, Respondent's progressive discipline policy, which it took pains to present at length during the hearing, calls for a verbal reprimand at a minimum in the case of a first time unauthorized solicitation or distribution of materials. (Tr. 550-551, GC 17) That is exactly what Fox received. (JX 1) Whereas, in the event of a violation of a GMP, the progressive discipline policy calls for a written reprimand to termination; Fox received no such thing. (Tr. 143-145, 550-551, GC 17, JX 1) Third, neither Ramirez nor Chernock mentioned the red pen that had been confiscated from Fox's clipboard, further confirming that the meeting was about distribution rather than GMPs. (Tr. 145) Lastly, during the meeting neither Ramirez nor Chernock mentioned GMPs or a prohibition of personal property on the production floor. (Tr. 180) Given the above evidence, the Administrative Law Judge correctly determined that, following unlawful surveillance in the form of clipboard audits designed to find and discipline union supporters, Fox was unlawfully disciplined for being in possession of union authorization cards, and his discipline was never repudiated. To reach this conclusion, the Administrative Law Judge correctly analyzed the Employer's rules, lack of enforcement of such rules, what Fox was told about why he was being disciplined, and analyzed Fox's discipline under *Wright Line*, to find a violation of Section 8(a)(1) and (3) of the Act. The

Administrative Law Judge then correctly included in his Order language reflecting the unlawful conduct described *supra*, and included traditional remedies in support thereof.

VII. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND A VIOLATION OF SECTION 8(a)(1) BASED ON RESPONDENT'S UNLAWFUL SURVEILLANCE OF EMPLOYEES' UNION ACTIVITY BY SEARCHING FOR EVIDENCE OF THEIR UNION ACTIVITY ONLINE AND SEARCHING SUSPECTED UNION SYMPATHIZERS' FACEBOOK PAGES

Respondent excepts to a panoply of the Administrative Law Judge's findings, conclusions, credibility findings, and determinations regarding its surveillance of Facebook activity.

Respondent excepts to the Administrative Law Judge's determination that Ramirez's attempt to locate a publically broadcasted radio program constitutes unlawful surveillance in violation of Section 8(a)(1) of the Act; his determination that Ramirez's search of Yazzmin Trujillo's Facebook page constitutes unlawful surveillance in violation of Section 8(a)(1) of the Act; his decision to apply a "curious" line of cases in analyzing Ramirez clicking on Trujillo's Facebook page; his decision to find coerciveness in Ramirez's clicking on Trujillo's Facebook page, his conclusion that Ramirez engaged in surveillance in violation of Section 8(a)(3) of the Act; his alleged refusal to consider that the two individuals who participated in the LaMega broadcast wanted to disseminate their message to the general public; his alleged failure to give adequate consideration, analysis, and weight to the fact that when Ramirez clicked on Trujillo's Facebook page, she allegedly could not have been surveilling employee union activity because she did not recognize Trujillo as an employee; his alleged failure to give adequate consideration, analysis, and weight to Ramirez's testimony as to her motivations for clicking the Trujillo icon; his conclusion that because Ramirez was advised that a lady named Diana participated in the radio broadcast, Ramirez knew or should have known that the participant was Diana Concepcion before she investigated Trujillo; his conclusion that Ramirez knew Trujillo supported the Union; his

conclusion that Concepcion was told by Respondent that it was the surveillance of the radio show and the person who liked the radio show that resulted in further adverse action against her; his failure to conclude that Ramirez's subsequent suspicion that Concepcion was likely the same person as Trujillo did not taint her initial click on the Trujillo Facebook icon; his distinguishing of the *Chemtronics, Inc.*, 236 NLRB 178 (1978) line of cases; the Administrative Law Judge's recommended remedies and order based on these decisions and determinations, and other findings and conclusions.

To the extent that the above exceptions are based on the Administrative Law Judge's credibility findings, or his conclusions reached as a result of those credibility findings, it is well settled that credibility resolutions of administrative law judges should be given a great deal of weight and should be overturned only "where the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). It is also well settled that where demeanor is not determinative, an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, "and reasonable inferences which may be drawn from the record as a whole." *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996). Here, the Judge correctly credited the testimony of Concepcion over that of Ramirez.

The Administrative Law Judge correctly found that Respondent unlawfully engaged in surveillance of employees' union activity by searching for evidence of their union activity online and searching suspected union sympathizers' Facebook pages. In its brief in support of its exceptions, Respondent maintains that the Administrative Law Judge erroneously concluded that attempting to review publically broadcasted union propaganda constitutes surveillance. This is not

what Respondent did. Ramirez admittedly clicked on Yazzmin Trujillo's Facebook page not to try to find the broadcast of the Union's radio show, but to find out the identity of the person that "liked" the post about the Union's broadcast. (Tr. 793) The "like" of the Facebook post, like employees' participation in the radio broadcast, was concerted activity, and Ramirez believed that that concerted activity was done by an employee. Ramirez did not simply happen upon a broadcast of publically available information. She intentionally sought it out. By clicking on the "like," she was not seeking to find the broadcast, but surveilling union activity and supporters. In doing so, Ramirez not only violated Respondent's social media policy, which disavows any involvement in employees' usage of social media when that usage is purely personal in nature, but also engaged in unlawful surveillance. (Tr. 904) The Administrative Law Judge correctly found that Ramirez's surveillance began on June 16, when Supervisor Lewis alerted Ramirez about the Union's radio program on *La Mega*, including that Guzman and an employee named Diana participated. (Tr. 538, 785, GC 37) The Administrative Law Judge correctly concluded that Ramirez knew or should have known at this time that Diana referred to Diana Concepcion, given that Respondent employed only two Spanish-speaking employees named Diana out of nearly 600. (Tr. 536, ALJD 34: 29-35) Moreover, later that day Ramirez sent an email to Aardema stating that Concepcion is a union supporter. (Tr. 889-890) Nothing else, aside from the concerted activity of speaking about the organizing campaign on the radio program, served to prompt Ramirez's investigation into Concepcion.

In its exceptions, Respondent tries to paint Ramirez's search as one for publically available information – a radio broadcast. Again, this is not what Ramirez did. Within 16 minutes of her workday's start, Ramirez had already searched *La Mega*'s website and Facebook page and failed to find the recording of the radio program. (Tr. 785, 886, R 5) However, Ramirez by no means

terminated her investigation at that point. In fact, the length and effort behind Ramirez's continued investigation appears akin to the increased time spent watching activities of union supporters, well beyond mere observation. *Villa Maria Nursing and Rehabilitation Center, Inc.*, 385 NLRB 1345 (2001). Having failed to discover the recording of the radio program, Ramirez could not help but to stray even further afield from her initial investigation because she "remained curious to see who Trujillo was." (Tr. 793) Respondent suggests that Ramirez's search was passive. (R. Br. 28) Nothing could be further from the truth. Ramirez engaged in surveillance by searching to see who "liked" the radio program on Facebook. Finding that Trujillo had "liked" the program, Ramirez searched the Facebook account of Trujillo to investigate. (Tr. 789-793, 886) Although Respondent takes exception to the Administrative Law Judge's statement that Ramirez knew that Trujillo supported the Union, Trujillo's support of the Union's radio broadcast – i.e., her "like," could not be interpreted as anything but support for the Union. Upon learning of that support by way of the "like," Ramirez dug deeper, looking through the photographs, friends, and comments of Trujillo. (Tr. 789-793, 886, R 5) Ramirez's investigation on Facebook stretched from 8:00 a.m. on through 3:10 p.m., and then into the next day. (Tr. 800, 890-891) By the time her chase for information was complete, Ramirez had exhaustively looked through not only Trujillo's Facebook page, but even the Facebook pages of Trujillo's friends. (Tr. 803) Thus, Respondent's contention that Ramirez's search could not have been surveillance because she was not investigating an employee is meritless. Respondent was not only investigating Trujillo, but also her family, friends, and acquaintances, who Ramirez would have assumed had a connection to Respondent, and possibly the Union due to her "like" of the Union's radio broadcast. The Administrative Law Judge correctly found that this action by Ramirez was an intentional action to observe and learn of employee union activity under *Astro Shapes, Inc.*, 317 NLRB 1132, 1133 (1995). Since searching

through Facebook activity is not something Ramirez did in the course of her normal routine, it is unlawful. She intentionally sought out information about union and protected concerted activity, including looking through Trujillo's "friends." The Administrative Law Judge correctly found that her conduct violated the Act. See, e.g., *Dadco Fashions*, 243 NLRB 1193, 1198-1199 (1979).

With respect to Respondent's exception concerning the Administrative Law Judge's refusal to rely on the *Chemtronics, Inc.*, *supra*, line of cases, the Administrative Law Judge correctly distinguished those cases on the grounds that they involved alleged surveillance on the employers' properties. As the Administrative Law Judge noted, the Facebook search was not conducted incidental to Respondent's normal operations. In fact, it was done in violation of Respondent's own work rules – its social media policy. Based on the above, the Administrative Law Judge's Order and traditional remedies based on his findings of surveillance are proper based on those correct findings.

VIII. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND A VIOLATION OF SECTION 8(a)(1) AND (3) BASED ON RESPONDENT'S UNLAWFUL TREATMENT OF EMPLOYEE DIANA CONCEPCION IN RETALIATION FOR HER UNION ACTIVITY

Respondent excepts to the Administrative Law Judge's alleged failure to recognize that the information that came to Ramirez's attention concerning Concepcion raised a credible concern about Concepcion's identity; his alleged 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 U.S.; his conclusion that Ramirez's actions in investigating Concepcion's work status were wholly discretionary; his alleged misconstrual of an email sent by Ramirez to Aardema and the context in which it was sent; his conclusion that Respondent's suspicion that Concepcion liked the *La Mega* Facebook posting

about the Union radio broadcast should be concluded in applying the *Wright Line* analysis, his alleged misplaced reliance on *Super Shuttle of Orange County, Inc.*, 339 NLRB 1 (2003); his alleged failure to properly consider Respondent's affirmative defense that Concepcion was treated the same way as other employees who were not union supporters; his alleged failure to give adequate consideration, analysis, and weight to the alleged lack of evidence of animus toward Concepcion; his alleged failure to give adequate consideration, analysis, and weight to the fact that Respondent was the subject of several ICE audits; his conclusion that Respondent's request for documentation from Concepcion was motivated by union animus; his alleged failure to consider that Respondent treated Concepcion better than two non-union supports; his alleged failure to correctly apply the *Wright Line* analysis to Respondent's request for documentation from Concepcion and her subsequent suspension; his conclusion that the General Counsel made a *prima facie* showing under the *Wright Line* that Respondent's request for documentation and subsequent suspension of Concepcion were unlawful, his alleged failure to give adequate consideration, analysis, and weight to the fact that Respondent's VP of HR instructed Ramirez to follow past practice; the conclusion that Respondent cannot prove that it would have requested documentation from Concepcion in the absence of her protected activity; his alleged failure to give adequate consideration, analysis, and weight to the evidence of historical past practices; and the recommended remedies and order based on these decisions and determinations. The Administrative Law Judge correctly found that Respondent's unlawful treatment of employee Diana Concepcion in retaliation for her union activity violated Section 8(a)(1) and (3) of the Act.

A. Respondent was not under any legal obligation to re-confirm Concepcion's identity

Respondent argues that it had a legal obligation to re-confirm Concepcion's identity because it had constructive knowledge that she was not who she claimed to be. The

Administrative Law Judge correctly found that Respondent's assertion is incorrect. The Immigration Reform and Control Act of 1986 ("IRCA") provides that it is unlawful to continue to employ an alien "knowing the alien is (or has become) an unauthorized alien with respect to such employment. 8 U.S.C. § 1324a(a)(1). As Respondent noted in its brief to the judge, and as the Administrative Law Judge found, Respondent was aware of the following: (1) there was one picture of (someone assumed to be) Concepcion on Trujillo's Facebook page, (such picture was not Trujillo's Facebook profile picture, and was included among a plethora of other photos on the photos page (GC 62)). (2) Trujillo referred to others on her Facebook page having the name Trujillo as relatives, and (3) Concepcion's AP benefits file lists a Trujillo as her beneficiary and sharing her address. Yazzmin Trujillo was not "friends" with Adriana Trujillo, Concepcion's beneficiary (Tr. 896-897).

The standard of "knowing" under IRCA is as follows: "The term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:

- (i) Fails to complete or improperly completes the Employment Verification Form, I-9;
- (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
- (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf."

See 8 CFR § 274a.1.

8 CFR § 274a.1 further notes that “knowledge that an employee is unauthorized may not be inferred from an employee’s foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under 274(b) of the Act or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual.”

In a December 1, 2011 technical assistance letter to the National Labor Relations Board, the U.S. Department of Justice Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), (the Agency entrusted with enforcing the anti-discrimination provision of the Immigration and Nationality Act (INA)), noted that U.S. citizens should never be re-verified. *See* Letter from Seema Nanda, Acting Deputy Special Counsel, Office of Special Counsel for Immigration-Related Unfair Employment Practices – NYA, to William B. Cowen, Esq., Solicitor, National Labor Relations Board, (Dec. 1, 2011) (available at <https://www.justice.gov/crt/osc-technical-assistance-letters>). Only if an employer receives notice from Immigration and Customs Enforcement (ICE) that certain documents utilized by employees during the I-9 process are suspect may an employer request additional documentation from employees. *See Id.*

In another technical assistance letter, OCS noted that mere suspicion or conjecture that an employee is not authorized to work is not constructive knowledge. *See*, Letter from Seema Nanda, Acting Deputy Special Counsel for Immigration-Related Unfair Employment Practices – NYA, to Kimberly Best Robidoux, Larrabee Mehlman Albi Coker LLP, (Oct. 26, 2011) (available at <https://www.justice.gov/crt/osc-technical-assistance-letters>). *See also*, *Collins Food Intl. Inc. v. INS*, 948 F.2d 549 (9th Cir. 1991)(constructive knowledge requires “positive information” and is “sparingly applied”); *Aramark Facility Svcs. v. SEIU, Local 1877*, 530 F.3d

817 (9th Cir. 2008) (neither receipt of social security no-match, nor failure to have workers correct the no-match within 2 days, constitutes constructive knowledge).

The cases cited by Respondent in support of its conclusion that it had a legal obligation to re-verify Concepcion's identity are inapplicable to the current situation. In both *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989) and *New El Ray Sausage v. INS*, 925 F.2d 1153 (9th Cir. 1991), the constructive knowledge was based on specific information from INS – a predecessor agency to ICE that was entrusted with administering and enforcing immigration law matters – that certain employees may have committed document fraud. Indeed, OSC's October 26, 2011 technical assistance letter specifically describes constructive knowledge when employers "ignored notices about employees' authorization status *from government authorities*" (emphasis added). Here, there was no such communication from an official government source. (Tr. 909) Respondent had no specific and detailed information that would rise to the level of constructive knowledge. In its own brief in support of its exceptions, Respondent discusses its "reasonable doubts," rather than any "constructive knowledge." (R. Br. 44) Respondent was not under any legal obligation to request additional documentation from Concepcion, a presumptive U.S. citizen, based on one photo of her on someone else's Facebook account. Notably, the photograph was *not* Trujillo's profile picture or cover photo. (Tr. 791, R 5A) Neither was Concepcion's beneficiary listed among Trujillo's Facebook "friends." (Tr. 896-897) Moreover, Respondent had properly completed an I-9 Form at the time of Concepcion's hire and ran her through the E-Verify system. (Tr. 909) Respondent did not have constructive knowledge that Concepcion was not authorized to work, and the Judge correctly ruled that Ramirez's actions were wholly discretionary.

- B. Respondent unlawfully demanded that employee Diana Concepcion document her identity and Respondent unlawfully suspended employee Diana Concepcion indefinitely for her failure to comply with the unlawfully motivated demand that she document her identity

Respondent maintains that its request for additional documentation and subsequent suspension was not motivated by Concepcion's union sympathies, and argues that it would have made the same request of Concepcion absent any union organizing campaign. The Administrative Law Judge correctly concluded that Respondent's demand for additional documentation of Concepcion's identity and subsequent suspension was motivated by her protected activity.

Respondent maintains that the General Counsel did not meet its *prima facie* burden of showing that Respondent's actions were motivated by union activity. The Administrative Law Judge correctly found that the record established that (1) Concepcion engaged in union activity; (2) Respondent knew of such activities; and (3) Respondent harbored animosity towards the Union and union activity. Concepcion was a known union supporter. Her photographs were featured in union literature that was distributed at Respondent's facility. (Tr. 49-52, 364, GC 3) She also participated in a radio program regarding the Union's organizing efforts, among other activities in support of the Union. (Tr. 364-368) Respondent questioned Concepcion about attending the radio show and was aware of her union activities. (Tr. 376, 538, 785, GC 37) Ramirez was personally aware of Concepcion's union activity, as evidenced by her email to Chuck Aardema stating that Concepcion is a union supporter. (Tr. 889-890) Thus, the Administrative Law Judge correctly found that Concepcion engaged in Union activity, and that Respondent was aware of that activity. Moreover, the Administrative Law Judge also correctly included in his *Wright Line* analysis that Respondent suspected that Concepcion was Trujillo, and that adverse action motivated by a mistaken belief that an employee engaged in union and/or protected concerted activity is also

violative of the Act. See, e.g., *Salisbury Hotel*, 283 NLRB 685, 686 (1987).

Respondent made its anti-union stance known in its employee handbook, its anti-union meetings and literature, its numerous unlawful acts in support of its efforts to squelch the Union organizing drive including unlawful surveillance and unlawful discipline, among many other means. (Tr. 128, 129, 266, 318, 579, GC 35, GC 37) Concepcion then suffered adverse employment action when, on June 17, Ramirez requested that she provide documentation to prove her identity and authorization to work for Respondent, on June 29 when Respondent suspended her, and on July 17 when it indefinitely suspended her, despite Concepcion submitting to Respondent a copy of her birth certificate and offering to provide other forms of identification, such as her electric bill, to satisfy Respondent inquiries into her identity. (Tr. 380) Respondent refused to accept Concepcion's documents and insisted that Concepcion provide one of the documents required for E-verify purposes instead. (Tr. 822, 913) Respondent insisted on this despite being aware that employers are not to re-verify employment eligibility of current employees. (Tr. 911) The Administrative Law Judge correctly found that Respondent took these actions against Concepcion because of her union activity.

Respondent argues that it could not have taken action against Concepcion because of her Union activity because of record evidence that it did not ask other union supporters to confirm their identities. However, as the Administrative Law Judge correctly found, Respondent chose to retaliate against those supporters in other ways – for example disciplining Guzman, and searching through and confiscating Fox's union authorization cards.

Respondent further argues that the amount of time it gave Concepcion to produce the unlawfully requested documents shows that it was not unlawfully motivated. That Respondent gave Concepcion time to comply with its unlawful request is irrelevant to whether Respondent

violated the Act, as the simple act of requiring the additional documentation is unlawful regardless of the timeframe given to produce the documents. What is relevant is that Respondent asked Concepcion to re-verify her identity for work authorization purposes one day after learning of her participation in the Union's radio broadcast, and subsequently suspended her when Respondent was unsatisfied with the documentation she provided. Respondent later indefinitely suspended Concepcion on July 17, the same day she called in on strike. (Tr. 862-863)

Respondent argues that even if the General Counsel met its initial burden under *Wright Line*, Respondent demonstrated that it would have requested documentation from Concepcion to confirm her identity in the absence of her protected conduct. The Administrative Law Judge correctly found that Respondent engaged in unlawful surveillance, and only learned of the existence of the Trujillo Facebook account (the basis of Respondent's affirmative defense) because of its unlawful surveillance. Respondent cannot rely on the poisonous fruits of its unlawful search to discipline Concepcion. See, e.g. *Hanson Aggregates BMC, Inc.*, 353 NLRB 287 (2008) (ordering that, as a make-whole remedy for the employer's unlawful unilateral changes, the employer rescind all discipline issued to employees as a result of the unilateral change).

The Administrative Law Judge properly applied *Wright Line* to find that Respondent cannot show that it took its actions for any lawful reason. Instead, Concepcion was suspended for not complying with an unlawfully motivated directive to produce documentation. The Administrative Law Judge correctly found that the suspension "did not exist independently of the unlawfully motivated investigation." Thus, the Administrative Law Judge correctly found that Respondent cannot prove that it would have taken the same actions even in the absence of Concepcion's protected activity. Moreover, in two out of three cases where Respondent has encountered a situation where it believed an employee went by a different name on Facebook, the

employee in question was authorized to work. (Tr. 907) Thus, based on Respondent's own history, Facebook pages have not been credible predictors of an employee's identity or work authorization status, and are not sufficient to require an employee to provide additional identity or work authorization information.

IX. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND A VIOLATION OF SECTION 8(a)(1) BASED ON RESPONDENT'S UNLAWFUL ASSESSMENT OF AN ATTENDANCE POINT TO EMPLOYEE JESSENIA MALDONADO FOR HER PARTICIPATION IN PROTECTED AND CONCERTED ACTIVITY

Respondent excepts to the Administrative Law Judge's decision that Respondent's assessment of an attendance point to employee Jessenia Maldonado violated Section 8(a)(1) of the Act; the Administrative Law Judge's decision to exclude asterisks on the July 17 daily call-in sheet; the Administrative Law Judge's conclusion that the lack of an asterisk on the July 17 call-in sheet constituted hearsay; the Administrative Law Judge's decision to credit Maldonado's testimony over that of Ramirez about her calling in on July 17 and about a subsequent meeting concerning her attendance points, the Administrative Law Judge's failure to give adequate consideration, analysis, and weight to Respondent's treatment of nine other employees who called off on July 17 and allegedly used the Union's call off script; and the Administrative Law Judge's recommended remedies and order based on these decisions and determinations.

The Administrative Law Judge correctly found that Respondent's issuance of an attendance point to Jessenia Maldonado for calling in on strike violated Section 8(a)(1) of the Act.

Unrepresented employees who engage in a peaceful work stoppage to protest unacceptable working conditions are engaged in concerted activity and employers who discharge the employees violate Section 8(a)(1). *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); see also, *Daniel Construction, Co.*, 277 NLRB 795 (1985) (single concerted walkout 1 day in protest of adverse

working conditions found protected). Additionally, failure to notify the employer of the reason for a work stoppage does not render that conduct unprotected. *CGLM, Inc.*, 350 NLRB 974, 979-980 (2007) (knowledge of employee protest over working conditions satisfied when another employee reported that the others were going "on strike."). This is in tandem with the line of cases following *Wright Line*, which hold that knowledge may be inferable from circumstances. *Hospital San Pablo, Inc.*, 327 NLRB 300 (1998).

In this case, Maldonado participated in the Union's 1-day strike on July 17. (Tr. 1074) Respondent's attendance point system can lead to termination. (Tr. 1084) Maldonado only agreed to participate in the strike after being assured by a union representative that she could not receive an attendance point for participating in the strike, so long as she read from the provided script when calling into Respondent's 800 number. (Tr. 1071) That script read: "I am not reporting to work today to protest the Company's unfair labor practices. I will unconditionally return to work on my next scheduled shift." (GC 26) Maldonado testified, and the Administrative Law Judge correctly credited her and found that, on July 17, before her shift, Maldonado left a message on Respondent's 800 number, wherein she read the script verbatim. (Tr. 1073-1074, GC 26, ALJD 40: 9-10) Respondent's call log confirms that call. (R 36)

On the day of the strike, Respondent's 800 number received several voicemail messages containing a reading of the script. (Tr. 1092, 1104) Nonetheless, Respondent issued an attendance point to Maldonado for missing work on July 17. (Tr. 1076) In addition, Aardema, not normally involved in deciding whether to issue attendance points, testified that he was involved in the decision to issue attendance points for July 17, because those absences were related to the Union campaign. (Tr. 1029) The Administrative Law Judge correctly found that Maldonado, having left the voicemail containing a reading of the script, was participating in a protected strike, and that

Respondent's issuance of an attendance point, which could lead to discharge, was a violation of Section 8(a)(1) of the Act. *Washington Aluminum, supra*.

Respondent either had actual or constructive knowledge of Maldonado's participation in the strike, rendering moot Respondent's speculative claims about whether Maldonado did or did not read the script on the voicemail. (Even if Maldonado did not leave the voicemail, it is of no moment. That is because Respondent had constructive knowledge of Maldonado's participation in the protected activity once other employees called in and left voicemails containing readings of the script. That, combined with Respondent's knowledge of Maldonado's union support, provides a clear basis for Respondent having at a minimum constructive knowledge, at least, of Maldonado's participation in the strike. *CGLM, supra*. As a result, Respondent violated the Act by issuing an attendance point to Maldonado for her July 17 absence.

In its brief in support of its exceptions, Respondent takes issue with the Administrative Law Judge crediting Maldonado over Ramirez. First, it is well settled that credibility resolutions of administrative law judges should be given a great deal of weight and should be overturned only “where the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). Moreover, it is well settled that where demeanor is not determinative, an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, “and reasonable inferences which may be drawn from the record as a whole.” *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996). Here, the Judge correctly credited the testimony of Maldonado about what she said in her message to Respondent. The Administrative Law Judge credited her testimony, noting that “on balance I believe her undisputed testimony that she called in and left the strike message using the script.”

(ALJD 41, fn 47). Notably, Respondent did not call as a witness Manufacturing Coordinator Nhi Phan, the person who received and heard the call-off message, so Maldonado's testimony was un rebutted. Moreover, Maldonado's testimony about using the script is underscored by Maldonado's testimony about her initial trepidation to participating in the strike, only to overcome that fear upon learning that by reading the script she would not receive an attendance point. It is unlikely that somebody so focused on attendance points would ignore explicit instructions as to how to avoid receiving an attendance point. While Respondent argues that Maldonado's testimony is not corroborated, it fails to acknowledge that her testimony is also un rebutted.

Respondent also argues that the Administrative Law Judge's exclusion of asterisks on the call-in sheets kept by the Employer as hearsay are incorrect, claiming they should have been admitted as a record of regularly conducted activity. The record is clear, however, that keeping asterisks on the call-in sheet was a onetime event and not regularly conducted activity. It was thus properly excluded. See F.R.E. 803(6). See also *Pierce v. Atchison Topeka & Santa Fe*, 110 F.3d 431, 444 (7th Cir. 1997) (trial judge did not abuse his discretion in excluding a manager's memo that was placed in the plaintiff-employee's personnel file and summarized manager's meetings with plaintiff, as it "was not created with the kind of regularity or routine that gives business records their inherent reliability," and "it was obviously to memorialize an unusual incident . . . that [the manager] may have been concerned could have some litigation potential to it"). Similarly, here, by using asterisks, the Employer was memorializing an unusual incident, not keeping a record of regularly conducted activity, and the asterisks were therefore properly excluded. Respondent did not argue at trial that the asterisks were a present sense impression under F.R.E. 803(1).

Finally, Respondent's alleged failure to discipline some of the employees who called in

using the script has no bearing on the undisputed fact that it *did* issue Maldonado an attendance point, and insisted on keeping the attendance point on Maldonado's record even after it learned that Maldonado was on strike that day. Its treatment of other employees does not rebut such conclusion. The Administrative Law Judge correctly found that Respondent violated Section 8(a)(1) of the Act by issuing a point to Maldonado, and correctly included in his Order language reflecting the unlawful conduct as well as traditional remedies in support of such finding.

X. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND VIOLATIONS OF SECTION 8(a)(1) BASED ON RESPONDENT'S UNLAWFUL SOLICITATION OF GRIEVANCES AND IMPLIED PROMISE TO INCREASE BENEFITS AND IMPROVE TERMS AND CONDITIONS OF EMPLOYMENT IN ORDER TO DISCOURAGE EMPLOYEES FROM SUPPORTING A UNION

Respondent excepts to the Administrative Law Judge's alleged failure to give adequate consideration, analysis, and weight to the fact that Respondent decided to implement the CATS program before the Union organizing drive began; the Administrative Law Judge's conclusion that Respondent impliedly promised to remedy grievances in connection with CATS; and to what it deems as the Administrative Law Judge's misinterpretation of the testimony of Ronnie Fox and Mandy Ramirez concerning Respondent's reply to Fox's CATS form on attendance policy changes. Respondent further excepts to the Administrative Law Judge's proposed remedies and recommended order based on these findings.

The Administrative Law Judge correctly found that Respondent's unlawful solicitation of grievances and implied promise of increased benefits and improved terms and conditions of employment via the CATS form was a form of discouraging employees from supporting a union in violation of Section 8(a)(1) of the Act. In the *absence of a previous practice* of doing so, an employer is prohibited from soliciting employee grievances during a union organizing campaign

"where the solicitation carries with it an implicit or explicit promise to remedy the grievances and 'impress[es] upon employees that union representation [is] [un]necessary." *Albertson's, LLC*, 359 NLRB No. 147, slip op. at 1-2 (2013). The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances. This inference is particularly compelling when, during a union organizing campaign, an employer that has not previously had a practice of soliciting employee grievances institutes such a practice. *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004). It is well established that when an employer institutes a new practice of soliciting employee grievances during a union organizational campaign, "there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary." *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992); see also, *K-Mart Corporation*, 316 NLRB 1175, 1177 (1995). That an employer's representative does not make a commitment to specifically take corrective action does not diminish the anticipation of a remedy for employee complaints. See, e.g., *Laboratory Corp. of America Holdings*, 333 NLRB 284, 284 (2001). An employer may rebut this "compelling inference" by establishing that it had a past practice of soliciting grievances in a like manner, *Center Service System Div.*, 345 NLRB 729, 730 (2005), or by making clear that it was not promising to remedy the employees' complaints. See, e.g., *Uarco, Inc.*, 216 NLRB 1, 2 (1974). Nonetheless, "an employer cannot rely on past practice if it 'significantly alters its past manner and methods of solicitation during the campaign." *Center Service System Div.*, 345 NLRB at 730.

Here, Respondent previously had no procedure in place whereby an employee could voice concerns. (Tr. 151, 326) At the end of May, and after the Union campaign had begun, Respondent announced an entirely new way of communicating concerns with Respondent: the CATS form.

(Tr. 187, 327, 727, 740) Respondent also informed employees at that time that that it would respond to completed forms within 48 hours. (Tr. 187, 327, 727, 740) Contrary to Respondent's claims that the Administrative Law Judge erred in concluding that Respondent impliedly promised to remedy grievances raised through CATS, Plant Manager Sterwerf admitted that CATS would be a way for employees to express questions, concerns, thoughts, problems, and ideas to Respondent, and to have them addressed in a timely manner. (Tr. 705, 709) With respect to the timing of the implementation, Sterwerf did not announce the implementation of CATS until May, 10 months after she became Respondent's Plant Manager (Tr. 741). Moreover, Sterwerf's June 3 email discussing the impact of CATS at her previous place of employment reveals its intent. She wrote that her former employer "did not intend for it to drop grievances, but it did because the team saw it. They got a quicker response directly from the manager." (Tr. 742-743, GC 52)

Although Respondent maintains that the Administrative Law Judge erred in concluding that Respondent was promising to remedy the grievances raised by the CATS forms, the record evidence supports the Administrative Law Judge's findings. When Fox completed a CATS form, Respondent practically treated it as an emergency in responding to Fox. (Tr. 154-156, GC 15) On July 21, Sterwerf emailed Ramirez, Chernock, and Aardema stating the importance of speaking with Fox within 48 hours. This was followed by Ramirez meeting with Fox the very next day and informing him that Respondent was working on what to do about Fox's complaint.

(Tr. 155-156, 587) Respondent maintains that "working on it," simply meant that they were engaged in reviewing the attendance policy company-wide. However, that is not what Fox was told, and he would not have any reason to believe that working on it meant anything but working on addressing his complaint.

Another instance of remedying employee complaints via CATS occurred in response to the

CATS form submitted by Rodriguez, which resulted in Respondent applying a vacation day and eliminating Rodriguez's attendance point. (Tr. 919-920) A similar outcome occurred for other employees who submitted CATS forms. (Tr. 921) Given the foregoing, Respondent's exceptions with respect to the CATS form lack merit. The Administrative Law Judge correctly found that the implementation of CATS was an unlawful solicitation of grievances by Respondent in violation of Section 8(a)(1) of the Act. The Administrative Law Judge also correctly included in his Order language reflecting the found violation, and traditional remedies in support thereof.

XI. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND THAT EMPLOYEE DIANA CONCEPCION IS ENTITLED TO BACK PAY

Respondent maintains that Concepcion is not entitled to backpay because she has not provided any evidence of her ability to lawfully work in the United States. To the contrary, Concepcion provided evidence of her ability to lawfully work in the U.S. at the time she was hired. (Tr. 909) Respondent accepted her evidence of citizenship at that time. Her citizenship never expired, she was never discharged, and she is not required to provide that evidence again. See, e.g., United States Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices, *Types of Discrimination*, <https://www.justice.gov/crt/types-discrimination> (Describing document abuse: "Employers may not request more or different documents than are required to verify employment eligibility... or specify certain documents over others..."). Moreover, an employer may not re-verify an employee's employment eligibility when she is reinstated after disciplinary suspension for wrongful termination, found unjustified by any court, arbitrator, or administrative body, or otherwise resolved through reinstatement or settlement; 8 C.F.R. § 274a.2(b)(viii)(A). See also, *Overstreet v. Santa Fe Tortilla Co.*, No. 13-CV-0165, slip

op. at p.17 (D. N.Mex 2013)(10j order; unconditional reinstatement ordered; Under INA, employer may not condition reinstatement of wrongfully terminated employee on employment reverification); Legal Aid Society of San Francisco Employment Law Center, *Document Abuse (Identification Documents at Work): Things You Should Know About Proving Your Work Status to Your Employer / YOUR LEGAL RIGHTS*, <https://las-elc.org/factsheets/document-abuse.pdf>.

Respondent cites *Hoffman Plastic Compounds, Inc.*, 535 U.S. 137 (2002), in support of its contention that Concepcion should not be awarded backpay. In *Hoffman Plastics*, the employee in question admitted that he was not authorized to work in the United States. Here, there is no evidence that Concepcion is an undocumented alien or otherwise lacks the authorization to work in the United States. Concepcion provided a valid birth certificate at the time of her hire and there is no evidence that Concepcion is not authorized to work in the United States. Respondent is barred from re-verifying her employment eligibility and she is not obligated to comply with such unlawful demand. The Administrative Law Judge correctly found that she is entitled to backpay.

XII. CONCLUSION

Based on the record as a whole, and for the reasons referred to herein, Counsel for the General Counsel submits that Respondent's 64 exceptions should be rejected in their entirety and that the Administrative Law Judge's legal and factual conclusions be affirmed with the exception of the findings addressed in Counsel for the General Counsel's Cross Exceptions, submitted under separate cover.

Dated at Cincinnati, Ohio this 29th day of August 2016.

Respectfully submitted,

/s/ Zuzana Murarova

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/s/ Gideon Martin

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