

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

Cases 09-CA-153966
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 CROSS-EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

Counsel for the General Counsel takes cross-exceptions to Administrative Law Judge David I. Goldman's June 27, 2016 decision in the above matter. Pursuant to Section 102.46(e) of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel hereby submits the following Cross-Exceptions to the Administrative Law Judge's Decision:

1. To the failure to find that Respondent unlawfully solicited employees to withdraw union authorization cards. (ALJD 7-8)¹ This conclusion is contrary to record evidence and controlling law.

¹ References to the Administrative Law Judge's Decision will be designated as (ALJD __); references to the trial transcript will be designated as (Tr. __); references to the General Counsel's exhibits will be designated as (GC __); and, references to Respondent's exhibits and the Union's exhibits are designated as (R __) and (U __), respectively.

2. To the finding that there was no evidence for the act of interrogation of employee Sonia Guzman as alleged in complaint paragraph 5(f). (ALJD 18) This conclusion is contrary to record evidence.
3. To the failure to find that the pay raise granted employees on or about August 30, 2015, and announced on July 15, 2015 violated the Act, and to the finding that the raise was unrelated to the union organizing campaign.² (ALJD 49-50) This failure and finding is contrary to record evidence and controlling law.
4. To the finding that a notice reading is unwarranted under the circumstances of this case. (ALJD 58-59) This finding is contrary to record evidence and controlling law.
5. To the finding that a notice publication, as requested by the General Counsel, is unwarranted under the circumstances of this case. (ALJD 58-59) This finding is contrary to record evidence and public policy.
6. To the finding that a training for employees, supervisors, and managers, as requested by the General Counsel, is unwarranted under the circumstances of this case. (ALJD 58-59) This finding is contrary to record evidence and public policy.
7. To the finding that Respondent periodically furnishing the Union with employee contact information, as requested by the General Counsel, is unwarranted under the circumstances of this case. (ALJD 58-59) This finding is contrary to record evidence and public policy.
8. To the failure to award search-for-work and work-related-expenses regardless of whether these amounts exceed interim earnings, as requested by the General Counsel. (ALJD 58-59) This finding is contrary to record evidence and controlling law.
9. To the failure to require that employee Diana Concepcion be made whole, including for

² All dates herein refer to 2015 unless stated otherwise.

reasonable and consequential damages incurred, as requested by the General Counsel.
(ALJD 58-59) This is contrary to controlling law and public policy.

ARGUMENT IN SUPPORT OF EXCEPTIONS

- I. Contrary to record evidence and controlling law, the Administrative Law Judge erroneously failed to find that Respondent unlawfully solicited employees to withdraw union authorization cards.

The General Counsel's complaint alleged, and the record evidence established, that Respondent unlawfully solicited employees to withdraw their union authorization cards. As a general rule, an employer may not solicit employees to revoke their union cards. *Uniontown Hospital Assn.*, 277 NLRB 1289, 1307 (1985) While the Administrative Law Judge correctly noted that an employer may advise employees of their option to revoke their authorization cards, *Mohawk Industries, Inc.*, 334 NLRB 1170, 1171 (2001), citing *R.L. White Co., Inc.*, 262 NLRB 575, 576 (1982), he failed to duly apply the remaining portion of that doctrine holding that such advice is only lawful "so long as the employer neither offers assistancenor otherwise creates an atmosphere wherein employees would tend to feel peril in refraining from revoking," such as by offering the "advice" in the context of contemporaneous unfair labor practices. *Ibid.* and *Escada (USA), Inc.*, 304 NLRB 845, 849 (1991) (distributing a sample revocation letter to employees in the context of other unfair labor practices unlawful). Also see, *Valerie Manor, Inc. & New England Health Care Employees Union, Dist. 1199, SEIU*, 351 NLRB 1306, 1309 (2007). Thus, in *Mohawk Industries, supra*, the Board found that a supervisor unlawfully solicited revocation of authorization cards by, at regular employee meetings, telling employees that he had an address to which they could write to get their cards back and by telling them that they could obtain a withdrawal from his office or from the union organizer. *Id.* at 1170; also see

VJNH, Inc., 328 NLRB 87, 101 (1999) (Employer found to have unlawfully solicited revocations of cards when informing employees that they have the right to demand to have the card returned). Finally, a non-perilous atmosphere, i.e., one in which an employer may lawfully offer passive aid, is one where "...[the] idea[of revocation] was initiated by employees....." *Hydro-Forming, Inc.* 221 NLRB 581, 582 (1975) citing *Jimmy Richards Co., Inc.*, 210 NLRB 802 (1974).

In the instant case, beginning in May, Respondent supervisors led five to six meetings, whereby its production lines were stopped, all employees from that line were gathered together, and supervisors addressed the Union campaign. (Tr. 128, 129, 266-267, 318, 502, 579) Those meetings included dissemination of anti-Union literature, and Respondent also made such literature available to employees in the hallway. (Tr. 130, 267-268, 502) One paper was entitled "How to Withdraw Your Signed Union Authorization Card," and included instructions for employees to complete an attached form, mail it to the Union, and tell the Union that the employee wanted his or her union authorization card back. (Tr. 131-132, GC 12) Another document informed employees that: "if you signed a union card and want to withdraw your support, the union must give it to you." (Tr. 634, JX 1) A similar paper disseminated by Respondent to employees stated: "If you signed a card and want to withdraw your support, the UFCW must give it to you. Contact HR for more information." (emphasis in original). (GC 29) Respondent provided no evidence of any employee questioning Respondent on the topic of union card revocation prior to these meetings. To the contrary, Employee Ronnie Fox testified that unprompted by any employee question, his supervisor stated that employees have the choice to get their card back from the Union (Tr. 130). Employee Kevin Favors testified that his line supervisor "volunteered" to employees that "if you don't want to be part of the union that's

taking place, you can go ahead and sign this paper and that will basically waive off your signature that you probably already signed... If you sign this paper, it would basically take you off the union.” (Tr. 270-271) Employee Sonia Guzman testified that her supervisor also volunteered information about revoking cards unprompted. (Tr. 318-319) All of these supervisors testified but none disputed these employees’ accounts.

In declining to find a violation in Respondent’s conduct, the Administrative Law Judge noted that an employer may provide ministerial or passive aid to employees who wish to withdraw from union membership. The Administrative Law Judge relied on *Space Needle, LLC*, 362 NLRB No. 11 (2015). However, the Board in *Space Needle, LLC* specifically limited its holding to cases where an employer “does not create an atmosphere wherein employees would tend to feel peril in refraining from [withdrawing].” *Id* at 1. The facts herein are distinguishable. By stating to employees that the Union must return cards upon request, and doing so unprompted by any employee question or request, Respondent did more than offer passive aid. It essentially solicited revocation of union support. *Mohawk, supra; VJNH, supra*. Further, Respondent made such solicitation in an atmosphere where employees would tend to feel peril in revoking union cards. *Valerie Manor, supra*. Respondent created such an atmosphere when it subsequently retaliated against employees because of their support for the Union, and committed numerous other violations. Moreover, it impressed upon employees the importance of its solicitation by stopping lines inside its busy facility to disseminate the written solicitations during and at the end of employee meetings against unionization.

In declining to accord proper weight to Respondent’s numerous unfair labor practices, the Administrative Law Judge stated that *Mohawk* and *VJNH* involved unfair labor practices of greater scope and severity than are present here. In reaching this conclusion, the Administrative

Law Judge minimizes the impact of Respondent's numerous unfair labor practices occurring during the union organizing drive, including discipline, surveillance, enforcement of an unlawful solicitation/distribution policy, interrogation, and informing vulnerable employees that information about wages should not be shared. He particularly minimizes the chilling effect of targeting Union supporters regarding their authorization to work in the U.S. at a facility with a diverse workforce where over 5 languages are spoken and where not all employees speak English. (Tr. 503-04, 633) Notably, Respondent even resorted to unlawfully confiscating Union authorization cards from employee organizers in an effort to prevent more employees from signing them. (ALJD 22-23)

Finally, with respect to the distributed documents indicating that a union must return authorization cards if an employee wishes to withdraw his or her support for the Union, it is not categorical that a Union must return an authorization card upon receipt of a letter of revocation. Thus, the contents of this particular piece of Employer literature are factually inaccurate. While Section 8(c) of the Act provides that expressing of views, argument or opinion is not an Unfair Labor Practice, if the expression contains no threat of reprisal or promise of benefit, such expression must be based on objective fact. Given the false nature of the expressed view of the Employer, the Employer is not protected here by Section 8(c), and the document seeking withdrawal of union support is violative of Section 8(a)(1) the Act.

II. Contrary to record evidence, the Administrative Law Judge failed to find that there was evidence for the act of interrogation of employee Sonia Guzman as alleged in complaint paragraph 5(f).

On about June 8, in the HR office Renee Chernock and Mandy Ramirez, accused Sonia Guzman of giving out flyers in the cafeteria contrary to Respondent's policy (which policy the

Administrative Law Judge found to be unlawful). (Tr. 320, 321, 342, ALJD 14:27-28) Although the interrogation in this case came in the form of an accusation rather than a question, it was nevertheless a statement that would reasonably elicit a response, and therefore interrogative. See, e.g. *Grass Valley Grocery Outlet*, 338 NLRB 877 (2003) (finding that an employer's statement to employee that "*I hear that you're voting for the union...I heard from the boys... [that you are] a strong leader in the union,*" was unlawful because the statement constituted an unlawful effort to elicit from the employee whether he supported the union). Indeed, here Respondent was accusing and interrogating Guzman about engaging in union activity, which Guzman denied. (Tr. 320) Thus, the record *does* contain evidence of Guzman's interrogation. Moreover, as a result of that interrogation, Guzman was issued discipline, which the Administrative Law Judge also found to be unlawful. (Tr. 320, 768, ALJD 15:40-41) The interrogation of Guzman was done under the same circumstances as the interrogation of Carmen Cotto, which the Administrative Law Judge found to be coercive and unlawful. Thus, Guzman's interrogation under the same circumstances is unlawful under the same analysis.

III. The Administrative Law Judge erroneously failed to find that the pay raise granted employees on or about August 30 and announced on July 15 violated the Act.

While the Administrative Law Judge correctly found that the General Counsel met its *prima facie* burden under *Wright Line* showing that the pay increase announced on July 15 and implemented on August 30 was motivated by employees' union activity, he incorrectly concluded that Respondent met its burden to show that it would have implemented the wage increase even in the absence of union activity. The Administrative Law Judge also erred in finding that Respondent proved that it had a legitimate business reason for announcing the wage

increase on July 15.

The granting of wage increases during a union campaign is not *per se* unlawful, with the test being whether, based on the circumstances of each case, the granting of increased wages and benefits is calculated to impinge upon the employees' freedom of choice in an election which might be directed in the future. *LRM Packaging, Inc. and Local 300-S, Production Service and Sales District Council*, 308 NLRB 829, 834 (1992) (granting of new wages was found lawful during the pendency of a representation proceeding where the employer had established that such action was consistent with past practice, such action had been decided upon prior to the onset of union activity, and business justifications prompted the adjustment). In finding a grant of benefits during a union organizing campaign unlawful, the Board does not rely on any presumption but rather draws an inference of improper motivation from all the evidence presented and from a respondent's failure to establish a legitimate reason for the timing of the benefit. *Holly Farms Corp.*, 311 NLRB 273, 274 (1993) (granting wage increase unlawful where wage increase was unscheduled, contrary to employer's policy, addressed a primary concern of certain employees and the size, timing, and applicability of the increase was entirely at respondents' discretion); see also *Manor Care Health Services – Easton*, 356 NLRB 202, 222 (2010) (“Absent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act”).

In the instant case, the organizing campaign began as early as March, growing steadily thereafter. (Tr. 41-42) As early as June 6, the Union began distributing flyers which included a demand for increased wages. The Union also submitted a petition to Respondent that included an employee demand for \$15 an hour wages. (Tr. 45, GC 4, GC 6) The goal of any Union

campaign is a successful election and, at this time, in the thick of the Union campaign, Respondent had to know that a petition for election was forthcoming. At the very least, Respondent had to know that an election might be directed in the near future. *LRM Packaging, supra*. Respondent's July 15 announcement of a forthcoming wage increase was very clearly timed to discourage employees' union activity. (Tr. 191, 199, 328, GC 30) In failing to find a violation in the timing of Respondent's announcement of the wage increase, the Administrative Law Judge erred in not giving sufficient consideration, analysis, and/or weight to Senior Vice President of Human Resources Chuck Aardema's e-mail concerning the announcement's effect on employees, which stated, in part, that ". . . communication on the new salary structure next week should provide a positive boost for those in the Cincinnati plant." (Tr. 1039, GC 59) The Administrative Law Judge acknowledged that it is likely, and in fact obvious, that the Union was a reason that Aardema and other top management wanted the wage reevaluation completed and implemented earlier rather than later. (ALJD 49:1-3) Thus, his subsequent conclusion that the timing of the announcement and implementation of the raise were for legitimate business reasons is perplexing. It is clear that Respondent viewed this as an opportunity to blunt the growing campaign. It would be impossible that such a promise- made mere weeks after employees first voiced a desire for increased wages - would not influence a future election. See *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

Respondent did not present any evidence establishing the necessity of making the announcement about the wages on July 15 - an arbitrary date 45 days before implementation, and the Administrative Law Judge's conclusion that the timing of this announcement "seem[ed] . . . to be legitimate" is not based on any record evidence. (Tr. 1038, ALJD 49:31-32). Not only was the announcement made close in time to the Union's prior demands, it also stood out in a

significant way as a new and unique manner of providing a raise. Thus, it was a complete departure from past practice. *Cf. LRM Packaging, supra*. Prior to this, employees had only received raises on the anniversary of their hiring. (Tr. 157-158, 286, 327, 332, 440) Moreover, many employees had explicitly been informed that they were not going to receive another raise at any time in the future. (Tr. 158-159, 287, 328) Therefore, it was a major surprise when an unexpected raise was announced for nearly all employees, regardless of whether the employee had reached the maximum pay or not, and totally unconnected to employees' anniversary dates. Although the Administrative Law Judge relied upon Sue Bruncker's February 4 email announcing plans to "fast track the evaluation of wages for the plants," this "fast tracking" never occurred, and should therefore be disregarded as proof of a legitimate basis for the raise. (Tr. 978-981, ALJD 48:22). Moreover, the "evaluations" on which Respondent presumptively relied in implementing the raise are so vague as to be unreliable indicators that Respondent intended to grant raises before learning of the union organizing campaign. Notably, Respondent did not introduce the results of any such evaluations into the record. Moreover, such evaluations did not include information about the actual timing of any raises or which employees would be affected. See, e.g. *Caterpillar Logistics, Inc.*, 362 NLRB No. 49 (2015) (finding that Respondent's prior statements about a possible safety bonus program were full of contingencies and did not amount to an announcement that employees would receive a bonus). Certainly here, as in *Caterpillar*, all announcements prior to July 15 were simply evaluations and contingencies. The wage rate was not, as the Administrative Law Judge mischaracterized it, "developed" before the Union organizing campaign. (ALJD 1:33-34) It was not even developed on July 15. On July 15, when the announcement of the wage raises was made, Respondent did not even have the wages finalized, and was still only beginning to do the cost analysis and to check the employee job

classifications. (Tr. 552, 1000, 1001). At the time of the announcement, the raises had not even been finalized.

Given the foregoing, coupled with the Administrative Law Judge's finding that it was obvious that the Union was a reason that Respondent wanted the wage reevaluation implemented as soon as possible, the Administrative Law Judge erred finding that Respondent met its burden of showing that the wage increase and its announcement would have occurred in the absence of union activity. In addition, Respondent's myriad of unlawful conduct concurrent with the announcement and implementation of the wage increase also indicates the real motive behind the wage increase was to discourage support for a union. The Administrative Law Judge failed to accord any weight to such unlawful conduct when examining the lawfulness of the wage increase. The Administrative Law Judge also erred in not finding that when Respondent proceeded to actually issue the wage increase, on the heels of its wage announcement and other unlawful conduct, it also violated Section 8(a)(3) of the Act.

IV. The Administrative Law Judge erroneously failed to find that a notice reading is warranted under the circumstances of this case.

The Administrative Law Judge erred in finding that a notice reading is unwarranted under the circumstances of this case. A notice reading is necessary and essential to properly remedy Respondent's conduct for several reasons. First, the Board has held that a notice reading is more effective at remedying violations during an organizational campaign than a traditional notice posting because of the greater impact an employer has on employees when standing and reading before them. See, *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993), *enfd.* mem 55 F.3d 684 (D.C. Cir. 1995). The reading of the notice will also "ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the

Respondent's bulletin boards.” *Excel Case Ready*, 334 NLRB 4, 5 (2001).

Second, testimony established that the breadth and severity of Respondent’s unfair labor practices was so wide-reaching and severe that extraordinary remedies are necessary. The Board has held the remedy of reading a notice by a company representative is appropriate when the unfair labor practices are “so numerous, pervasive and outrageous” that extraordinary remedies are necessary “to dissipate fully the coercive effects of the unfair labor practices found.” *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995)(unfair labor practices found to be “egregious and notorious”). Here, the scope of Respondent’s unfair labor practices included solicitation to revoke union cards by falsely informing employees that the Union was required to return authorization cards to employees who made the request, enforcement of an overly broad solicitation/distribution policy, confiscation of union cards, interrogation regarding union activities and sympathies, solicitation of employee complaints and grievances, numerous forms of surveillance, including searching for and confiscating union cards, informing employees that wages are considered confidential, issuing unlawful warnings to its employees, issuing attendance points to an employee who went on strike, indefinitely suspending an employee due to her Union activity, and unlawfully issuing a wage increase to its employees. Moreover, many of the unfair labor practices were committed by high ranking officials in the facility, making the need for a notice reading even greater. *OS Transport LLC*, 358 NLRB 1048, 1049 (2012) (relying on senior officials involvement in the commission of unfair labor practices to require a notice reading).

A notice reading is also necessary because the impact and awareness of the unfair labor practices was unit wide. *OS Transport LLC*, 358 NLRB 1048, 1049 (2012) (relying on awareness of unfair labor practices within the unit to require a notice reading). Respondent’s

unfair labor practices that were proliferated unit-wide included telling hundreds of employees in writing that they were prohibited from discussing their wages, posting an unlawful solicitation/distribution policy, telling employees that the Union was required to return authorization cards to employees who made the request, searching through employees' clipboards in a search for union cards, and granting an unprecedented wage increase. These unfair labor practices were directed to the entire workforce, and they have not been corrected or sufficiently disavowed.

The Administrative Law Judge's statement that "this is not a case where the severity and scope of the employer's unfair labor practices demonstrates that traditional remedies are insufficient to redress the effects of the Respondent's unfair labor practices" minimizes Respondent's unlawful practices and is contrary to his own findings. It particularly minimizes the impact of Respondent's surveillance, unlawful search and seizure of authorization cards, and the unfair labor practices aimed at employees' immigration status. The Administrative Law Judge also incorrectly failed to find that the wage raise, a hallmark violation, was unlawful.

The Administrative Law Judge himself characterizes Respondent's unfair labor practices as "a flurry of unlawful activity." (ALJD 1:10). He noted that Respondent "moved quickly to oppose unionization," and even hired a consulting firm to assist the Union organizing campaign (ALJD 45-46). It immediately posted an unlawful no-solicitation/no-distribution policy which it has not sufficiently redressed to date, so employees may still believe that they cannot solicit and distribute in break areas, for example. Respondent specifically targeted employees Cotto and Guzman, two leaders in the Union organizing drive, because of their union activity and as part of a "crack down" on union activity. (ALJD 45-49) Respondent, on numerous occasions, called Union leaders into the office, sometimes over the loudspeaker and other times by having

supervisors pull them off of their jobs, thereby generally making it known to employees who witnessed and/or heard them being summoned that they were being targeted. (Tr. 222, 322, 323, 375, 377, 462, 547, 548, 605, 608, 762, 765, 777, 780, 808, 833) Indeed, Guzman testified that employees are rarely called into the Human Resources office – typically only when they are in trouble. (Tr. 461) The record contains evidence that employees within the plant learned of Respondent’s unlawful conduct. (Tr. 145, 226-227, 281, 322, 381, 382, 463, 464, 468, 545, 769, 836-837) Some even came to the Human Resources office to confront Human Resources about the unlawful conduct. (Tr. 769) There was a petition signed by over 25 employees concerning Respondent’s treatment of Concepcion. (Tr. 389-90, GC 11) A rally was held outside of Respondent’s facility, in part to inform coworkers about the Employer’s unfair labor practices) (Tr. 59, 390-391, GC 59) Further, on several occasions, police arrived, having been called by Respondent, while the Union was handing out literature around Respondent’s facility. (Tr. 58) Under these circumstances, it cannot be concluded that Respondent’s unfair labor practices were not sufficiently widespread or chilling to necessitate a notice reading.

The evidence showed that there was widespread knowledge of Respondent’s numerous and egregious unfair labor practices, many of which Respondent does not even deny but rather explains away as “mistakes,” and the Administrative Law Judge erred in not ordering a notice reading to remedy the violations. A notice reading, and specifically a notice reading in English, Spanish, and additional languages is necessary because Respondent employs a diverse workforce, with over five languages spoken at its facility. Not all of Respondent’s employees speak English. (Tr. 503-04, 633) A notice reading in the specific languages would be more effective at reaching Respondent’s diverse workforce than only a traditional posting.

- V. The Administrative Law Judge erroneously failed to find that a notice publication, as requested by the General Counsel, is warranted under the circumstances of this case.

The Administrative Law Judge erred in not issuing an Order requiring Respondent to publish in three publications of general local interest and circulate copies of the Notice in English, Spanish, and in additional languages if the Regional Director for Region 9 decides that it is appropriate to do so, signed by Respondent's plant manager, Petra Sterwerf, or her successor, and to do so at its expense, published twice weekly in a publication that will achieve a broad coverage area, for a period of 8 weeks in publications to be determined by the Regional Director for Region 9.

The publication of notices in publications of broad circulation has been found appropriate in other case involving egregious employer conduct. See e.g. *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 7 (Oct. 24, 2014) (publication will better reach all affected by the employer's unfair labor practices including future employees in the area industry); *Fieldcrest Cannon*, 318 NLRB 470, 473 (1995); and *Three Sisters Sportswear Co.*, 312 NLRB 853, 854 (1993). The Board has recognized that non-traditional remedies are appropriate in cases where the workforce is particularly vulnerable to immigration-related threats or actions. *Concrete Form Walls*, 346 NLRB 831, 839 (citing to "long-lasting effect" of violations on "workforce which is particularly vulnerable to immigration-related threats or actions). Testimony showed that Respondent's unfair labor practices have been communicated to potential future employees at rallies attended by individuals, including non-employees and members of the media, and visible to hundreds of passersby, as well as by numerous articles published about the ongoing organizing. (Tr. 59-64, 367-368) They were also communicated to potential future employees by way of a program on the local Spanish-language radio station (Tr. 79-80, 84) and to Respondent's customers (Tr. 85-

86). Because reports of Respondent's unfair labor practices were widely disseminated, a publication of a notice is necessary to fully cure Respondent's unfair labor practices.

VI. The Administrative Law Judge erroneously failed to find that training for employees, supervisors, and managers, as requested by the General Counsel, is warranted under the circumstances of this case.

The Administrative Law Judge erred in not issuing an Order requiring Respondent to schedule a training for all employees on their rights under the Act conducted by a Board Agent during paid work time and requiring Respondent to pay for any translator needed for the training, as well as an Order requiring Respondent to schedule a training for all supervisors and managers on compliance with the Act conducted by a Board Agent during paid work time and requiring Respondent to pay for any translator needed for this training. This remedy is necessary as part of a complement of remedies to restore the status quo and effectuate the purposes of the Act. The Board has stated that the purpose of a remedial notice is to “counteract the effect of unfair labor practices on employees by informing them of their rights under the Act and the Board’s role in protecting the free exercise of those rights.” *J. Picini Flooring*, 356 NLRB 11, 12 (2010). The rationale for a training remedy is the same. Due to the pervasiveness of Respondent’s violations, the particularly vulnerable nature of Respondent’s workforce, such training is necessary to ensure effective communication of employees’ rights under the Act.

The Board has utilized a training and instruction remedy in certain circumstances. See *J.P. Stevens & Co., Inc.* 244 NLRB 407, 458 (1979) (requiring employer to provide written instruction to supervisors on compliance with the Act). Such a remedy has also been included in a number of Board settlements. See, e.g. *NLRB v. Howard University Hospital*, No. 99-1465 (D.C. Cir. Fed. 24, 2015), para. 10 at p. 5 (requiring that all managers and supervisors complete

collective bargaining training on a variety of topics and that all newly hired or promoted managers and supervisors complete training within 30 days of employment or promotion). Moreover, such training would bring the NLRB into conformance with other federal enforcement agencies, such as the Department of Labor, DOJ's Office of Special Counsel , and the Equal Employment Opportunity Commission , which routinely incorporate mandatory training into their administrative orders and judicially monitored consent decrees.

Because of the degree of chill created by Respondent's retaliation associated with employees' immigration status, training on employee rights led by a Board agent is necessary to effectively communicate to employees that all employees may exercise their statutory rights without retaliation, if they so choose. Because of the breadth of Respondent's unfair labor practices, training provided to its managers is necessary to educate those individuals about how to comply with the Act. Moreover, because much of Respondent's defenses essentially amounted to an ignorance defense, training would effectively ameliorate such ignorance.

VII. The Administrative Law Judge erroneously failed to find that Respondent periodically furnishing the Union with employee contact information, as requested by the General Counsel, is warranted under the circumstances of this case.

The Administrative Law Judge erred in not issuing an Order providing that, upon request of the Union, Respondent immediately furnish it with lists of the names, addresses, and classifications of all of Respondent's employees as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during a period of 2 years following entry of this Order.

The Board has awarded such a remedy in certain cases where it is necessary to ensure that employees may freely exercise their Section 7 rights. See, e.g. *Federated Logistics &*

Operations, 340 NLRB 255, 258 & n. 10 (2003); *Excel Case Ready*, 334 NLRB at 5; *Blockbuster Pavilion*, 331 NLRB 1274, 1275 (2000). Here, such an order is necessary for the same reasons detailed *supra*, and particularly because of the degree of chill on employee union activity created by the unlawful immigration-related threats during an initial organizing campaign. This remedy would allow the Union to “reach out to remaining employees directly and begin to restore employees’ willingness to engage in protected activities should they so choose.” See Member Schiffer’s adoption of this remedy in her concurrence in *Farm Fresh Co.*, *Target One, LLC*, 361 NLRB No. 83, slip op. at 2 n.3 (October 30, 2014) (stating that such a remedy is appropriate where respondent engaged in a particularly swift, harsh, and targeted response to employees’ organizing efforts because it made it clear to the remaining employees that pro-union activity would be punished). Such a remedy is necessary because it facilitates communication between the Union and employees that is outside of Respondent’s domain and, therefore, “insulated from discriminatory reprisal.” *Blockbuster Pavilion*, 331 NLRB at 1275.

VIII. The Administrative Law Judge erroneously failed to award search-for-work and work-related-expenses regardless of whether these amounts exceed interim earnings, as requested by the General Counsel.

The Board should overrule the Administrative Law Judge’s failure to award Diana Concepcion search-for-work-related expenses regardless of whether these amounts exceeded interim earnings, as requested by the General Counsel. Under *King Soopers Inc.*, 354 NLRB No. 93 (2016), discriminatees are to be compensated for such expenses even when interim earnings are nonexistent or less than those expenses. Moreover, they are not treated as an offset to interim earnings but rather are to be treated as a separate component of the make-whole remedy. The *King Soopers* decision, which issued on August 24, 2016, noted that its holding is to be applied

retroactively in all pending cases at whatever stage. *Id.* at 8. Thus, this case is encompassed by the *King Soopers* decision and Concepcion should be awarded search-for-work-related expenses regardless of whether these amounts exceeded interim earnings.

IX. The Administrative Law Judge erroneously failed to require that employee Diana Concepcion be made whole, including for reasonable and consequential damages incurred, as requested by the General Counsel.

The Administrative Law Judge erred in failing to require that employee Diana Concepcion be made whole for reasonable and consequential damages incurred as requested by the General Counsel. Under the Board's present remedial approach, some economic harm that flow from a respondent's unfair labor practices is not adequately remedied. See, Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *E.g.*, *Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "broad discretionary" authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don*

Chavas, 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board’s remedial structure is to “make whole” employees who are the victims of discrimination for exercising their Section 7 rights. See, e.g., *Radio Officers’ Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore “the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act’s “general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company’s unlawful act).

Moreover, the Supreme Court has emphasized that the Board’s remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must “draw on enlightenment gained from experience.” *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. See, e.g., *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act’s make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of

computing simple interest on backpay awards), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); see also *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress”). Compensation for employees’ consequential economic harm would further the Board’s charge to “adapt [its] remedies to the needs of particular situations so that ‘the victims of discrimination’ may be treated fairly,” provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); see *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent’s unlawful conduct.

Reimbursement for consequential economic harm achieves the Act’s remedial purpose of restoring the economic status quo that would have obtained but for a respondent’s unlawful act. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.³ Similarly, employees who lose

³ However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. See *Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).⁴

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. See *Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would

⁴ Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (Oct. 24, 2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering. In *Nortech Waste, supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific."

Nortech Waste, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee’s consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996)).⁵

⁵ The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. See *Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized “damages for ‘future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.’” *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. See *Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007) (“[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages” for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); see also *Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).

Based on the record as a whole, and for the reasons referred to herein, Counsel for the General Counsel submits that these twelve Cross Exceptions should be sustained, and that the Administrative Law Judge's findings be rejected or modified in conformance, including his Order and Notice to Employees.

Dated this 29th day of August, 2016.

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CITATION OF AUTHORITIES

Cases

Blockbuster Pavilion,
 331 NLRB 1274 (2000)..... 17, 18

BRC Injected Rubber Products,
 311 NLRB 66 (1993)..... 22

Carpenters Local 60 v. NLRB,
 365 U.S. 651 (1961) 21

Caterpillar Logistics, Inc.,
 362 NLRB No. 49 (2015)..... 10

Concrete Form Walls,
 346 NLRB 831 15

Deena Artware, Inc.,
 112 NLRB 371 (1955)..... 22

Escada (USA), Inc.,
 304 NLRB 845 (1991)..... 3

Excel Case Ready,
 334 NLRB 4 (2001)..... 12, 18

F.W. Woolworth Co.,
 90 NLRB 289 (1950)..... 20

Farm Fresh Co., Target One, LLC,
 361 NLRB No. 83, slip op. at 2 n.3 (October 30, 2014) 18

Federated Logistics & Operations,
 340 NLRB 255 (2003)..... 17, 18

Fieldcrest Cannon, Inc.,
 318 NLRB 470 (1995)..... 12, 15

Grass Valley Grocery Outlet,
 338 NLRB 877 (2003)..... 7

Graves Trucking,
 246 NLRB 344 (1979)..... 19

Greater Oklahoma Packing Co. v. NLRB,
 790 F.3d 816 (8th Cir. 2015)..... 22

Holly Farms Corp.,
 311 NLRB 273 (1993)..... 8

Hydro-Forming, Inc.,
 221 NLRB 581 (1975)..... 4

Isis Plumbing & Heating Co.,
 138 NLRB 716 (1962)..... 20, 21

<i>J. Picini Flooring,</i> 356 NLRB 11 (2010).....	16
<i>J.P. Stevens & Co., Inc.,</i> 244 NLRB 407 (1979).....	16
<i>Jimmy Richards Co., Inc.,</i> 210 NLRB 802 (1974).....	4
<i>Kentucky River Medical Center,</i> 356 NLRB 6 (2010).....	20
<i>King Soopers Inc.,</i> 354 NLRB No. 93 (2016).....	18, 19
<i>Landgraf v. USI Film Products,</i> 511 U.S. 244 (1994).....	24
<i>Lee Brass Co.,</i> 316 NLRB 1122 (1995).....	24
<i>LRM Packaging, Inc. and Local 300-S, Production Service and Sales District Council,</i> 308 NLRB 829 (1992).....	8, 9, 10
<i>Manor Care Health Services – Easton,</i> 356 NLRB 202 (2010).....	8
<i>Mohawk Industries, Inc.,</i> 334 NLRB 1170 (2001).....	3, 5
<i>NLRB v. Exchange Parts Co.,</i> 375 U.S. 405 (1964).....	9
<i>NLRB v. Howard University Hospital</i> No. 99-1465 (D.C. Cir. Fed. 24, 2015).....	16, 17
<i>NLRB v. J.H. Rutter-Rex Mfg. Co.,</i> 396 U.S. 258 (1969).....	19, 20, 21
<i>NLRB v. Mackay Radio & Tel. Co.,</i> 304 U.S. 333 (1938).....	21
<i>NLRB v. Seven-Up Bottling of Miami,</i> <i>Inc.,</i> 344 U.S. 344 (1953).....	20
<i>Nortech Waste,</i> 336 NLRB 554 (2001).....	22, 23, 24
<i>Operating Engineers Local 513 (Long Const. Co.),</i> 145 NLRB 554 (1963).....	19, 23
<i>OS Transport LLC,</i> 358 NLRB 1048 (2012).....	12
<i>Pacific Beach Hotel,</i> 361 NLRB No. 65, slip op. at 7 (Oct. 24, 2014).....	15, 21, 23
<i>Pappas v. Watson Wyatt & Co.,</i> 2007 WL 4178507 (D. Conn. Nov. 20, 2007).....	24

<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941)	20, 21, 23
<i>Pilliod of Mississippi, Inc.</i> , 275 NLRB 799 (1985).....	24
<i>Proulx v. Citibank</i> , 681 F. Supp. 199 (S.D.N.Y. 1988).....	24
<i>R.L. White Co., Inc.</i> , 262 NLRB 575 (1982).....	3
<i>Radio Officers' Union of Commercial Telegraphers Union v. NLRB</i> , 347 U.S. 17 (1954)	20
<i>Roman Iron Works</i> , 292 NLRB 1292 (1989).....	22
<i>Service Employees Local 87 (Pacific Telephone)</i> , 279 NLRB 168 (1986).....	23
<i>Space Needle, LLC</i> , 362 NLRB No. 11 (2015).....	5
<i>Three Sisters Sportswear Co.</i> , 312 NLRB 853 (1993).....	11, 15
<i>Tortillas Don Chavas</i> , 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014)	19, 20
<i>Uniontown Hospital Assn.</i> , 227 NLRB 1289 (1985).....	3
<i>Valerie Manor, Inc. & New England Health Care Employees Union, Dist. 1199, SEIU</i> , 351 NLRB 1306 (2007).....	3, 5
<i>Virginia Elec. & Power Co. v. NLRB</i> , 319 U.S. 533 (1943)	20
<i>VJNH, Inc.</i> , 328 NLRB 87 (1999).....	4, 5
<i>Wright Line</i> , 251 NLRB 1083 (1980).....	7
 Statutes	
42 U.S.C. § 1981a(b)(3).....	24
 Other Authorities	
<i>The Practicality of Increasing the Use of Section 10(j) Injunctions</i> , 7 INDUS. REL. L.J. 599 (1985)	19