

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

JAMAICA CAR WASH CORP. D/B/A
SUTPHIN CAR WASH

Case 29-CA-169069

and

RETAIL, WHOLESALE AND DEPARTMENT
STORE UNION (RWDSU)

COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION

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I. STATEMENT OF THE CASE

This case involves the termination of employee Yovani Castillo and Respondent's efforts to rid itself of the Union by the expiration of its contract with the Union. The employees involved herein are a unit of car wash workers at Jamaica Car Wash Corp. d/b/a Sutphin Car Wash, "the Respondent," located in Jamaica, New York, who are represented by the Retail, Wholesale, and Department Store Union, "the Union." (Tr. 305)¹ The Union and Respondent were parties to a collective bargaining agreement that was effective from October 14, 2013, though October 13, 2016. (GC-3) This agreement contained a union security clause that required membership in the Union after thirty days of employment.² (Id.) Respondent hired discriminatees Yovani Castillo and Francisco Gomez on December 3, 2015.³ (Tr. 118, 181) Neither employee knew what a union was at the time they were hired. (Tr. 126, 182)

Contrary to the Administrative Law Judge's ("ALJ") erroneous findings of fact and conclusions of law, the evidence adduced at trial established that Respondent engaged in a scheme to rid itself of the Union by the expiration of the CBA in October 2016, by avoiding the permanent hiring of any pro-Union employee. To achieve this goal, Respondent interrogated and threatened the discriminatees and terminated the employment of Yovani Castillo, whom it believed to be a Union supporter, in order to ensure that no new employees supported the Union and to ensure that current employees would be too afraid to continue to support the Union.

Contrary to the ALJ's unfounded speculation, the evidence amply supports this theory. To find

¹ All references to the administrative hearing transcript will appear as "Tr. (page number)". All references to the administrative exhibits will appear as either "GC (General Counsel)-(exhibit number)", or "R(Respondent)-(exhibit number)." References to the Administrative Law Judge's Decision will appear as "ALJD (page number: line number(s))."

² The CBA states, "To the extent permitted by law, membership in the Union on and after the 31st day following the beginning of employment of each worker. .shall be required as a condition of employment. (GC-3)

³ Although Gomez and Castillo are cousins, they did not tell anyone at Respondent that they were cousins. (Tr. 147)

otherwise would require a finding that two unsophisticated car wash workers, with no previous experience with unions, manufactured a complicated, legal-based scheme to somehow defraud Respondent out of a small amount of backpay. As will be demonstrated herein, rather than relying on the probative record evidence and Board law, the ALJ based his erroneous findings and conclusions on misstatements of, and ignoring of, record evidence, on the misapplication, and in some instances the complete ignoring of, Board law and by improperly substituting his own speculation for record evidence. Thus, the General Counsel urges that the ALJ's findings of fact and conclusions of law be reversed. See *Fresenius USA Manufacturing, Inc.*, 358 NLRB No. 138 (2012); *Jewel Bakery, Inc.* 268 NLRB 1326 (1984).

II. PROCEDURAL HISTORY

On February 4th, 2016, Retail Wholesale and Department Store Union (RWDSU) (“the Union”), filed a charge in 29-CA-169069 against Jamaica Car Wash Corp. d/b/a Sutphin Car Wash⁴ (“Respondent”), alleging that Respondent threatened reprisals against Union shop steward Diego Hernandez in retaliation for his protected concerted activities, in violation of Section 8(a)(1) of the National Labor Relations Act, (“the Act”), and that on or about December 23, 2015, Respondent unlawfully discharged employee Yovani Castillo in retaliation for his support for the Union, in violation of Section 8(a)(3) of the Act. (GC-1(A)). On March 28, 2016, the Union amended the charge to include the allegations that Respondent threatened employees with termination if they supported the Union, instructed employees not to talk to the Union stewards or representatives, promised employees benefits if they relinquished their support for the Union, threatened employees with unspecified reprisals for engaging in Union and other protected

⁴ The charge was initially filed against Sutphin CW Corp. However, Respondent's name was recently changed. Therefore, at trial, the ALJ granted CGC's request to amend the Complaint to reflect Respondent's new name, Jamaica Car Wash Corp. d/b/a Sutphin Car Wash. (GC-2) Respondent raised no objection to the amendment and it was granted by ALJ Chu. (Tr. 6)

concerted activities, and interrogated employees regarding the Union activities of other workers. (GC-1(E)).

On May 12th 2016, the Regional Director for Region 29 of the Board issued a Complaint and Notice of Hearing (the “Complaint”) in Case No. 29-CA-169069. (GC-1(H)). The Complaint alleges that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by threatening employees that supporting the Union was futile, promising employees raises and additional work hours if they ousted the Union, threatened employees with termination if they supported the Union, interrogated employees about the Union activities of other employees, threatened employees with unspecified reprisals for engaging in Union activities, and terminated the employment of Yovani Castillo because of his support for the Union. On May 26th 2016, the Respondent filed its Answer to the Complaint (GC-1(H)) denying most allegations in the Complaint.

The case was tried before Administrative Law Judge (“ALJ”) Kenneth Chu on June 21st, 22nd, 23rd and July 7th and 8th of 2016, in Brooklyn, New York. On July 7, 2016, the ALJ granted Counsel for the General Counsel’s (“CGC”) motion to amend the Complaint to include the following additional allegations: that Respondent interrogated employees regarding the Union activities and other protected concerted activities of Yovani Castillo, and that on or about February 25, 2016, Respondent refused to reinstate Yovani Castillo to his former position of employment because Castillo had engaged in Union activities. (GC-7, Tr. 403) On January 9, 2017, the ALJ issued his Recommended Decision in this case, dismissing the Amended Complaint in its entirety.

III. FACTS

1. RESPONDENT THREATENED AND INTERROGATED EMPLOYEES, AND PROMISED THEM BENEFITS IF THEY RELINQUISHED SUPPORT FOR THE UNION

A. December 3, 2015: Manager Israel Palacios threatened Yovani Castillo and Francisco Gomez that supporting the Union was futile, and that Respondent would raise employees' salaries if they got rid of the Union.

Testimony of Francisco Gomez

On December 3, 2016, employees Yovani Castillo and Francisco Gomez' first day of employment, Manager Israel Palacios called Castillo and Gomez into Palacio's office at around 9:30 a.m.⁵ No one else was present for the meeting. Palacios began the meeting by asking the two employees if they knew what a union was. Palacios then told the workers that the union was not good for anything and he used "gross" words to describe the Union. Gomez credibly testified that Palacios then stated that Respondent's owner had said that if in October they got rid of the Union, he was willing to raise salaries and give more hours to employees. (Tr. 118) Palacios then told Castillo and Gomez that Respondent knew that only two employees at the facility still supported the Union, Diego and Domingo. (Tr. 119) Gomez also testified that Palacios stated that the Union was good for nothing and employees had to pay \$5.50 per week to the Union. Palacios also begged Gomez "not to join" the Union and "not to sign" with the Union. (Tr. 134) The meeting lasted for about half an hour to forty minutes. (Tr. 119)

Testimony of Yovani Castillo

Castillo corroborated Gomez' account of the meeting with Palacios on their first day of employment, December 3, 2015. Most importantly, Castillo testified, corroborating Gomez, that Palacios stated that in October 2016, Respondent was going to get rid of the Union and if they did, Respondent would increase employees' salaries. (Tr. 182-183)

⁵ Although Gomez and Castillo are cousins, they did not tell anyone at Respondent that they were cousins. (Tr. 147)

Castillo credibly testified about the remainder of the meeting. Castillo testified that Palacios told the workers that the Union was “shit” and that each worker had to pay \$5.40 per week to the Union. (Tr. 182) Castillo explained that Palacios discussed the fact that the union gave no benefits other than a fifteen minute break. Again corroborating Gomez and accounting for the length of the meeting, Castillo also testified that Palacios then generally explained the requirements of the job. (Tr. 183) Castillo further testified that Palacios informed the two of some of the rules of the facility. (Tr. 183-184)

Testimony of Israel Palacios

Manager Palacios admitted that he met in his office with Castillo and Gomez on their first day of employment December 3, 2016. Palacios also admitted that during this meeting, he discussed the Union. (Tr. 33) Thus, there is no dispute that the meeting between Palacios, Gomez, and Castillo took place on December 3, and that Palacios talked to the employees about the Union. Despite admitting to talking to the employees about the Union, Palacios generally denied that he threatened employees that supporting the Union was no good, that he promised employees raises if they got rid of the Union, and that he wanted to get rid of the Union by October (Tr. 378).

B. In Mid-December 2015, Manager Palacios interrogated Francisco Gomez, threatened him and Yovani Castillo with termination, instructed Gomez not to talk to Union shop steward Diego Hernandez, and promised Gomez raises and more work hours if he relinquished support for the Union.

Francisco Gomez's Testimony

The unrebutted testimony of Francisco Gomez establishes that in mid-December 2015, at approximately 10:00 a.m. to 10:30 a.m., Manager Palacios summoned him to a meeting in Palacios' office to talk to Gomez about his cousin Yovani Castillo. No one was present other than Palacios and Gomez.

Palacios started the meeting by asking Gomez whether he knew if Castillo had anything to do with the Union or if he was supporting the Union. Gomez replied that he did not know anything. (Tr. 119) Gomez' uncontradicted testimony establishes that Palacios then stated that he was going to fire Castillo because Palacios learned that Castillo supported the Union. Palacios further stated that he didn't want any more employees to support the Union because Respondent wanted to get rid of the Union.⁶ (Tr. 120)

Palacios then discussed the shop steward Diego Hernandez, stating that Gomez should not pay attention to Hernandez and should ignore Hernandez because Hernandez was going to try to talk to Gomez about the Union. (Tr. 120, 172)

Palacios discussed raises with Gomez again, telling Gomez that Respondent's owner, Magalhaes, stated that if Respondent could get rid of the Union, Magalhaes was going to increase employees' salaries and work hours. (Tr. 120)

About a half hour into this meeting between Gomez and Palacios, Magalhaes' brother and co-owner "Jose"⁷ walked into the meeting. Gomez's unrebutted testimony establishes that Jose asked Palacios if he had any issues with Gomez. Palacios replied no, but that the problem was with Yovani Castillo. Jose then told Palacios that Palacios "knew what he had to do." (Tr. 121) About two days after this meeting, Respondent fired Castillo. (Id.)

C. On February 28, 2016, Palacios again interrogated Gomez.

On February 28, 2016, Manager Palacios summoned Francisco Gomez to his personal vehicle to accompany Palacios on a trip to a store to buy supplies for the car wash. (Tr. 122) No one else was present. Gomez's unrebutted testimony establishes that during that trip, Palacios asked Gomez if he knew anything about Castillo and his involvement with the Union because the

⁶ Although Palacios testified at length about other issues, he did not testify about this meeting, nor did he testify about the comments that Gomez attributed to him.

⁷ Manager Israel Palacios testified that the owners of the car wash are brothers Fernando Magalhaes and Jose Peters.

Union had come to the car wash on the day that Respondent fired Castillo. (Tr. 122-123) Palacios then asked Gomez why the Union had come to the car wash asking about Castillo's termination if Castillo was no longer an employee of the car wash. Gomez replied that he did not know anything. (Tr. 122) Although Manager Palacios testified at length during the trial, he did not testify about this meeting, nor did he deny making the statements that Gomez attributed to him during this meeting.

Manager Palacios's Testimony

Palacios did not deny the mid-December meeting.

Contrary to the ALJ's findings, Palacios did not deny that the mid-December meeting took place, nor did he specifically deny making the unlawful statements that Gomez said he made during his mid-December 2015 meeting. Crucially, Palacios did not deny making the specific comments that Gomez alleges he made during that meeting: that Palacios interrogated Gomez about Castillo's Union support, and that Palacios said that he was going to fire Castillo because he had heard Castillo was the with the Union. Palacios only generally denied, without giving any specific dates, that he threatened any employee with termination if they supported the Union and that he instructed employees not to talk to the Union. (Tr. 89, 90)

Palacios did not deny the February 28th meeting in his car.

Palacios did not deny the meeting and interrogation that took place in his personal vehicle on February 28th Palacios did not deny that the meeting took place nor did he deny that he interrogated Francisco Gomez during this meeting about the Union activities of Yovani Castillo.

Palacios did not offer a general denial of these meetings.

The ALJ concluded from the following exchange that Palacios effectively denied having the mid-December and February 28th meetings: (ALJD 26: 17-20)

Q. Did you ever say anything to Mr. Gomez or Mr. Castillo *about the union* after you interviewed them?

A. No. The regulations are there about the union. (Tr. 381)

However, nowhere in this exchange did Palacios deny having a meeting with Gomez in mid-December or on February 28th. Similarly, Palacios did not deny interrogating Gomez about Castillo's Union activity or about having told Gomez that he was going to fire Yovani Castillo because he heard he was with the Union.

RESPONDENT UNLAWFULLY TERMINATED YOVANI CASTILLO

a. Yovani Castillo's Testimony

On Sunday, December 20th, 2015, at the end of his shift, Yovani Castillo went to check the posted schedule to see what days he was working the following week, starting on December 21, 2015. Castillo did not see his name on the schedule. (Tr. 185) Not seeing his name on the schedule, Castillo asked Palacios why his name was not on the work schedule. Castillo testified that Palacios said not to worry because it was supposed to rain on the following week on Monday, Tuesday, Wednesday, and Thursday and Palacios added that he would let Castillo know when he would work. (Id.) Palacios also told Castillo to call the car wash on Tuesday morning, December 22nd. Following instructions, Castillo called Palacios on Tuesday morning, but Palacios did not answer his phone. Eager to follow up on Palacios's instruction to contact the car wash that Tuesday, and because he could not reach Palacios by phone, Castillo sent Palacios a text message. (Tr. 186)

In Castillo's December 22nd and December 24th text messages to Palacios, Castillo Sought to Return to Work

In Castillo's first text message to Palacios on December 22nd (GC-4(a) and (b)), Castillo asked if he was going to work on December 23rd. Palacios responded no, and that Castillo should come to the car wash on Wednesday December 23rd, to pick up his paycheck. (Tr. 187) On December 23rd, accompanied by Francisco Gomez, Castillo went to the car wash to pick up his paycheck. (Tr. 190) While at the car wash getting his check, Castillo asked Palacios about whether Castillo would work the next day, December 24th. (Tr. 191)⁸ Palacios replied that either Palacios would let Castillo know or Castillo could call Palacios to inquire about whether Castillo would work on the following day, December 24th. (Tr. 191) Castillo called the car wash on December 24th to ask about whether to come to work. Assistant manager "Donald" answered the phone and put Castillo on hold. No one ever picked up the phone.

Not able to get through to Palacios by phone, at approximately 9:00 a.m. that same morning, Castillo sent another text message to Palacios at about 9:00 am on the same day, December 24th, asking whether Castillo should report to work. Palacios replied that Respondent would let Castillo know about work in the future. (Tr. 192, GC-4(b)) Palacios added that business was bad (Tr. 192, GC-4(b)) and that Respondent had a lot of employees at the moment. (Tr. 193, GC-4(b)) Castillo then asked if he would be working the following day, December 25th. (Tr. 193, GC-4(b)) Palacios replied "no," adding that Respondent was going to wait for snow to fall and if they needed Castillo, *Respondent would call him*. (Tr. 194, GC-4(b)) Castillo then asked Palacios to please let Castillo know when to return to work because he needed the job, something Castillo would repeat to Palacios later that same day. (Id.)

⁸ Respondent's witness assistant manager Donald Montezuma corroborated Castillo's assertion that he asked Palacios on 12/23 about why he wasn't working. (Tr. 277)

The December 24th audio recording shows that Palacios terminated Castillo

Shortly after their text messaging on the morning of December 24th, at approximately 10:00 a.m., Castillo called Palacios on his cell phone. Castillo's testimony and the transcription of the conversation to which Respondent stipulated, (Tr. 53, 55, 56), plainly establishes that contrary to Respondent's purported defense, Respondent fired Castillo.

Castillo: Mr. Israel, excuse me this is Yovani

Palacios: How are you boy?

Castillo: Oh, calling you about the messages that you have sent me and I understand that you told me that I am not going to work.

Palacios: Not now, because we are too much people, I have too much people. .Removing a little of snow, because you see how the weather is, the truth is that now we do not need too much people countryman. We have to wait that a little of snow comes and after that I will call you and I will let you know if we have something.

Castillo: That means I do not have to attend to work tomorrow!

Palacios: No , no not now countryman. I told you not now we have too much people. Not now countryman. I can tell you I have too much people and always for Christmas , we have snow, do you understand, for Christmas this gets straight, but the truth is, not at this time.

Castillo: Yes, but I told you I will call you and--

Palacios: No, no, if you can look for another thing, look for it my neighbor, look for it, do you understand me, because now we do not need you.

Castillo: Ah, ok because the truth is that I need the job and.

Palacios: We all have necessities, country man, but we have too much people and from where we will get the money to pay these people.

Castillo: Yes I know

Palacios: Anything, I will let you know and I will call you.

Castillo: Ok

Palacios: thanks and I am sorry

(Tr-195, GC-5)

Thus, the record evidence clearly establishes that by telling Castillo to look for other work because Respondent did not need him, Respondent terminated Castillo's employment. Furthermore, belying Respondent's purported defense that Castillo abandoned his job, the evidence establishes that Palacios never told Castillo that there was no work for him for that "moment" only, (GC-5, Tr. 195) nor did Palacios direct Castillo to call Palacios to ask for additional work. (Id.)

Castillo understood that Respondent had terminated him.

In response to the ALJ's questions, Castillo testified that after this conversation with Palacios, he understood that he was fired. (Tr. 201) **Castillo understood that Palacios had told him that there was no work for him for the future, not just for that day. (Tr. 202)** Castillo testified, in response to the ALJ's questioning:

Q. So when he said there was no work on the 24th, he also say I will call you?

A. He said that if they needed me they were going to call me, because business was bad and there was a lot of people. And if there was a lot of people and business was bad, how were they going to pay the people?

Q. What I want to know, was it just for that day or for the future?

A. I understood for the future. (Tr. 202)

Later in his testimony, Castillo reiterated that he understood that he had been terminated. Castillo testified as follows in response to the GC's questions regarding the December 25th phone conversation with Manager Palacios:

Q. What about, Mr. Castillo what was your understanding when Mr. Palacios said I'm sorry?

A. I understood that he was firing me. (Tr. 242)

b. Respondent did not have a policy regarding employees calling in for work.

Respondent argued, and the ALJ found, that there was a policy in place that employees had to call Respondent for work. (ALJD 27: 9-16) Therefore, Castillo was not terminated because it was his responsibility to call the car wash to seek work after December 24th, which he failed to do. (ALJD 27: 15-16) The evidence adduced at trial shows there was no such policy.

During his 611(c) testimony with the GC, Palacios admitted that he never called Castillo to come back to work. (Tr. 61) In an attempt to diminish this point, Palacios offered contradictory testimony, on Respondent's direct, regarding whose responsibility it is to make a call regarding finding out whether there is work on a given day. When questioned by Respondent's counsel, Palacios incredibly attempted to show that there was a policy in place that

employees always had to call Respondent to ask about their work schedules. Thus, Palacios argued that Castillo should have known to call Palacios when he did not hear from him. In response to CGC's questions, Palacios testified that, "Sometimes they come to me, sometimes I go to them. We have great communication." (Tr. 27) In response to Respondent's questioning, Palacios testified that his "duty is not to call them." (Tr. 88) He then quickly qualified that by stating, "it is their duty if they want to work, to call me. And—or if I need workers, it's my duty to call them." (Id.)

General Manager Magalhaes offered similarly contradictory testimony regarding who has the responsibility to call regarding work. Respondent's counsel asked Magalhaes if there was a strict rule regarding who should call. (Tr. 318) Magalhaes responded that, "*Most of the time it's both ways, but mainly 90% of the time it's the employees that call.*" (Tr. 319) This statement is internally inconsistent and not credible.

2. RESPONDENT'S DEFENSE IS PRETEXTUAL

Respondent argued, and the ALJ found, that Castillo was not terminated and that he had abandoned his job. (ALJD 26: 22-23) The Respondent argued, and the ALJ found, that Respondent had simply told Castillo that there was no work for him for just that "moment" and thus, the burden was on Castillo to return to the car wash to seek work. (ALJD 26: 27-51) As already discussed above, the text messages and transcript from the December 24th conversation between Castillo and Palacios show that Palacios never told Castillo that there was no work for him for just that "moment." Moreover, the documentary evidence adduced at trial shows that Respondent had plenty of work to employ Castillo which demonstrates that Respondent's claim of lack of work is pretext.

- a. ***Respondent's exhibits show that all of Respondent's workers were employed the day after Palacios told Castillo there was no work for him.***

The ALJ found that the GC had failed to offer evidence that there was sufficient work at the car wash for Yovani Castillo. (ALJD 27: 20-32) However, the record contains documentary evidence adduced at trial, which included time clock records, that show that there was plenty of work available for all of Respondent's workers.

Palacios testified that there was insufficient work for Castillo during the Christmas week. However, Respondent's punch records show that all car wash workers worked from December 25th through December 27th, and most worked on December 24th. When questioned by CGC, Palacios testified that he knew that the car wash was closed on the 22nd and 23rd because "the weekend of. Christmas is the week we do more business, most business." (Tr.41) When questioned by Respondent, Palacios' testimony changed. In response to Respondent's leading questions regarding the amount of work at the car wash during Christmas week, Palacios changed his testimony and stated that there was not a lot of business and Respondent did not need all the car wash workers to work. (Tr.79) Not only does this claim contradict his earlier testimony, but it is also not supported by Respondent's own exhibit. Exhibit R-3, which are punch records for all car wash workers for the week of December 21, 2015. Those records shows that there was plenty of work available immediately following the December 24th conversation in which Palacios claims to have told Castillo that there was insufficient work for him:

EMPLOYEE	HOURS WORKED	KEY DAYS WORKED
Jose Enrique Alonso	40	12/24- 12/27
Raul Alonso	37.08	12/24-12/27
Juan Enrique Barreno	39.47	12/24-12/27
Yovani Castillo	0	n/a
Ricardo Estrada Campos	28.30	12/25-12/27

Pedro Francisco Ortiz	37.52	12/24-12/27
Francisco Gomez	39.38	12/24-12/27
Diego Hernandez	33.35	12/24-12/27
Domingo Ixquiactap	28.11	12/24-12/27
Samuel Mensah	40.16	12/24-12/27
Jorge Torres	25.44	12/25-12/27
Santos I Tzunun Sapon	37.34	12/24-12/27
Eduardo Vasquez	36.28	12/24-12/27

These punch records show that contrary to Palacios' testimony, each and every car wash worker, (12 in total) at the facility worked December 25th through December 27th. Thus, the day after Palacios is alleged to have told Castillo there was no work for him for that "moment", Respondent's entire workforce was working.

b. Respondent's Records Show, And Respondent Admits, That It Hired Many New Workers After Castillo's Termination.

The evidence conclusively establishes that within a few weeks of terminating Yovani Castillo – while telling Castillo that Respondent did not have enough work for him - Respondent hired two new car wash workers. In that regard, Respondent's New Hire Reporting Confirmation List (Exhibit GC-6) shows that Respondent hired car wash worker Victor Garcia on December 30th and then hired Diego Echeverry on January 25th. GC-6 also shows- and Respondent admitted - that it has hired numerous car wash workers each month since Castillo's termination. (GC-6)

c. Respondent's Defense That It Did Not Fire Castillo Because His Name Remained on the Schedule After he Stopped Working

Respondent argued, and the ALJ found, that it could not have terminated Castillo because Respondent continued to put Castillo on the work schedule. (ALJD 27: 42-43) In this regard, Manager Palacios claimed that he placed Castillo on the schedule for the weeks of December 21st and December 28th. Palacios vaguely testified that he created these schedules "on a Sunday."

(Tr. 73, 74) Thus, “in his mind,” Castillo was still an employee for those weeks and had not been fired. (Tr. 73) The evidence adduced at trial shows that Palacios’ hand written schedules are not accurate. For example, Respondent’s punch records show that employee Victor Garcia was hired on December 30th (GC-11) The punch records show that Garcia worked on December 30th, from 9:00 am – 7 pm; December 31st from 7-7; January 2, 2016, from 9-7; and January 3rd, 2016, from 7-7. (GC-11) Notwithstanding all these hours of work, Garcia does not appear anywhere on the hand written schedule for the week of December 28th (R-2)

d. Contradictions and Inconsistencies in Manager Palacios’ Testimony

Much of Respondent’s defense relied upon the testimony of Manager Palacios. In this regard, a full reading of Palacios’ testimony shows that most of Palacios’ testimony was internally inconsistent and contradicted the probative record evidence. The ALJ ignored all of these inconsistencies. First, Palacios denied that he texted and phoned Castillo during Castillo’s last week at the car wash. It wasn’t until CGC confronted Palacios with text messages and an audio recording of conversations he had with that Palacios changed his testimony to admit that he in fact had *multiple* communications with Castillo about his employment at the car wash. (Tr. 37,53,55,56)

Undaunted by the fact that the text messages and audio recording between Palacios and Castillo were in evidence, (GC-4(b),5), in trying to create the defense that Respondent did not fire Castillo but instead, that Castillo abandoned his job, Palacios testified that “in the recording it said that he had to call me back and he never did.” (Tr. 58) This is simply untrue. The transcript of the phone call conclusively establishes that Palacios did not Castillo to call Palacios regarding when to return to work. (GC-5) Similarly, there is no such statement in any of the text messages. (GC-4(b))

In fashioning Respondent's defense, Palacios also claimed that there was no work available for Castillo on December 24th or December 25th (Tr. 79) The documentary evidence shows that this assertion is also untrue. Respondent's punch records, which record each time an employee punches the time clock, establish that on December 24th, every employee except three (Ricardo Estrada Campos, Jorge Torres, and Yovani Castillo), worked. On December 25th, every single car wash employee worked that day—except Castillo. (R-3) Thus, Palacios' testimony that there was insufficient work to employ Castillo on December 24th or December 25th is patently untrue.

Palacios also offered testimony that was internally inconsistent. For example, when questioned on 611(c) examination by Counsel for the General Counsel, Palacios admitted that Christmas week is when the car wash is the "most busy." (Tr. 41) Later, in response to Respondent's counsel leading questions on its direct examination, Palacios did a complete about-face – this time testifying, in contradiction to his earlier testimony - that there was not a lot of business during Christmas week. (Tr. 79)

In addition, Palacios again flip-flopped regarding whether Respondent has a policy requiring employees to call in to the car wash to ask for work or to inquire as to when they were scheduled to work. On 611(c) examination by Counsel for the General Counsel, Palacios testified that employees sometimes call him and he sometimes calls them to ascertain their work schedules. (Tr. 27) During Respondent's direct examination, Palacios tried to walk back his earlier testimony, testifying ambiguously that his "duty is not to call them." (Tr. 88) Thus, Palacios exposed his willingness to say anything that he thought would support Respondent's case.

3. JANUARY 2016, THE UNION SENT RESPONDENT A LETTER/PETITION TO PROTEST YOVANI CASTILLO'S TERMINATION

General Manager and owner Fernando Magalhaes testified that in February 2016, he received a letter from *the Union* protesting Respondent's termination of Yovani Castillo. (Tr.

332) In the Union's letter to Magalhaes, the Union requested that Respondent reinstate Castillo to his position, stating: (GC-8)

"We the undersigned, are union workers from Jomar Car Wash. We were very upset to hear reports that you and your manager have been violating the rights of union workers at Sutphin Car Wash. We would have thought that as a progressive employer, you would ensure that no workers are abused. We would never expect that you would interrogate or threaten workers, and hope that you will take all steps necessary to make sure that this does not happen. Furthermore, we ask that you immediately re-hire Yovani Castillo." (GC-8)

The letter was signed by nineteen (19) workers from nearby Jomar Car Wash.⁹

4. RESPONDENT REFUSED TO RE-HIRE CASTILLO BECAUSE HE SOUGHT THE UNION'S ASSISTANCE REGARDING HIS TERMINATION AND RESPONDENT THREATENED EMPLOYEES WITH UNSPECIFIED REPRISALS

a. February 25, 2016, General Manager Magalhaes Threatened Shop Steward Diego Hernandez With Unspecified Reprisals for protesting Yovani Castillo's Termination.

Diego Hernandez is an employee of Respondent and is the only shop steward at Respondent's facility. (Tr. 245, 246) There was another shop steward named "Santos" but he left the car wash earlier this year. (Tr. 246) Santos signed the Union letter. (GC-8)

On February 25, 2016, at approximately 4:00 p.m., owner Magalhaes called shop steward Hernandez into a meeting regarding the termination of Yovani Castillo. Present for the meeting were manager Israel Palacios, assistant manager "Donald,"¹⁰ and another worker named Enrique. (Tr. 248) Hernandez testified that Magalhaes stated that he was going to read the letter that they sent from the Union. Magalhaes then said that the Union had claimed that Respondent had fired Castillo but Respondent did not fire him. Magalhaes read the letter in English and assistant manager Donald translated in Spanish for Hernandez. (Tr. 249) The letter was signed by

⁹ Jomar is another car wash, with different owners, whose workers are represented by the Union.

¹⁰ Assistant Manager Donald testified at the hearing. His last name is Montezuma. (Tr. 268)

nineteen (19) workers from a nearby car wash called Jomar Car Wash. Hernandez testified that Magalhaes denied that Castillo was fired and insisted that Castillo had not shown up for work.

(Tr. 257)

Diego Hernandez's unrebutted testimony establishes that Magalhaes harbored animus against the Union and against employees who supported the Union. In that regard, Hernandez testified that Magalhaes demonstrated his animus toward the Union's and employees' efforts to protest Castillo's termination by stating, "Look at those people. They're messing with me. They're fucking with me, because they are making me lose my time, waste my time, because they said that we had fired that guy and we haven't really fired that guy." (Tr. 250) Hernandez testified that Magalhaes then complained about two former employees of the car wash, Santos¹¹ and Hector, for their Union activity, stating, that they were "talking and talking. .and they are being paid to do. .their job. And you know Diego, if they [referring to the Union and the workers] keep talking, talking, talking with the workers out there on the street, we're going to investigate and you're going to see what is going to happen." (Tr. 251-252) Hernandez testified that Magalhaes had said these things because he was mad that Union representative Nicolas and the two workers were speaking the truth regarding what had happened with Castillo. (Tr. 258)

Despite testifying at length, Magalhaes never denied that he told Hernandez during the February 25, 2016, meeting that if workers kept talking with the Union representatives and in protest of Castillo's termination, the employees "would see what would happen." Magalhaes only generally denied that he ever threatened employees. (Tr. 312) Thus, Hernandez' testimony that Magalhaes' threat to "see what is going to happen" if employees continued to talk to and support Castillo and the Union remains unrebutted.

b. Respondent Refused To Re-Hire Castillo

¹¹ Hernandez clarified that Santos had been a shop steward just like him. (Tr. 259)

General Manager Magalhaes admitted that he refused to re-hire Yovani Castillo at the February 25th meeting.

The evidence establishes that Magalhaes harbored animus towards the Union. In that regard, Magalhaes testified that in or around December 2015, Union representative “Nick” complained in front of employees that Magalhaes didn’t want to pay the Thanksgiving bonus. (Tr. 309) Magalhaes admitted his animus toward the Union, testifying that Nick’s discussion with employees about the bonus was a “problem” for Magalhaes because “[Nick] was accusing me of a lie. .and he was accusing me in front of the new employees.” (Tr. 311) As a result of this problem regarding the bonuses and Nick complaining in front of the employees about it, Magalhaes admitted that, “I think this is when everything started.” (Id.) Magalhaes was clearly referring to the sequence of events involving the Union that led to the current litigation.

Magalhaes’s testimony establishes that his animus toward the Union was for raising work related issues and challenging his authority. This animus was continued and was reignited when the Union protested Castillo’s termination. Magalhaes testified about the meeting that he held with shop steward Diego Hernandez in February 2016. (Tr. 323) Magalhaes admitted that the letter that the Union sent him in February 2016, stated that the Union felt that Castillo had been fired unjustly and that the Union wanted Castillo to be reinstated. (Tr. 332) In that regard, Magalhaes testified that just as in the December 2015 complaint by the Union regarding the Thanksgiving bonus, Magalhaes felt that by presenting him with the February 2016 letter protesting Castillo’s unjust termination, Magalhaes believed that the Union was treating him unfairly. (Tr. 333) Magalhaes testified as follows:

Q. But the letter was from the Union, correct?

A. Yes, it is correct.

Q. In the letter, the Union said that they felt that Yovani Castillo was fired unjustly, correct?

A. Yes, it is correct.

Q. And in the letter, the union wanted Yovani Castillo reinstated, correct?

A. Yes, it is correct. (Tr. 332)

Q. Now, when you received this letter, you thought the letter was untrue correct?

A. Yes, of course.

Q. Because in your view he wasn't fired, correct?

A. Because that was a treatment from the Union that was unfair to me, because they have witnesses from that car wash not from another car wash. (Tr. 333)

Q. Mr. Magalhaes, isn't it a fact that at no point after that meeting did you call Yovani Castillo to offer him his job back?

A. It is true. I'm not going to call him when I'm accused of doing something that I didn't do. (Tr. 335)

Regarding Respondent's refusal to reinstate Castillo despite the Union's efforts, Magalhaes admitted that his decision was motivated by animus. In that regard, Magalhaes admitted that he refused to reinstate Castillo because the Union was again "falsely accusing him." Magalhaes stated, "I'm not going to call him when I'm accused of doing something that I didn't do." (Tr. 335)

5. RESPONDENT INTERROGATED EMPLOYEES IN PREPARATION FOR TRIAL WITHOUT GIVING THEM THE ASSURANCES REQUIRED BY JOHNNIE'S POULTRY

Assistant Manager Donald Montezuma admitted that Owner Fernando Magalhaes had a meeting with employees about two weeks before the trial in which Magalhaes informed the employees that he wanted them to testify. (Tr. 293, 299, 300) Montezuma testified that the following employees were present for this meeting with Magalhaes: Henrique Berreno, Jose Alonso, Ricardo Estrada, and Eduardo Vazquez. (Tr.293-294) Montezuma testified that Magalhaes told the workers that they did not have to testify and that their participation was optional. (Tr. 294) However, Montezuma admitted that Magalhaes did not give assurances to the workers that there would be no negative consequences for testifying, regardless of how they testified. (Tr. 300) In that regard, Montezuma testified that Fernando did not give the required assurances:

Q. Did Fernando say to you, during that conversation, that there would be no .negative consequences to you, no matter how you testified?

A. No, he simply said—told us to tell the truth.

Q. Did he—but did he tell you there would be no consequences on the job? There would be no punishments?

A. Not all. It was something, how do you say it, voluntary. (Tr. 300)

Montezuma then explained that Magalhaes asked him about what happened to Yovani Castillo. Montezuma testified, “.he asked me what had happened to Yovani Castillo and I said to him. .that after December 25th he didn’t come back to work.” (Tr. 302) Montezuma then admitted that he and Manager Israel Palacios then asked the workers present about what happened to Yovani Castillo. In that regard, Montezuma testified, “.Israel [Palacios] and I, we were asking the other workers.” (Tr. 302) Finally, Montezuma admitted that he and the same employees that had met with Magalhaes, also met with Respondent’s attorney one week prior to the hearing. The group met in the attorney’s office, all together. (Tr. 303)

Employee Eduardo Vazquez also testified about the meeting with Magalhaes a few weeks prior to the hearing. Vazquez testified that Israel Palacios was present at the meeting in addition to about two other employees named “Henrique.” (Tr. 368) Vazquez testified that Magalhaes asked the employees present to testify at the trial. (Tr. 370) Vazquez testified that Magalhaes did not specifically state that the employees had the choice of whether or not they wanted to come testify. (Tr. 372)¹² In that regard, Vazquez corroborated the fact that Magalahaes had not given the required assurances:

Q. Did Mr. Fernando during this conversation tell you that you didn’t have to come and testify today?

A. Say that again?

Q. During that meeting with Fernando Magalhaes did he tell you that you didn’t have to come today if you didn’t want to?

A. No. Simply I’m going to come and tell the truth.

¹² ALJ Chu asked Vazquez whether anyone said, “you can come or you’re free not to come.” Vazquez generally and vaguely replied, “I’m free.” (Tr. 373) He did not state that Magalhaes told him that his participation was voluntary.

Q. Right, So, Fernando never specifically told you that you had the choice of whether or not to come.

A. No. (Tr. 372)

Vazquez also stated that Magalhaes never told the employees present that there would be no consequences however the employees testified. (Tr. 373) Vazquez testified:

Q. During that conversation with Mr. Fernando Magalhaes did it tell you that it didn't matter how you testified?

A. No.

Q. Did Mr. Magalhaes during this conversation say to you that there would be no consequences regardless of how you testified here today?

A. No.

Vazquez asserted that Magalhaes told him and the workers present to tell the truth, the young man [Castillo] left employment by himself. (Id.) Although Vazquez testified that Magalhaes did not ask him any questions, Vazquez was not asked whether Israel Palacios asked him and others questions about the termination of Castillo during this meeting. (Tr. 371)

Fernando Magalhaes did not testify at all about the meeting that he held with employees a few weeks before trial. Thus, Montezuma and Vazquez' testimony regarding what happened at that meeting is unrebutted.

IV. ARGUMENT

The ALJ Did Not Base His Findings of Fact and Conclusions of Law on the Credibility of Witnesses.

(Exception 3)

The ALJ's did not base his findings of fact and conclusions on credibility resolutions, despite sporadically using the term "credibility" in his Decision. Rather, the ALJ's Decision was based upon his misstating and ignoring key record evidence, on misapplying and in some instances completely ignoring Board law, and on improperly substituting his own speculation for record evidence, as will be shown below.

To the extent that it could be argued that the ALJ based any findings of fact and conclusions of law on credibility determinations, the ALJ did not make proper credibility findings. The ALJ failed to analyze the witnesses' demeanor, and failed to specify which portions of witnesses' testimony he credited and discredited. The ALJ failed to articulate a basis for any explicit or implicit credibility determinations and failed to consider and address evidence that contrasted his factual findings, including conflicts and inconsistencies in testimony. Rather, the ALJ used vague, conclusory terms in purportedly determining witnesses' credibility.

The Board's established policy is, generally, not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence convinces the Board that they are incorrect. See *Standard Dry Wall Products*, 91 NLRB 544 (1950). However, the Board has also consistently held that "where credibility resolutions are not based primarily upon demeanor. .the Board itself may proceed to an independent evaluation of credibility." *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 635 (2011), quoting *JN Ceazan Co.*, 246 NLRB 637, 638 fn 6 (1979). The Board has also overturned an ALJ's credibility findings where the findings were made in conclusory, general terms. *Id. at 635-636*. In this case, contrary to Board law, the ALJ did not base his alleged credibility resolutions on the witnesses' demeanor and the Board should overturn his findings and re-evaluate witnesses' credibility.

In this case, the ALJ concluded, without any explanation, that "Upon my close review of the testimony of Castillo and Gomez, and contrasting the same with the testimony provided by Palacios, Echeverry (whose testimony he already discredited on page 15 of the Decision) and Vasquez, I do not credit the testimony of Castillo and Gomez. " (ALJD 18: 41-45) Pursuant to the above case law, the Judge's unsubstantiated comment does not constitute a proper credibility analysis or resolution. The ALJ did not consider the witnesses' demeanor, conflicts in testimony

or address Respondent's witnesses' internally contradictory testimony. The ALJ failed to articulate a basis for crediting Respondent's witnesses over the GC's witnesses, particularly in light of the fact that he had already explicitly discredited Respondent's witness, Diego Echeverry (ALJD 15:34-35). Moreover, the ALJ ignored crucial inconsistencies and bald-faced internal contradictions in Respondent's key witness, Manager Israel Palacios,' testimony, as will be discussed in greater detail below. Thus, the ALJ's supposed credibility finding consisted of nothing more than unsupported, conclusory statements and not a full analysis of witness' demeanor and testimony.

Thus, pursuant to the above Board law, even if it could be argued that the ALJ's findings were based on credibility, the ALJ erred by failing to make proper credibility resolutions. These improper credibility determinations, any erroneous findings that flowed from them, should be overturned.

The ALJ Erred in Failing to Find that Respondent Threatened Employees With Futility and Termination, Promised Employees Benefits for Relinquishing Support for the Union, and Instructed Employees not to Speak to Union Representatives
(Exceptions 1,2,4-13, and 31)

The ALJ erred by dismissing the GC's allegations that on December 3rd Manager Israel Palacios: a) threatened discriminatees Castillo and Gomez with futility, b) threatened Gomez and Castillo with termination, c) promised the discriminatees more work hours and higher salaries if they relinquished support for the Union, and d) instructed Gomez not to speak to Union representatives. The ALJ based his decision to dismiss these allegations on a mischaracterization of and ignoring of certain record testimony and a misunderstanding and misstatement of Board law.

- a) *The ALJ erroneously dismissed 8(a)(1) allegations by misconstruing Board law and relying upon the irrelevant fact that neither Castillo nor Gomez reported Respondent's unlawful threats to the Union.*

(Exceptions 4 and 5)

In analyzing Respondent's unlawful statements, the ALJ impermissibly imposed an element that is not required under long-standing Board law. In that regard, the ALJ dismissed the 8(a)(1) allegations by improperly relying on the fact that discriminatees Castillo and Gomez did not report Respondent's unlawful statements to a Union representative and then illogically concluding that the threats never occurred. (ALJD 19:8-11) The ALJ erroneously found that the two discriminatees were Union members upon hire and speculated that they would have reported the threats to the Union had they actually occurred. (ALJD 19:5-6) The ALJ is simply wrong in fact and in law.

First, it is untrue that Castillo and Gomez became Union members upon hire. The parties' CBA clearly provides that employees do not become members of the Union until the 31st day after commencing employment. (GC-3) Thus, the ALJ's conclusion to the contrary was erroneous as was his implication that the fact that they were about to become Union members after thirty days of employment could not serve as a ground for Respondent's animus.

In any event, whether Union members or not, the Board has never required a showing that threats were communicated to others in order to find a violation. The Board does not, and has never, required that the GC prove that the discriminatee reported unlawful threats to the union (or anyone else) in order to establish an 8(a)(1) violation. The ALJ incorrectly implied that it is more likely that a threat actually occurred when the victim relayed the threat to someone else as this would show that the victim actually felt threatened and thus, would show that the threat actually occurred. Such a conclusion is incorrect because the Board has commonly held that the subjective mindset of the victim of the threat is irrelevant to the 8(a)(1) analysis. *Multi-ad Services*, 331 NLRB 1126, 1228 (2000) (cited by the ALJ); *Dorsey Trailers, Inc.*

Northumberland PA Plant, 327 NLRB 835, 851 (1999); See also *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). Thus, Board law does not require a showing that a discriminatee felt coerced enough by the threat to report the threat to someone else.

Moreover, the Board commonly finds 8(a)(1) violations where the threat is made to one single employee. See e.g; *Coronet Foods, Inc.*, 305 NLRB 79, 84 (1991) (Board upheld ALJ finding that the fact that respondent threatened only one employee did not serve to legalize Respondent's otherwise unlawful threat.) To conclude otherwise would give license to employers to unlawfully threaten and coerce employees, as long as they did so to only one employee.

b) *The ALJ Erred By Dismissing the 8(a)(1) Allegations By Misconstruing Board law and Relying upon the irrelevant fact that Respondent did not threaten additional employees. The ALJ further erred by improperly substituting his own conjecture in concluding that had Respondent threatened employees, it would have threatened more tenured workers.*

(Exceptions 6, 7, and 9)

Similarly, the ALJ improperly dismissed the 8(a)(1) allegations by relying on the fact that Respondent did not threaten employees other than Castillo and Gomez. (ALJD 19: 13-18, 34-47) Again, the ALJ has misconstrued Board law. The Board has consistently held that just because Respondent did not unlawfully retaliate against all of its workers does not compel the conclusion that Respondent did not or could not have retaliated against the named discriminatees. *Igramo Enterprise Inc.*, 351 NLRB 1337, 1339 (2007) ("That the Respondent took no action against other participants at the meeting (except for Betancourth) also is not outcome determinative, for "a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents.") Consequently, the fact that Respondent did not threaten other employees, including Respondent's employee witness Eduardo Vasquez, is entirely irrelevant to the analysis of whether Respondent threatened *Francisco Gomez* and *Yovani Castillo*. Thus, here

again the ALJ misconstrued Board law and relied on a completely irrelevant factor to dismiss the 8(a)(1) threat allegations.

The ALJ also impermissibly substituted his own speculation for record evidence. The ALJ opined that Respondent could not have made the unlawful 8(a)(1) statements to discriminatees Castillo and Gomez because, in his view, if Respondent truly wanted to threaten workers, it would have threatened more tenured workers. (ALJD 19:18-21) Thus, the ALJ speculated that Respondent could have made threats in a way that the ALJ believed would have had a more coercive and intimidating impact on employees, and therefore it must be concluded that Respondent did not make the threats. There is absolutely no basis in Board law for such a conclusion. Board law does not analyze who the object of Respondent's threats is or whether the threats were successful. *Dorsey Trailers, Inc. Northumberland PA Plant*, 327 NLRB 835, 851 (1999), supra. The test for an 8(a)(1) violation is an objective test. Thus, it was wholly improper for the ALJ to interpose his own speculation regarding whether Respondent's conduct had the greatest impact on employees since the Board does not consider the impact of 8(a)(1) threats when analyzing whether a violation has occurred. Furthermore, it was improper and constituted reversible error when the ALJ then based his decision to dismiss the 8(a)(1) allegation on his own unfounded speculation and conjecture.

c) The ALJ erroneously dismissed these 8(a)(1) allegations by ignoring Board law and relying upon the irrelevant fact that Respondent did not interrogate Francisco Gomez about his own Union activities and did not discharge Gomez. (Exceptions 12 and 28)

The ALJ continued to rely on this faulty analysis in finding that Respondent could not have threatened or interrogated the discriminatees because Respondent did not fire Francisco Gomez or interrogate him about his own Union activities. (ALJD 20: 10-14, 25-26: 49-4) Again, Board law is clear that to find a violation of the Act, the GC need not show that all pro-union

employees were retaliated against. *Igramo Enterprise Inc.*, 351 NLRB 1339, supra.

Notwithstanding this important precedent, the ALJ insisted throughout his Decision that the fact that Respondent did not retaliate against other employees, including Francisco Gomez, precludes a finding that Respondent retaliated against Yovani Castillo. This conclusion is just plain wrong.

Under Board law, the GC does not need to show that Respondent interrogated Gomez about his own Union activities or that he was discharged to prove that Respondent unlawfully interrogated employees. Logically, when confronting union support, an employer may want to simply send a message to its workforce that they could be fired for supporting the union as opposed to decimating its workforce and chose one employee to make an example of. In this case, the ALJ ignored the overwhelming evidence that Respondent believed that Castillo supported the Union, and there is no evidence that Respondent believed that Gomez supported the Union. Thus, the ALJ ignored the evidence that explained why Respondent fired Castillo and not Gomez and, instead, improperly substituted his own surmising and conjecture. The ALJ's erroneous finding should be reversed.

d) The ALJ misconstrued the record and Board law in finding that there was no evidence presented as to why Respondent believed that Castillo supported the Union and in concluding that the lack of such evidence precluded and 8(a)(1) finding.

(Exceptions 10,11, and 27)

The ALJ improperly ignored record evidence in concluding that Francisco Gomez never testified as to why Palacios believed that Castillo supported Union. (ALJD 19-20: 52-2; 25: 46-48) The ALJ reasoned that because Gomez did not explain why Palacios believed Castillo supported the Union, and because there was no evidence presented that Castillo actually supported the Union, the threats and promises of benefits could not have happened. The ALJ further concluded that Respondent therefor had no knowledge of Castillo's Union activities. Not

only is this argument illogical, it is based on a misreading of the record and General Counsel's theory of the case, and the ignoring of Board law.

Gomez did explain why Palacios thought Castillo supported the Union

The ALJ completely ignored evidence establishing that Gomez did, in fact, explain Palacios' belief of Castillo's Union activity. Gomez explained that Palacios said he had heard from others that Castillo supported the Union. In that regard, when asked what Manager Palacios said about Yovani Castillo during the mid-December meeting, Francisco Gomez clearly testified that:

- A. He said that he was going to fire him from the job *because he was told that he was supporting the Union* and that he—because he didn't want more people to be in support of the Union because what he wanted was to get rid of the Union.” (Tr. 120)

Gomez' testimony demonstrates that the ALJ erred in concluding that Gomez failed to explain why Palacios believed Castillo supported the Union. Gomez clearly testified that Palacios believed that Castillo supported the Union because Palacios “had been told” that Castillo was supporting the Union. Thus, there was no basis in the record for the ALJ to conclude that Gomez offered no explanation for why Palacios believed Castillo supported the Union and then using that conclusion to illogically dismiss the 8(a)(1) (and later 8(a)(3)) allegations.

Board law does not require that the GC prove *why* an employer believed a certain employee supported the union to find a violation of Section 8(a)(1).

In addition to this misreading of the record, the ALJ's finding is illogical and not based on Board law. Even if it were true that the record lacks an explanation for why Respondent believed Castillo supported the Union, that fact does not preclude a finding that employees were unlawfully threatened. Again, in analyzing 8(a)(1) violations, the Board does not look to the employer's motivation. *NLRB v. Gissel Packing Co.*, 395 US 575 (1969) Thus, whether the

employer was motivated by a well-founded belief regarding an employee's union activity, or a mistaken belief, the motive is completely irrelevant to the analysis of whether the employee was threatened. Rather, the Board looks exclusively to whether the remark would reasonably tend to interfere with employee rights. *Dorsey Trailers Inc.*, 327 NLRB 835, 851 (1999). Consequently, the ALJ erred in concluding that an 8(a)(1) violation could not be found because there was no evidence presented as to why Respondent thought Castillo supported Union.

The evidence adduced at trial showed that Respondent believed that Yovani Castillo engaged in Union activity.

The ALJ also misconstrued the record and Board law in concluding overall that Castillo did not engage in Union activity. (ALJD 20:2-8) The ALJ based much of his Decision on the lack of evidence of the Union activity of Yovani Castillo. However, the GC never argued that Castillo engaged in Union activity. Rather, the GC argued that 1) Respondent *believed* that Castillo supported the Union, and 2) Respondent wished to avoid Castillo joining the Union to further its plan to rid itself of the Union at the expiration of the collective bargaining agreement in October 2016.

Board law is clear that an employer's belief regarding an employee's Union activity alone is sufficient to establish that the employee engaged in union activity and that the employer had knowledge of that activity in order to find an 8(a)(1) or (3) violation. *Salisbury Hotel*, 283 NLRB 685, 686 (1987); *Metropolitan Orthopedic Associates*, 237 NLRB 427, 429 (1978). Here, the GC always maintained, and the evidence established, that Respondent *believed* that Castillo supported the Union. In addition, the record demonstrated that Respondent harbored animus towards employees joining the Union. Thus, the GC's case was predicated upon Respondent's *belief* that Castillo supported the Union and on Respondent's desire to prevent Castillo from becoming a Union member. The ALJ misconstrued the General Counsel's theory of the case and

erroneously ignored this important Board law and instead, focused his attention on the irrelevant consideration of whether or not Castillo engaged in Union activity, instead of analyzing whether Respondent believed that Castillo supported the Union

In any event, whether an employee has engaged in union or activity or not has no bearing on whether their employer could have threatened them regarding union activity. The existence of union activity is not a factor considered by the Board to find an 8(a)(1) violation. Consequently, the ALJ's reliance on this misinterpretation of the record and Board law constitutes reversible error.

- e) *The Judge erred in finding that Manager Israel Palacios denied having a meeting in mid-December with Francisco Gomez in which Palacios interrogated Gomez, threatened to terminate Yovani Castillo, and instructed Gomez not to speak to Union representatives.*
(Exceptions 2 and 31)

The General Counsel alleged that in mid-December 2015, Manager Israel Palacios called a private meeting with discriminatee Francisco Gomez to interrogate him regarding Yovani Castillo's Union support and to threaten Gomez that Respondent was going to fire Castillo because he was with the Union. The evidence establishes that during this meeting, Palacios exposed Respondent's animus toward Castillo and Respondent's plan to fire Castillo because of his perceived Union support. Specifically, the evidence showed that Palacios first asked Gomez whether Castillo supported the Union. Palacios then stated that Respondent was going to fire Castillo because Palacios had heard that Castillo supported the Union and that Respondent did not want any more employees who supported the Union because Respondent wanted to get rid of the Union. Later in the conversation, Palacios told Gomez not to speak to the shop steward, who would likely try to talk to Gomez about the Union.

The ALJ concluded that this meeting never took place for the erroneous reasons discussed above (for example, because Gomez never reported it to a Union representative), and because, according to the ALJ, Manager Palacios denied that the meeting took place. This conclusion is based on a complete mischaracterization of the record.

The record evidence establishes that despite testifying at great length, Palacios did not specifically deny that he met with Gomez in mid-December, and he did not specifically deny that he interrogated Gomez about Castillo's Union support and threatened that he was going to fire Castillo because he heard he was with the Union. The statement that the ALJ relied on to conclude that Palacios denied the mid-December meeting and the contents thereof is not a specific denial under Board law:

Q. Did you ever say anything to Mr. Gomez or Mr. Castillo *about the union* after you interviewed them?

A. No. The regulations are there about the union. (Tr. 381)

From this response, the ALJ inexplicably concluded that Palacios denied that the mid-December meeting took place and denied that he told Gomez that he was going to fire Castillo because he heard that he supported the Union. When looking at the plain language of Palacios' response, it is clear that the ALJ's conclusion is unsound and based upon a misreading of or a complete ignoring of record testimony. Palacios was never asked about the mid-December meeting, nor was he ever specifically asked if he told Gomez that he was going to fire Castillo because he had heard he supported the Union. As demonstrated by the above exchange, Respondent's counsel only asked Palacios an exceedingly general question about whether he spoke to the discriminatees about the Union. The mid-December conversation clearly concerned Yovani Castillo and the termination of Castillo--it was not specifically about the Union.

Even if it could be argued that the above response, or Palacios other general denials, somehow constituted a general denial of the mid-December meeting and the interrogation and threat Palacios made during that meeting, it is well settled Board law that a witness' general denial does not constitute a denial of specific statements attributed to that witness. In fact, the Board has upheld the conclusion that an adverse inference is warranted where a witness does not deny, or only generally denies without further specificity, certain adverse testimony from an opposing witness. *Asarco, Inc.*, 316 NLRB 636, 640 fn. 15 (1995) modified on other grounds *Asarco, Inc. v. NLRB*, 86 F.3d 1401. Thus, the ALJ erred in finding that Manager Palacios denied the mid-December meeting and that Palacios denied interrogating Gomez during that meeting and telling Gomez that he was going to fire Yovani Castillo because he had heard that he was with the Union.

The ALJ ignored the wild inconsistencies in Palacios' testimony.

Not only did the ALJ erroneously consider Manager Palacios' general denial of talking to the discriminatees about the Union in order to dismiss the 8(a)(1) allegations, the ALJ also completely ignored the pervasive inconsistencies in Palacios' testimony, which should have caused the Judge to completely discredit Palacios' testimony, including his general denials of interrogations and threats.

Manager Palacios was caught in a lie early in his trial testimony. At first, Palacios denied that he had any communications by text or by phone with discriminatee Yovani Castillo the week that Castillo was fired. However, Palacios was forced to change his testimony when confronted with print-outs of the text messages and an audio recording of the December 24th phone conversation between Palacios and Castillo during the week that Castillo was discharged. Palacios had been caught in a lie yet the ALJ ignored this crucial inconsistency.

In addition, the ALJ failed to consider any of the other myriad inconsistencies in Palacios' testimony. For example, Palacios continued to lie on the stand by claiming that he told Castillo during the December 24th recorded phone conversation that "if you want go ahead and look for something else and then later you come back, you come back. " (Tr.84). This statement "later you come back" is not anywhere in the audio recording. Thus, again, Palacios lied on the stand. The ALJ never mentioned this serious inconsistency.

Consequently, the ALJ's conclusion that Manager Palacios denied this key meeting and the unlawful statements attributed to him during the meeting is predicated on the Judge's ignoring crucial false testimony given by Palacios. The ALJ should not have credited any of Palacios' testimony. The ALJ conclusions to the contrary should be reversed.

*f) The ALJ ignored overwhelming probative record evidence in erroneously concluding that there was no evidence presented that Respondent harbored animus towards the Union.
(Exception 8)*

The ALJ erroneously concluded that the GC offered no evidence other than what he characterized as the self-serving testimony of Castillo and Gomez to establish Respondent's anti-Union animus and animus toward Castillo. (ALJD 19: 26-32) This is simply untrue. First, and foremost, as discussed above, the overwhelming evidence establishes that the testimony of Castillo and Gomez was not self-serving and was in fact credible, unrebutted, reliable testimony. Consequently, the testimony regarding the mid-December meeting where Palacios' threatened Gomez that he was going to terminate Castillo because he heard that Castillo supported the Union is strong evidence of anti-Union animus. However, this was not the only evidence of animus that the GC presented.

The GC presented employee and shop steward Diego Hernandez whose unrebutted testimony establishes that during the February 25th meeting, General Manager Fernando

Magalhaes displayed animus towards the Union through his commentary and threats. Magalhaes stated regarding the Union, “Look at those people. They’re messing with me. They’re fucking with me, because they are making me lose my time, waste my time, because they said that we had fired that guy [Castillo] and we haven’t really fired that guy.” (Tr. 250) Hernandez’s unrebutted testimony further establishes that Magalhaes went on to threaten employees with reprisals if they engaged in Union activity and protested Castillo’s termination. In discussing two former employees, Santos¹³ and Hector, Magalhaes said that they were “talking and talking. .and they are being paid to do. .their job. And you know Diego, if they [referring to the Union and the workers] keep talking, talking, talking with the workers out there on the street, we’re going to investigate and you’re going to see what is going to happen.” (Tr. 251-252)

Magalhaes, himself, admitted that Respondent harbored animus towards the Union during his sworn testimony. Magalhaes testified regarding a conflict with the Union in December 2015, stating that it was a “problem” because “[Union rep Nick] was accusing me of a lie. .and he was accusing me in front of the new employees.” (Tr. 311) Magalhaes further admitted that his animus toward the Union lingered from that time on, admitting that, “I think this is when everything started,” exposing Magalhaes’ lingering anti-Union animus. (Id.) Magalhaes is clearly referring to the sequence of events involving the Union that led to the current litigation.

Most importantly, Magalhaes also admitted that although the Union was seeking Castillo’s reinstatement, Magalhaes refused to reinstate Castillo because the Union was again, in Magalhaes’ mind, falsely accusing him (through the protected activity of protesting Castillo’s termination) in connection with Castillo’s termination and challenging Magalhaes in front of his

¹³ Hernandez clarified that Santos had been a shop steward just like him. (Tr. 259) The Union letter/petition also contains the signature of Santos Martinez.

employees. Magalhaes stated, “I’m not going to call him [back to work] when I’m accused of doing something that I didn’t do.” (Tr. 335)

Thus, shop steward Hernandez’s testimony and GM Magalhaes’s admissions conclusively demonstrate that Respondent harbored animus towards the Union and towards Castillo. The ALJ completely ignored this evidence in erroneously concluding that the GC presented no evidence of animus other than the “self-serving” testimony of Castillo and Gomez. This finding should be reversed since it is contrary to the record evidence.

The ALJ Erred in Failing to Find that on February 25, 2016, Respondent Threatened Employees with Unspecified Reprisals for Engaging in Union Activity (Exceptions 14 and 15)

The ALJ ignored crucial record testimony that showed the GM Magalhaes threatened employees with unspecified reprisals.

The ALJ erroneously dismissed the GC’s allegation that Respondent, through GM Magalhaes threatened employees with unspecified reprisals during the February 25th meeting he conducted with shop steward Hernandez, Manager Israel Palacios, Assistant Manager Donald Montezuma and employee Enrique. In dismissing this allegation, the ALJ failed to consider record testimony. The ALJ incorrectly found that Magalhaes did not engage in any conduct during this meeting that interfered with employees’ rights. The ALJ further concluded that Magalhaes’ only statement involved a comment about two employees “talking too much.” (ALJD 21:8-14)

The ALJ completely ignored shop steward Hernandez’ un rebutted testimony that Magalhaes stated that employees Hector and Santos were “talking and talking. .and they are being paid to do. .their job. And you know Diego, if they [referring to the Union and the workers] keep talking, talking, talking with the workers out there on the street, we’re going to investigate and you’re going to see what is going to happen.” (Tr. 251-252) As argued by the

GC, the “you’re going to see what happens” constitutes a threat of unspecified reprisals. Magalhaes was obviously threatening employees with adverse consequences if they continued their protected Union activity of protesting Castillo’s termination. See e.g. *Atlas Logistics Group*, 357 NLRB 353, at fn 2 (2011). Moreover, Magalhes *did not deny* making this statement. Although he testified about the meeting, Magalhaes did not address these statements the Union attributed to him. Similarly, although *both* Manager Israel Palacios and Assistant Manager Donald Montezuma, who attended the February 25th meeting, testified, neither witness testified regarding these statements. Thus, Hernandez’ testimony remains unrebutted. The ALJ’s failure to even consider Hernandez’ unrebutted testimony that Magalhaes threatened employees with reprisals if they supported the Union and protested Castillo’s discharge – and the ALJ’s failure to draw adverse inferences from Respondent’s witnesses failure to specifically deny the unlawful threats - constitutes reversible error. The Board should reverse the ALJ’s dismissal of this allegation.

The ALJ Erred in Failing to Find that on February 28th 2016, Respondent Unlawfully Interrogated Francisco Gomez (Exceptions 16-21)

Similar to his earlier improper findings, the ALJ dismissed this interrogation allegation for reasons not supported in Board law. In addition, the ALJ ignored and misconstrued record evidence.

- a. *The ALJ misconstrued Board law and relied on irrelevant factors in dismissing the allegation that on February 28th, Respondent unlawfully interrogated Francisco Gomez regarding the Union activities of Yovani Castillo (Exceptions 16-19)*

First, the ALJ found that there was no corroboration of the February 28th interrogation that took place in Manager Palacios’ car. (ALJD 22:35) This finding is completely improper

because a) there were no witnesses to the interrogation, and b) Board law does not require corroboration to prove an 8(a)(1) interrogation.

No one else was present for the interrogation.

The record was clear that the interrogation took place in Manager Palacios' personal vehicle and that only Palacios and Gomez were present in that vehicle. Thus, there could have been no corroboration. The ALJ is simply wrong on this point.

Board law does not analyze the motivation of the employer.

The ALJ's second reason for dismissing the allegation is difficult to discern. To the extent that he dismissed this allegation because the GC failed to present a witness to testify about (or corroborate) why Palacios interrogated Gomez, such an inquiry is not part of the Board's analysis of 8(a)(1) interrogations. (ALJD 22: 37-43) Again, in analyzing 8(a)(1) violations, the Board does not look to the employer's motivation. *NLRB v. Gissel Packing Co.*, 395 US 575 (1969); *American Tissue Corp.*, 336 NLRB 435, 441 (2001). Thus, under Board law it is NOT necessary for the GC to present an explanation for why the employer chose to interrogate an employee. Rather, the question is whether under the totality of the circumstances, the interrogation tends to restrain, coerce, or interfere with employees' rights. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984). This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. Clearly, Board law does not require an analysis of the employer's motivation for the interrogation.

Looking at the *Bourne* factors in connection with the February 28th interrogation, for a second time a high level Manager Palacios summoned Gomez alone into a meeting in his car to talk about Yovani Castillo. By the time of this meeting in February 2016, Castillo had already been unlawfully terminated. Thus, this meeting took place in the context of many unfair labor practices. With regard to the information sought, Palacios had no other purpose than to secure information about Castillo and the Union in order to defend against the Union's claims of unlawful discharge. Palacios had no legitimate reason for this interrogation. Finally, Gomez' response was again swift and vague, though he likely knew at that point that the Union had filed a charge on Castillo's behalf. The totality of the circumstances surrounding this interrogation clearly show it to be unlawful. The ALJ's dismissal of this allegation because evidence was not presented to corroborate why Palacios interrogated Gomez on February 28th was improper and in contravention of well-established Board law.

Board law does not require that the GC show that a victim of an interrogation reported the interrogation to the Union to find a violation.

The ALJ then again improperly found that the interrogation could not have taken place because Gomez did not report the interrogation to the Union. (ALJD 22: 45-48) As discussed earlier, Board law has never required that the GC prove that a threat or interrogation was reported to the Union, or anyone else, in order for the Board to find a violation. This is so, because, as the ALJ correctly pointed out, the 8(a)(1) test is an objective one that does not rely on whether the employee actually felt threatened or intimidated. (ALJD 22: 14-16) Consequently, because the Board does not look to whether the employee actually felt threatened, it is completely irrelevant whether the employee felt threatened enough to report the threat to someone else. Thus, the fact that threats or interrogations may not have been reported does not make it less likely that the threat or interrogation occurred as found by the ALJ.

Board law does not analyze whether the victim of an interrogation felt coerced.

The ALJ then found, contrary to his own research, that since Gomez did not *feel* intimidated or coerced, the interrogation could not have taken place. (ALJD 22: 48-50) On lines 14-16, of page 22 of the Decision, the ALJ correctly cited Board law that provides that the test for an 8(a)(1) interrogation does not hinge on whether the employee felt intimidated. Yet just a few lines later, on lines 48-50, the ALJ inexplicably found that since there was no evidence that Gomez felt coerced or intimidated, the interrogation could not have taken place. The ALJ's findings are clearly contrary to Board law and should be reversed.

The ALJ Erred By Failing to Find that Respondent Unlawfully Terminated Yovani Castillo
(Exceptions 22-41)

The ALJ completely misapprehended the GC's theory on the unlawful termination of Yovani Castillo. The ALJ incorrectly concluded that the GC failed to show that Castillo engaged in Union activity and therefore found that Castillo could not have been unlawfully terminated since there was no Union activity and consequently, no employer knowledge of Union activity. (ALJD 28: 1-3) However, the ALJ ignored the GC's theory, well supported by Board law, that Respondent terminated Castillo because it *believed* that he engaged in Union activity. Consequently, the ALJ's entire analysis of the termination of Yovani Castillo was based on the wrong legal theory and the wrong legal framework. In addition, the ALJ incorrectly found that, as argued by Respondent, that Yovani Castillo abandoned his job. This finding is in stark opposition to compelling record evidence, including text messages and an audio recording of conversations between Castillo and Manager Palacios.

- a. *The ALJ incorrectly based his decision on the wrong legal theory and legal framework.*
(Exceptions 22,23,29,30,41)

The ALJ ignored the legal theory, evidence, and case law presented that Respondent had a *belief* that Castillo engaged in Union activity, and unlawfully terminated Castillo based on that belief. By improperly dismissing Palacios' threat to Francisco Gomez that Respondent was going to fire Castillo because Palacios heard that Castillo was with the Union, the ALJ failed to consider the GC's argument that Castillo was unlawfully terminated based on Respondent's *belief* that he was "with the Union."

It is well-settled Board law that terminating an employee because of a respondent's belief that the employee engaged in protected activity is unlawful and violates Section 8(a)(3) of the Act. *Monarch Water Systems, Inc.*, 271 NLRB 558, fn. 3 (1984) (Whether employer's belief was a correct one is irrelevant. Threats made and actions taken by an employer against an employee based on the employer's belief that the employee engaged in or intended to engage in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity.) *Bo-Ty Plus, Inc.*, 334 NLRB 523, 528 (2001); *Hamilton Avnet Electronics*, 240 NLRB 781, 791 (1979) (employer mistakenly believed that employee was part of a group of employees at the forefront of organizing activity; her discharge was unlawful even though she engaged in no union activity); *Metropolitan Orthopedic Assn.*, 237 NLRB 427, 427 fn. 3 (1978) ("The discharge of four employees because of Respondent's belief, albeit mistaken, that the[y] had engaged in protected concerted activities is an unfair labor practice which goes to the very heart of the Act").

The ALJ failed to consider any of this precedent and instead analyzed Castillo's termination under a traditional *Wright Line* analysis. The ALJ was simply wrong. Since the ALJ analyzed

the wrong legal theory under the wrong legal framework his dismissal of the Castillo termination allegation should be reversed.

*b. The ALJ dismissed and ignored record evidence that demonstrated that Respondent held a belief that Yovani Castillo engaged in Union activity.
(Exceptions 29,30, 31)*

The ALJ incorrectly dismissed the most compelling evidence establishing Respondent's belief that Castillo supported the Union. In that regard, the ALJ dismissed Gomez's credible testimony that Manager Palacios said that Respondent was going to fire Castillo because he heard that Castillo supported the Union. As already argued, the dismissal was improper as it was based on a mischaracterization of record evidence and a misunderstanding of Board law.

This error was already addressed above on pages 29-30 of this Brief. To summarize, the record is clear that Manager Palacios did not deny meeting with Francisco Gomez in mid-December. Nor did Palacios ever specifically deny telling Gomez that he was going fire Yovani Castillo because he had heard that Castillo was with the Union. Thus, Francisco Gomez' testimony that Palacios stated Respondent was going to fire Castillo because he supported the Union remains unrebutted.

The dismissal of this mid-December threat was also improper because it was based on a misunderstanding of Board law. For example, the ALJ found that the meeting did not take place because there was no evidence presented that Gomez told the Union about the threats lodged during that meeting. Board law does not require a showing that the victim of a threat must report the threat to the Union in order to find an 8(a)(1) violation. Thus, the ALJ should have found that Manager Palacios told Gomez that he was going fire Castillo because he heard that Castillo supported the Union. The ALJ then should have concluded, based on long-standing Board law, that Respondent held a belief that Castillo supported the Union, and fired Castillo based on that belief in violation of Section 8(a)(3) of the Act.

In addition, the ALJ erroneously concluded that the fact that Castillo was about to become a member of the Union could not be considered union activity because Gomez was also going to become a Union member and he was not terminated. (ALJD 26: 5-9) As noted earlier in this Brief, the Board has held that the mere fact that Respondent chose not to retaliate against other employees that may support a union does not mean that Respondent did not unlawfully retaliate against the employee at issue. *Igramo Enterprise Inc.*, 351 NLRB 1337, 1339 (2007) Thus, the fact that Gomez was not discharged is completely irrelevant to the analysis of whether Castillo was unlawfully terminated. The Judge's reliance on Respondent not also firing Gomez when analyzing Castillo's discharge was reversible error.

The fact that Respondent did not retaliate against Gomez is completely irrelevant, particularly in light of the fact that Respondent obviously did not believe that Gomez supported the Union and likely did not believe Gomez would pose the same risk as Castillo towards Respondent's stated goal of getting rid of the Union upon the expiration of the CBA. The ALJ's conclusion to the contrary is erroneous and should be reversed.

c. The ALJ incorrectly found that Castillo's termination was not based on any anti-Union animus.

(Exceptions 24-26)

The ALJ illogically concluded that Castillo's termination was not based on any anti-Union animus because there was no evidence presented of 8(a)(1) violations that occurred contemporaneous to Castillo's termination to establish animus and, by extension, pretext. (ALJD 25: 26-35) This finding is incorrect on a number of levels.

The ALJ ignored evidence of animus found in the record.

First, as already discussed in connection with Exception number seven beginning on page 32 of this Brief, the ALJ ignored evidence of animus found in the record. To summarize, the ALJ ignored the testimony of shop steward Diego Hernandez which established that GM Magalhaes threatened employees that they would “see what is going to happen” if they kept protesting Castillo’s termination, and the ALJ ignored admissions made GM Magalhaes that the Union had accused him of lies in the past and that Magalhaes would not reinstate Castillo because the Union was again accusing him of a lie. This commentary shows Magalhaes’ frustration with the Union and their efforts to advocate on behalf of Yovani Castillo. In fact, Magalhaes was so frustrated that he threatened Diego Hernandez that “you’re going to see what is going happen” if the Union and the workers kept protesting the termination of Castillo. Such commentary that excoriates the Union and employee Union members and their efforts to help a fellow member clearly constitutes evidence of anti-Union animus. In his admissions, Magalhaes shows that he has problems with Union representative Nick and the Union. In fact, these problems were so troubling that Magalhaes refused to reinstate Castillo because he was so upset that the Union was again accusing him of something that he had not done. Thus, contrary to the ALJ’s findings the record contains ample evidence of anti-union animus that the ALJ completely ignored, including crucial Respondent admissions.

The ALJ improperly dismissed the myriad 8(a)(1) violations that demonstrate animus.

Secondly, the ALJ is incorrect that there was no evidence presented that Respondent engaged in contemporaneous 8(a)(1) violations. As discussed at length above, the ALJ improperly dismissed the interrogation allegations, threat allegations, promise of benefits allegation, and the instruction not to talk to Union representatives. The dismissal of these allegations was based on improper factors not found in Board law such as the fact that the threats

and interrogations were not corroborated when no other employees were present, and the fact that the victims of the interrogations and threats did not report the violations to the Union. Thus, the record is actually replete with evidence of numerous contemporaneous 8(a)(1) violations.

The ALJ ignored the evidence of animus demonstrated by Manager Palacios' statements by the evidence of Respondent's disparate treatment of Castillo.

Third, the ALJ misconstrued Board law in finding that the only way to prove Respondent's pre-textual discriminatory motivation is through contemporaneous 8(a)(1) violations. The Board has long held that the existence of 8(a)(1) violations, or other unfair labor practice violations, is just *one* factor to consider when analyzing whether Respondent had a discriminatory motive. Animus can be shown by, among other things, the presence of other unfair labor practices (*Mid-Mountain Foods, Inc.*, 332 NLRB 251, 251 fn.2, 260 (2000), *enfd.* 11 Fed.Appx. 372 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534, 534 (1993); statements and actions showing the employer's general and specific animus; (*Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999); disparate treatment (*Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).; and evidence demonstrating that an employer's proffered explanation for the adverse action is a pretext *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998). Finally, the Board will infer animus where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive." *J.S. Troup Electric*, 344 NLRB 1009 (2005). Thus, the ALJ was simply wrong on the law. Discriminatory motive in this case could be established by factors other than contemporaneous 8(a)(1) violations.

Based upon the above case law, the GC argued that animus, or discriminatory motive, is established in this case not only by the contemporaneous 8(a)(1) violations but also by Respondent's specific animus statements and the disparate treatment of Yovani Castillo. The un rebutted testimony of Francisco Gomez shows that in mid-December 2015, Manager Palacios

told Gomez that he had to fire Castillo because he supported the Union. Palacios also stated that he did not want any more employees to support the Union because he wanted to get rid of the Union. (Tr. 120) In addition, the unrebutted testimony of Gomez establishes that Palacios harbored animus towards employees actually joining the Union. Gomez credibly testified that Palacios told him on December 3, 2015, that he did not want Gomez to join the Union or sign with the Union. (Tr. 134) Palacios did not deny making these statements.

Furthermore, Respondent's punch records, which show employees' time clock punches for each day, demonstrate that Respondent treated Yovani Castillo disparately from all other employees, which also supports a finding of unlawful animus. Although Manager Palacios argued that there was no work for Castillo for just December 24th and December 25th, and that Castillo therefore should have known to call Palacios back to return to work, the record evidence does not support this argument. Respondent's time records irrefutably show that all but two car wash workers (and Yovani Castillo) worked on December 24th. The records also show that every single car wash employee worked from December 25th through December 27th, demonstrating that Respondent actually had plenty of work for all employees except Yovani Castillo, contrary to Manager Palacios' testimony.

In arguing that Castillo was not terminated, Palacios asserted that when he told Castillo that they "did not need him," that "business was bad," and that "you should find another job," he only meant that there was no work for Castillo for those two days or that "moment," December 24th and December 25th. Clearly, the documentary evidence does not support this claim. Rather, the punch records show that there was sufficient work for all employees at the time that Palacios claims he told Castillo there was no work for him for that moment which leads to the inescapable conclusion that Respondent singled out Castillo and told him there was no work for him because

Respondent believed he supported the Union. Pursuant to *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999), animus is also established by this evidence of disparate treatment. However, the ALJ completely ignored this compelling evidence.

- d. *The ALJ ignored compelling record evidence and Board law in finding that Yovani Castillo abandoned his position with Respondent.*
(Exceptions 32-40)

The ALJ ignored Board law.

The ALJ found that Yovani Castillo was not discharged and that he simply “for whatever reason” did not return to the car wash. (ALJD 26: 22-23) The ALJ made this finding in the face of compelling evidence to the contrary and without considering Board law that governs analyses of whether an employee has been discharged.

The Board has summarized the applicable legal principles in disputes that involve whether an employee has been discharged. In *North American Dismantling Corp.*, 331 NLRB 1557 (2000), the Board stated: “The Board has held that the fact of discharge does not depend on the use of formal words of firing. *Hale Mfg. Co.*, 228 NLRB 10, 13 (1977), *enfd.* 570 F.2d 705 (8th Cir. 1978). It is sufficient if the words or action of the employer “would logically lead a prudent person to believe his [her] tenure has been terminated.” *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964).” The Board elaborated upon its analysis of disputes regarding whether employees have been discharge in *In Re Kolkka*, 355 NLRB 844, 846 (2001). In that case the Board explained,

“Under this analysis, the determination of whether there was a discharge is judged from the perspective of the employees, and is based on whether the employer’s statements or conduct “would reasonably lead the employees to believe that they had been discharged.” *NLRB v. Hilton Mobile Homes*, 387 F.2d 7, 9 (8th Cir. 1967). See *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982) (“In determining whether or not a striker has been discharged, the events must be viewed through the striker’s eyes and not as the employer would have viewed them”). Moreover, the employer will be held responsible when its statements or conduct create an uncertain situation for the

affected employees. .the burden of the results of that ambiguity must fall on the employer. *North American Dismantling Corp.*, supra at fn. 4, quoting from *Brunswick Hospital Center*, supra.

The ALJ did not mention any of this crucial Board precedent anywhere in his analysis of Castillo's termination, and this failure constitutes reversible error. Had the ALJ done so, the evidence would have compelled him to find that Respondent fired Castillo.

The ALJ ignored key evidence.

Based on the above legal standard, the overwhelming credible evidence shows that Yovani Castillo was fired. The ALJ ignored the following evidence, established from the text messages and audio recording contained in the record, which includes Castillo's repeated requests to return to work, which would logically lead any prudent person to believe that he had been terminated: In mid-December 2015, Manager Palacios told Castillo that Respondent was going to fire Castillo because he supported the Union:

- 1) On December 20th, Castillo looked for his schedule for the following week, and did not see his name or any schedule posted for the following week;
- 2) On December 20th, when Castillo asked Palacios about Castillo's work schedule for the next week, Palacios told Castillo not to worry and asked Castillo to call the car wash on December 22nd;
- 3) On December 22nd, Castillo texted Palacios about returning to work. Palacios told Castillo he would not work on the 23rd and advised Castillo to come and pick up his pay check;
- 4) On December 23rd, Castillo picked up his paycheck and again asked Palacios when he could return to work; Palacios told Castillo to call the car wash on the next day, the 24th;
- 5) On December 24th, Castillo texted with Palacios, again asking when Castillo could return to work;
- 6) On December 24th, Palacios told Castillo in text messages that, "business was bad," "Respondent had a lot of employees at the moment," that Castillo was not working on the 25th, and that Respondent would call Castillo if they needed him;

- 7) Also on December 24th, Castillo called Palacios to again ask when he could return to work; Palacios replied that “Respondent had too many people,” “we do not need you,” “I will call you and let you know if we have something.
- 8) During the December 24th call” Palacios also told Castillo to look for other work, stating, “if you can look for another thing, look for it because now we do not need you.”

The language used by Palacios – culminating in Palacios advising Castillo to look for other work - was clear and would lead a reasonably prudent employee to believe that they had been discharged. Palacios unambiguously told Castillo to find another job because Respondent did not need him. There is no way to interpret this statement other than that Castillo had been fired. Even if one could argue that there was some ambiguity, which there wasn't, as discussed above, the Board has held that any ambiguity in questions of discharge should be construed against the employer. *North American Dismantling Corp.*, supra at fn. 4, quoting from *Brunswick Hospital Center*, supra. The evidence irrefutably shows that Castillo was fired, yet the ALJ ignored this evidence.

Board law does not require Respondent to state that an employee is fired in order to find that the employee was discharged.

The ALJ erroneously concluded that since there was no evidence in the record that Respondent specifically stated that Castillo was discharged, Castillo was not discharged. (ALJD 26: 24-26) This conclusion is in direct opposition to well settled Board law. As discussed above, in *North American Dismantling Corp.*, 331 NLRB 1557 (2000), the Board stated: “The Board has held that the fact of discharge does not depend on the use of formal words of firing. *Hale Mfg. Co.*, 228 NLRB 10, 13 (1977), enfd. 570 F.2d 705 (8th Cir. 1978). Rather, it is sufficient if the words or action of the employer “would logically lead a prudent person to believe his [her] tenure has been terminated.” *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964).” Consequently, the GC did not have to show that Respondent told Castillo he was discharged.

Rather, the GC had to show that Respondent's words and actions would lead a reasonable prudent person to believe that his employment had been terminated. The ALJ's entire analysis of the question of whether Castillo was fired is simply wrong and not based on Board law and should be reversed.

The record does not support the ALJ's conclusion that Respondent told Castillo there was no work for him for just that "moment."

Contrary to the record evidence, the ALJ erroneously concluded that Castillo was not discharged, but rather that he was told that there was no work for him "at that moment" and therefore, Castillo should have known to return to work at some future date. (ALJD 26:27-51, 27: 1-7) This is simply not true."

That the ALJ's conclusion that Palacios told Castillo that there was no work for him only temporarily is incorrect is made patently clear when analyzing December 24th conversation as a whole, and in the context of Castillo's efforts to return to work since December 20th. The transcript of the audio recording shows that Manager Palacios in the phone conversation with Castillo on December 24th, told Castillo he no longer had a job:

Castillo: Mr. Israel, excuse me this is Yovani

Palacios: How are you boy?

Castillo: Oh, calling you about the messages that you have sent me and I understand that you told me that I am not going to work.

Palacios: Not now, because we are too much people, I have too much people. . Removing a little of snow, because you see how the weather is, the truth is that now we do not need too much people countryman. We have to wait that a little of snow comes and after that I will call you and I will let you know if we have something.

Castillo: That means I do not have to attend to work tomorrow!

Palacios: No , no not now countryman. I told you not now we have too much people. Not now countryman. I can tell you I have too much people and always for Christmas , we have snow, do you understand, for Christmas this gets straight, but the truth is, not at this time.

Castillo: Yes, but I told you I will call you and--

Palacios: No, no, if you can look for another thing, look for it my neighbor, look for it, do you understand me, because now we do not need you.

Castillo: Ah, ok because the truth is that I need the job and.

Palacios: We all have necessities, country man, but we have too much people and from

where we will get the money to pay these people.

Castillo: Yes I know

Palacios: Anything, I will let you know and I will call you.

Castillo: Ok

Palacios: thanks and I am sorry

(Tr-195, GC-5)

(ALJD 26: 41-51) Based on this selective portion of the transcript, the ALJ concluded that because Palacios used the phrase “*now*” that this is somehow equivalent to Respondent telling Castillo that there was no work for him for just that moment. (ALJD 27:1-6)

However, a full reading of the transcript, especially when analyzed in the context of all of Castillo’s efforts to return to work from December 20th until the 24th, conclusively demonstrates that the Judge erred by concluding that Palacios did not fire Castillo. In that regard, the conversation between Castillo and Palacios on December 24th shows that the totality of Palacios’ statements to Castillo would lead a reasonably prudent person to conclude that they had been terminated, notwithstanding Palacios’ use of the word “now.”

First, Castillo made it abundantly clear that he wanted to return to work, telling Palacios, “the truth is that I need the job.” Next, after telling Castillo to look for another job, that Respondent had too many employees and didn’t know where they’d get the money to pay them, that if anything changed Palacios would let Castillo know, and that Palacios was “sorry,” any reasonably prudent person would have believed they had been terminated because their boss was telling them they were sorry but that the employee should look for another job and the boss would call them if there was work for them in the future. Common experience dictates that when a manager tells an employee to look for another job, that the supervisor will call the employee if there is work in the future, and that the manager was “sorry” that employee has been terminated. It defies common sense and experience to contend that because Palacios used the term “now” at

just one point in the conversation, that this changed the conversation from one of termination to one of a temporary layoff. The vast majority of this conversation involved Palacios conveying to Castillo how little work there was and how little money Respondent had to pay everyone and how Castillo should look for another job. Rather than analyzing any of this commentary, the ALJ inexplicably focused on the use of just one word, “now.” In so doing, he completely ignored crucial testimony.

The record does not support the ALJ’s conclusion that Castillo understood that he was not discharged.

In the face of this irrefutable, record evidence, the ALJ found that Castillo was not discharged because Castillo supposedly testified that he “understood” that there was no work for him for just that moment and thus, that he had been temporarily laid off. (ALJD 26: 27-51, 27:1-7) This is simply not true and constitutes only a partial reading of Castillo’s testimony. The ALJ focused on the following exchange only to conclude that Castillo understood there was no work for him for just that moment:

Q. During that conversation with Mr. Palacios on the 25th, did he ever use the word moment?

A. Yes. (Tr. 236)

Although Castillo claimed that Palacios used the word “moment” (which the GC, who is bilingual, argued was a mis-translation (Tr. 237)) Palacios NEVER testified that he “understood” that there was no work for him for just that moment. Rather, Castillo actually testified, repeatedly, that his understanding was that he had been fired. The ALJ completely ignored the following crucial testimony where the *ALJ himself* asked Castillo what his understanding was:

Q. So when he said there was no work on the 24th, he also say I will call you?

A. He said that if they needed me they were going to call me, because business was bad and there was a lot of people. And if there was a lot of people and business was bad, how were they going to pay the people?

Q. What I want to know, was it just for that day or for the future?

A. I understood for the future. (Tr. 202)

The ALJ also ignored the testimony that followed Castillo's comment regarding the word moment which went as follows:

Q. What about, Mr. Castillo what was your understanding when Mr. Palacios said I'm sorry?

A. I understood that he was firing me. (Tr. 242)

In light of this clear, unequivocal testimony that Castillo understood that he had been fired, it is astonishing that the ALJ concluded that Castillo understood that Respondent meant there was just no work for Castillo for that moment. This conclusion required the complete ignoring of record testimony. To that end, the ALJ found that "My finding that Castillo understood that there was no work at that moment was reflected by the text recorded earlier the same day." (ALJD 27:2-5) The ALJ then cited a text message written by Manager Palacios, and NOT Castillo, in which Palacios stated: "No, no, if you can look for another thing, look for it, my neighbor, look for it, do you understand me, because now we do not need you" to support his finding regarding Castillo's understanding. First, the commentary cited by the ALJ actually came from the audio recording and not the text messages. Second, by focusing on a statement made by Palacios, the ALJ improperly drew conclusions as to Castillo's state of mind without ever considering Castillo's testimony regarding his own state of mind. These conclusions run contrary to the evidence and Board law and should be reversed.

The ALJ ignored crucial testimony showing that Respondent did not have a policy regarding whether employees had to call Respondent for work.

In his Decision, the ALJ found that Respondent had a policy whereby "90% of the time, the worker would call to find work." Because of this policy, the ALJ concluded that the burden was on Castillo to call in for work after December 25th, since Respondent had only told him that there

was no work available for him at that moment. (ALJD 27: 9-16) This conclusion is erroneous because it is based (again) on the ignoring of the record testimony. The ALJ completely ignored testimony from Manager Israel Palacios and General Manager Magalhaes that unequivocally demonstrated that Respondent had no consistent policy regarding employees calling in for work.

In that regard, Manager Palacios testified that, “Sometimes they come to me, sometimes I go to them.” (Tr. 27) He later testified that his “duty is not to call them. .it is their duty if they want to work, to call me. And—or if I need workers, it’s my duty to call them.” (Tr. 88) Similarly, Magalhaes testified that, “*Most of the time it’s both ways*, but mainly 90% of the time it’s the employees that call.” (Tr. 319) The ALJ only cited to the second half of Magalhaes’ statement regarding the alleged policy of employees calling in for work and completely ignored Palacios’ testimony regarding the alleged policy. However, a full reading of the testimony of Magalhaes and of Manager Palacios shows that there was *no* consistent policy and that sometimes workers called in and sometimes Respondent called the workers. The ALJ’s focus on one small portion of Magalhaes’ testimony while ignoring the remainder is astonishing and constitutes reversible error.

In any event, this entire line of argument is immaterial since the written transcript of the phone conversation unequivocally shows that Manager Palacios told Castillo that ***Respondent would call him*** if there was work available.

Palacios: Anything, I will let you know and I will call you.

Castillo: Ok

Palacios: thanks and I am sorry

(Tr-195, GC-5)

The ALJ improperly ignored this crucial evidence and should be reversed on this point.

The ALJ ignored evidence, including Respondent’s punch records, that showed that Respondent had sufficient work for Castillo at the time that

it told him there was no work available and that Respondent hired new employees each month after it fired Castillo

The ALJ inexplicably found that the GC presented no evidence that there was work available for Castillo at the time that Respondent told him there was insufficient work. (ALJD 27: 20-32) This finding is contrary to the compelling documentary evidence presented by the GC that showed that Respondent not only employed its full complement of workers the day after it told Castillo there was no work for him, but that also showed that it hired new workers in each month after Castillo's termination, including in December.

As the chart on page ?? of this Brief demonstrates, contrary to Manager Palacios' testimony, each and every car wash worker at the facility worked December 25th through December 27th. Thus, the punch records show that Respondent had sufficient work for all of its workers *the day after it told Castillo "if you can look for another thing, look for it," and "we have too much people and from where will we get the money to pay these people," and "Anything, I will let you know and I will call you."* In addition, all car wash workers except Ricardo Estrada Campos, Jorge Torres, and Yovani Castillo were working on December 24th, the day of the phone conversation between Castillo and Palacios. Thus, Respondent's own records show that Palacios was lying when he told Castillo there was no work for him on December 24th and December 25th. The fact that Palacios was lying leads to the inescapable conclusion that Respondent's defense that Castillo abandoned his job is pre-textual. However, the ALJ completely ignored this evidence and did not even mention the evidence in his Decision.

Moreover, the ALJ ignored Respondent's payroll records that show that Respondent hired new employees in each month following Castillo's termination, including in the month of December. Exhibit GC-6, Respondent's "New Hire Reports" shows that Respondent hired car

wash worker Victor Garcia¹⁴ on December 30th Respondent then hired Diego Echeverry (who testified at the hearing) on January 25th GC-6 also shows, and Respondent admitted, that it has hired various car wash workers each month since Castillo's termination. (GC-6) The ALJ ignored these records that showed that Respondent hired Echeverry in late January and then hired new workers every month thereafter. These records show that Respondent had sufficient work for new employees just weeks after Manager Palacios told Castillo he would call him "if anything" opened up, yet Respondent never called Castillo back.

Combined with the above punch record evidence, these documents completely undermine Respondent's defense that it had insufficient work for Castillo, whether for just that moment or for the foreseeable future. Rather, the records show that Respondent had sufficient work for all existing workers and sufficient work to hire new workers each month after Castillo's termination. Respondent simply did not have work for Yovani Castillo because Respondent believed him to be a Union supporter.

The ALJ erred in concluding that Respondent's work schedules were reliable by ignoring record evidence showing the schedules to be inaccurate.

At trial, Respondent presented work schedules for the two weeks following Castillo's discharge to show that it continued to put Castillo's name on the work schedules because it had not fired him. (R-2) The ALJ incorrectly concluded that these work schedules were reliable because he ignored punch records that showed that the work schedules were not accurate. (ALJD 27: 45-49) Respondent's punch records show that employee Victor Garcia was hired on

¹⁴ The ALJ found, essentially, that the hiring of Garcia could not be used against Respondent because Respondent testified that it would have hired Garcia regardless of the employment of Castillo because it hired him every year between the months of December and March. (ALJD 27: 36-38) The fact that Garcia has worked for Respondent in the past does not mean that Respondent was compelled to hire him again after the termination of Castillo. The fact remains that Respondent had sufficient work on December 30th to employ Garcia regardless of whether Garcia worked for Respondent in the past.

December 30th (GC-11) The punch records show that Garcia worked on December 30th, from 9:00 am – 7 pm; December 31st from 7 am-7pm; January 2, 2016, from 9 am-7 pm; and January 3rd, 2016, from 7 am-7 pm. (GC-11) Notwithstanding all these hours of work, Garcia does not appear anywhere on the hand written schedule for the week of December 28th (R-2) Consequently, Respondent's own records show that the work schedules offered by Respondent to prove that it did not fire Castillo are not accurate. The ALJ completely ignored this evidence and argument.

The ALJ Erred in Failing to Find that Respondent Unlawfully Refused to Reinstate Yovani Castillo
(Exceptions 42-50)

In dismissing this allegation, the ALJ ignored the key evidence of the violation which consisted of an admission made by Respondent's General Manager Fernando Magalhaes that he would not reinstate Castillo because the Union and others were protesting Castillo's termination. This protest was embodied in a Union letter/petition that was sent to Magalhaes which also sought Castillo's reinstatement. The ALJ misconstrued the record in finding that the GC alleged that the Union sought Castillo's reinstatement through shop steward Diego Hernandez. (ALJD 28: 9-11) Based on this erroneous finding, the ALJ then concluded that no request for reinstatement was ever made. (ALJD 28: 33-46) The ALJ came to this conclusion by completely ignoring the testimony of Fernando Magalhaes and misquoting the testimony of shop steward Diego Hernandez.

- a. *The ALJ erroneously concluded that the GC alleged that the Union sought Castillo's reinstatement through shop steward Diego Hernandez and then concluded that there was no request to reinstate Castillo.*
(Exceptions 42 and 44)

The ALJ misconstrued the record in finding that the GC alleged that the Union sought Castillo's reinstatement through shop steward Diego Hernandez. (ALJD 28: 9-11) Based on this erroneous finding, the ALJ then concluded that no request for reinstatement was ever made. (ALJD 28: 33-46) The ALJ came to this conclusion by completely ignoring the testimony of Fernando Magalhaes. Contrary to the ALJ's finding, Magalhaes admitted that the request for Castillo's reinstatement came from the Union via the Union letter/petition. Magalhaes testified as follows:

Q. But the letter was from the Union, correct?

A. Yes, it is correct.

Q. In the letter, the Union said that they felt that Yovani Castillo was fired unjustly, correct?

A. Yes, it is correct.

Q. And in the letter, the union wanted Yovani Castillo reinstated, correct?

A. Yes, it is correct. (Tr. 332)

Q. Now, when you received this letter, you thought the letter was untrue correct?

A. Yes, of course.

Q. Because in your view he wasn't fired, correct?

A. Because that was a treatment from the Union that was unfair to me, because they have witnesses from that car wash not from another car wash. (Tr. 333)

Q. Mr. Magalhaes, isn't it a fact that at no point after that meeting did you call Yovani Castillo to offer him his job back?

A. It is true. I'm not going to call him when I'm accused of doing something that I didn't do. (Tr. 335)

Magalhaes' testimony shows that, contrary to the ALJ's findings, through the Union letter Respondent knew that the Union was seeking Castillo's reinstatement. The GC never argued that shop steward Hernandez requested Castillo's reinstatement. The ALJ was simply wrong on this point. The request was found in the Union letter that GM Magalhaes admitted he received and which he admitted in fact contained a request for the reinstatement of Yovani Castillo.

- b. *The ALJ misquoted shop steward Diego Hernandez' testimony and improperly relied on Union's counsel's objections to conclude that the letter was not sanctioned by the Union.*
(Exceptions 45-47)

The ALJ erroneously found that the Union never requested Castillo's reinstatement because the Union's letter was not a petition from the Union or sanctioned by the Union. (ALJD 29: 4-5) In drawing this conclusion, the ALJ incorrectly found that the Union asserted that the Union letter was not a petition from the Union. (ALJD 28: 49-51) The ALJ also incorrectly found that shop steward Hernandez testified that he did not even know whether the letter was from the Union. (ALJD 29:1-3)

The ALJ's finding that the Union asserted that the letter was not a petition from the Union is completely incorrect and not based on record testimony. The Union did not present any witnesses. No Union representatives testified at the trial. The only commentary that Union counsel made during the hearing had to do with the ALJ's characterization of the February 25th meeting as a "Union meeting." The Union's counsel simply pointed out, through her objection, that the meeting was not an official Union meeting. Union counsel made no other representations regarding the February 25th meeting or the Union letter. Even if she had, which she did not, Union counsel's objections do not constitute testimonial evidence. Thus, it is perplexing how the ALJ came to the conclusion that the Union asserted during the trial that the letter was never sanctioned by the Union. This finding is simply wrong and runs contrary to the record testimony.

With regard to the ALJ's conclusion that shop steward Hernandez did not even know whether the letter was from the Union, the ALJ himself confirmed that Hernandez knew that the letter came from the Union. The ALJ asked Hernandez the following:

Q. .So does he know who wrote the letter?

A. Well, the letter was sent from the Union, but I don't know who wrote it.

Q. Did you know who the letter was addressed to?

A. Yes, they sent it to the owner.

Q. To who?

A. Well, the Union.

Q. Wait, wait, wait. You said the letter was sent by the Union, correct?

A. Yes. (Tr. 256)

In the face of this testimony given to the ALJ himself, the ALJ alarmingly concluded that Hernandez testified that he did not know if the petition was a union petition. Again, the ALJ was just plain wrong: Hernandez clearly testified that he knew that the petition/letter was from the Union- he just did not know who specifically drafted it. Thus, the ALJ's findings on this point should be reversed as they are not based on the record.

*c. The ALJ substituted his own personal speculation for record evidence in concluding that the Union letter was not a Union letter.
(Exception 48)*

The ALJ erroneously found that "at most, the letter/petition was drafted by other workers without full knowledge of the particulars and based upon rumors and speculation as to what happened to Castillo." (ALJD 29:7-9) This conclusion is nothing more than speculation and not based on the record. Both shop steward Diego Hernandez and Owner Magalhaes testified that the letter/petition came from the Union- there was no dispute about this important point. While it is true that other workers signed the petition, there was no dispute that the letter originated from the Union. Both GC and Respondent's witnesses agreed on this point. Thus, the ALJ's conclusion regarding the drafting of the letter/petition was not derived from the record, but rather, from his own personal speculation. Such a finding runs contrary to the evidence and is therefore improper and should be reversed.

*d. The ALJ ignored record evidence in concluding that the GC did not show evidence that anti-Union animus motivated Respondent's refusal to reinstate Castillo.
(Exception 49)*

The ALJ improperly found that the GC failed to present evidence that animus was a motivating factor in Respondent's refusal to reinstate Castillo. (ALJD 29: 10-15) Once again, this conclusion runs contrary to the record evidence. The ALJ completely ignored the testimony of GM Magalhaes where he testified as follows:

Q. Mr. Magalhaes, isn't it a fact that at no point after that meeting did you call Yovani Castillo to offer him his job back?

A. It is true. I'm not going to call him when I'm accused of doing something that I didn't do. (Tr. 335)

In this exchange, Magalhaes admitted that it was because of the "accusations" lodged against him by the Union and others regarding Castillo's termination, that he refused to reinstate Castillo. The only accusations being lodged against Magalhaes were the Union's, and other workers,' assertions that Castillo was fired unlawfully. Thus, Magalhaes admitted that the animus he harbored towards the Union's (and others) advocacy on behalf of Castillo, precluded him from reinstating Castillo. Thus, it is untrue that the GC failed to present evidence that animus was a factor in Magalhaes' refusal to reinstate Castillo. This erroneous finding should be reversed since it is not based on a full reading of the record.

The ALJ Erred in Failing to Find that Respondent Engaged in a *Johnnie's Poultry* Violation
(Exceptions 51-62)

The ALJ found that prior to questioning employees about the termination of Yovani Castillo in preparation for trial at a meeting in June 2016, Respondent gave employees the proper assurances required under the Board's decision in *Johnnie's Poultry*.¹⁵ Consequently, the ALJ found no violation. However, in his meandering analysis of the *Johnnie's Poultry* allegation, the

¹⁵ 146 NLRB 770 (1964)(requires that an employer administer three warnings to each employee it interviews in preparation for an unfair labor practice proceeding: instruct him of "the purpose of the questioning, assure him that no reprisal will take place, and obtain his permission on a voluntary basis.")

ALJ ignored the testimony of the key witness to the violation, Assistant Manager Donald Montezuma who testified that Respondent did not give all the required assurances. The ALJ also misquoted the testimony of employee Eduardo Vazquez, who corroborated Montezuma's testimony that Respondent failed to give all the required assurances. Finally, the ALJ based his erroneous findings at first on the wrong line of Board cases, and later upon the misapplication of the proper line of Board cases.

*a. The ALJ analyzed the interrogation under the wrong legal framework.
(Exception 54)*

The evidence establishes that in early June 2016, GM Magalhaes held a meeting with a handful of employees whom he wanted to testify at the trial. Assistant Manager Donald Montezuma and employee Eduardo Vazquez testified that Magalhaes did not give the employees the assurance that there would be no reprisals to their testimony regardless of how they testified. The ALJ misapplied Board law in his analysis of this June interrogation by utilizing the *Rossmore House* and *Bourne*¹⁶ line of Board cases.

In his analysis, the ALJ first improperly discussed general threats of retaliation and Board law regarding threats of retaliation. (ALJD 29: 31-40) However, no threats of retaliation were alleged in paragraph 7(a) of the Amended Complaint. Thus, it was improper for the ALJ to consider case law regarding general threats of retaliation when analyzing the 8(a)(1) *Johnnie's Poultry* interrogation allegation.

Secondly, the ALJ incorrectly relied on Board cases regarding general interrogations in finding that Respondent did not violate Section 8(a)(1) during the June meeting utilizing the line of cases beginning with *Bourne v NLRB*, 332 F2d 47 (2d Cir. 1964), and including *Rossmore House*, 269 NLRB 1176 (1984). (ALJD 29-30: 42-2) Although the allegation at issue involves an

¹⁶ *Bourne v NLRB*, 332 F2d 47 (2d Cir. 1964); *Rossmore House*, 269 NLRB 1176 (1984)

interrogation, the allegation involved a more specific violation, to wit, Respondent's failure to give the proper assurances under *Johnnie's Poultry* prior to interrogating employees in preparation for trial. The Board has held that the *Rossmore House* line of cases is not applicable to interrogations that are alleged to violate *Johnnie's Poultry*. In *Bill Scott Oldsmobile*, 282 NLRB 1073 (1987), the Board addressed this very issue. The Board found:

" .we find our dissenting colleague's reliance on *Rossmore House* and *Sunnyvale Medical Clinic* misplaced. The longstanding exception in *Johnnie's Poultry* to the Board's usual treatment of interrogations reflects the difference between the nature and circumstances of an employer's interviewing of employees in preparation for litigation and other interrogations generally. Thus, in *Johnnie's Poultry* the Board recognized that an employer's interviewing of employees in preparation for litigation has a pronounced inhibitory effect on the exercise of Section 7 rights. Despite the inherent danger of coercion in such interviews, the Board permitted an employer to exercise the privilege of interrogating employees in limited situations without incurring 8(a)(1) liability, but established specific safeguards designed to minimize the coercive impact of such interrogations. Accordingly, we find that the nature and circumstances of employer interviews in preparation for litigation justify a more formal standard for ensuring that employees' rights are protected, and that the exception in *Johnnie's Poultry* from the Board's usual treatment of interrogations is fully warranted." At 1075

Thus, the ALJ should not have analyzed the June interrogation under the traditional *Rossmore House* analysis and line of cases. Rather, as found by the Board in *Bill Scott*, the analysis of *Johnnie's Poultry* violations is an exception to the Board's traditional totality of the circumstances analysis of interrogation allegations. Therefore, the ALJ should have analyzed the June interrogation under the test forth in *Johnnie's Poultry* only. That analysis involves a review of whether the employer implemented the following safeguards prior to interrogating employees in preparation for trial:

- (1) the purpose of the questioning must be communicated to the employee;
- (2) an assurance of no reprisal must be given;
- (3) the employee's participation must be obtained on a voluntary basis;
- (4) the questioning must take place in an atmosphere free from union animus;
- (5) the questioning itself must not be coercive in nature;
- (6) the questions must be relevant to the issues involved in the complaint;
- (7) the employee's subjective state of mind must not be probed; and

(8) the questions must not “otherwise interfere with the statutory rights of employees.”

The Board generally insists on strict compliance with the *Johnnie's Poultry* standards. *A & R Transportation Inc.*, 237 NLRB 1084 (1978), enforced in part, 601 F2d 311 (7th Cir. 1979). This list has been condensed into three key warnings- the omission of even one of the three key warnings will result in an unfair labor practice finding. See, *Bill Scott Oldsmobile*, 282 NLRB 1073, 1075 n. 6, supra (“the Board has consistently required an employer to administer three warnings to each employee it interviews in preparation for an unfair labor practice proceeding: instruct him of “the purpose of the questioning, assure him that no reprisal will take place, and obtain his permission on a voluntary basis.”)

Although the ALJ later mentions the *Johnnie's Poultry* case, he appears to have based his decision to dismiss this allegation, in part, on the wrong line of Board cases. This constitutes reversible error.

- b. *The ALJ erred in finding that the June interrogation allegation was based solely on the testimony of Eduardo Vasquez and in finding that there were GC witnesses who testified at the hearing that witnessed the interrogation.*
(Exceptions 52, 53 and 60)

Employee Eduardo Vasquez testified that GM Magalhaes did not tell employees that there would be no reprisals regardless of how they testified. The Judge dismissed the allegation, in part, based on the incorrect finding that there was no other evidence to corroborate Vasquez's testimony. (ALJD 32: 33-34) This is incorrect. In dismissing the allegation, the ALJ ignored the testimony of Assistant Manager Donald Montezuma, whom General Counsel questioned about the June interrogation. Montezuma corroborated important aspects of Vasquez' testimony about the June meeting, including that GM Magalhaes did not give assurances to the workers that there would be no negative consequences for testifying, regardless of how they testified. (Tr. 300)

Thus, it is untrue that this allegation was supported exclusively by employee Vasquez' testimony.

Though difficult to discern, the ALJ also seemed to base his dismissal of the *Johnnie's Poultry* allegation on a finding that no GC witness testified about Maghalaes' meeting with employees in June (ALJD 29: 27-29) The ALJ confusingly seems to argue that there were GC witnesses that testified at trial that could have testified about the June interrogation. This is untrue and not supported by the record. The GC did not present any witness that attended the June meeting. Rather, the testimony adduced at trial revealed that only the following employees were present for the June meeting: Henrique Berreno, Jose Alonso, Ricardo Estrada, and Eduardo Vazquez. In addition, GM Magalhaes, Manager Palacios, and Assistant Manager Donald Montezuma were also present. No witness testified that any of the GC witnesses were present at the June meeting. Thus, the ALJ erred in his drawing any adverse inferences based on his incorrect conclusion that the GC's witnesses could have testified about this meeting.

- c. *The ALJ again misconstrued Board law in concluding that because Respondent did not threaten Eduardo Vasquez, Vasquez could not have been unlawfully interrogated during the June meeting with Magalhaes. (Exception 55)*

As he did earlier in his decision, the ALJ again misconstrued Board law in finding that because there was no evidence that employee Eduardo Vasquez had been threatened on other occasions, he could not have been unlawfully interrogated at the June meeting. (ALJD 30: 15-34) This finding is illogical and not based on Board law. The analysis of a *Johnnie's Poultry* violation does not involve an analysis of whether the victim of the interrogation had previously been threatened. Rather, the analysis involves a review of whether the employer gave employees it interrogated in preparation for trial three key warnings: the employer must instruct the employee of "the purpose of the questioning, assure him that no reprisal will take place, and

obtain his permission on a voluntary basis.” *Bill Scott Oldsmobile*, 282 NLRB 1073, 1075 n. 6 (1987)

Based on this case law, it is completely irrelevant whether the victim of the interrogation had previously been threatened on other occasions. Consequently, the ALJ’s inclusion of this irrelevant factor in his analysis of the June interrogation was improper and not based on Board law.

*d. The ALJ ignored the testimony of Assistant Manager Donald Montezuma who corroborated the violation.
(Exception 57)*

The ALJ erroneously concluded that there was no evidence presented that GM Magalhaes asked employees questions about the discharge of Castillo at the June meeting. (ALJD 32: 2-3)

The ALJ again completely ignored the testimony of Assistant Manager Donald Montezuma regarding the June meeting. Montezuma, who is not an admitted supervisor, testified that Magalhaes in fact asked him about the termination of Yovani Castillo. (Tr. 302) Magalhaes questioned him about the termination of Castillo without giving him the assurance that there would be no consequences to his testimony. Montezuma testified:

Q. Did Fernando say to you, during that conversation, that there would be no negative consequences to you, no matter how you testified?

A. No, he simply said—told us to tell the truth.

Q. Did he—but did he tell you there would be no consequences on the job? There would be no punishments?

A. Not all. It was something, how do you say it, voluntary. (Tr. 300)

Thus, there is no dispute that Magalhaes questioned at least one employee about Castillo’s termination without giving all three *Johnnie’s Poultry* assurances. As noted above, the number of employees interrogated is irrelevant to the analysis. *Kyle & Stephen, Inc.*, 259 NLRB 731 (1981). The violation can be established exclusively through the testimony of Montezuma. The ALJ ignored this evidence.

Moreover, there was evidence presented that Respondent questioned the other workers present for the June meeting. In that regard, Assistant Manager Donald Montezuma explained that both he and admitted supervisor Manager Israel Palacios asked the workers present about the termination of Castillo. (Id.) Although it is true that employee Eduardo Vazquez testified that Magalhaes did not ask him any questions, Vazquez was not asked whether *Manager Palacios* asked him questions about the termination of Castillo. Thus, there was in fact evidence presented that other employees at the June meeting were interrogated about the termination of Castillo. As will be discussed below, employee Vazquez corroborated Montezuma's testimony that Magalhaes never told the workers present that there would be no consequences to their testimony. In addition, Vazquez also testified that Magalhaes never told the workers present that their participation was voluntary.

e. The ALJ ignored the testimony of Donald Montezuma and misquoted the testimony of Eduardo Vazquez in concluding that GM Magalhaes told Vazquez that it did not matter how he testified and that his participation was voluntary. (Exception 58)

The ALJ incorrectly found that employee Eduardo Vazquez testified that General Manager Magalhaes told Vazquez that it did not matter how he testified. (ALJD 32: 14-15) This finding is astonishing in light of Vazquez's clear testimony to the contrary that plainly shows that Magalhaes never said this:

Q. During that conversation with Mr. Fernando Magalhaes did he tell you that it didn't matter how you testified?

A. No.

Q: Did Mr. Magalhaes during this conversation say to you that there would be no consequences regardless of how you testified here today?

A. No.

Thus, the ALJ was wrong in his conclusion that Vazquez testified that Magalahaes said it did not matter how he testified. Consequently, the ALJ completely ignored this key evidence that

Respondent did not give employees the proper assurances prior to interrogating them in preparation for trial.

The record also shows that Assistant Manager Montezuma corroborated Magalhaes' failure to give this assurance. Montezuma testified:

Q. Did Fernando say to you, during that conversation, that there would be no .negative consequences to you, no matter how you testified?

A. No, he simply said—told us to tell the truth.

Q. Did he—but did he tell you there would be no consequences on the job? There would be no punishments?

A. Not all. It was something, how do you say it, voluntary. (Tr. 300)

It is hard to understand how the ALJ could have come to such an erroneous conclusion with such clear testimony that shows that Magalhaes never told employees that there would be no consequences to their trial testimony. The ALJ was again wrong on the record and this finding should be reversed. A full reading of the transcript testimony would have led the ALJ to the conclusion that Respondent did not give all the proper assurances under *Johnnie's Poultry* and he would have found a violation of Section 8(a)(1).

Finally, the ALJ erred in concluding that Vazquez testified that Magalhaes told him that his participation in the trial was voluntary. The ALJ ignored crucial record evidence to come to this erroneous conclusion. The ALJ completely ignored Vazquez' testimony where he unequivocally testified that Magalhaes did not tell him that his appearance at trial was voluntary:

Q. Did Mr. Fernando during this conversation tell you that you didn't have to come and testify today?

A. Say that again?

Q. During that meeting with Fernando Magalhaes did he tell you that you didn't have to come today if you didn't want to?

A. No. Simply I'm going to come and tell the truth.

Q. Right, So, Fernando never specifically told you that you had the choice of whether or not to come.

A. No. (Tr. 372)

Rather than reading Vazquez' testimony in its entirety, the ALJ cited to one exchange that the ALJ had with Vazquez to conclude that Magalhaes told Vazquez that his participation was voluntary. The ALJ cited to the portion of Vazquez' testimony where the ALJ asked Vazquez whether anyone said, "you can come or you're free not to come." Vazquez generally and vaguely replied, "I'm free." (Tr. 373) Nowhere in this short exchange did Vazquez testify that Magalhaes *told him* he was free not to come to testify which is the key inquiry to the *Johnnie's Poultry* analysis. Rather, Vazquez only vaguely testified that he was "free." The ALJ chose to completely ignore Vazquez' prior testimony where he clearly testified that he was NOT told that his participation was voluntary. Rather, the ALJ seized upon one small, extremely vague portion of Vazquez' testimony to draw his conclusion. Since the conclusion is not based on a full reading of the testimony, it is improper and should be reversed.

VII. CONCLUSION

Based on the entire record, a preponderance of the credible, probative evidence conclusively supports each allegation in the Amended Complaint which alleged that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by threatening employees that supporting the Union was futile, promising employees raises and additional work hours if they ousted the Union, threatening employees with termination if they supported the Union, interrogating employees about the Union activities of co-workers, including about Yovani Castillo, threatening employees with unspecified reprisals for engaging in Union activities, terminating the employment of Yovani Castillo because of his support for the Union, and that on or about February 25, 2016, Respondent refused to reinstate Yovani Castillo to his former position of employment because Castillo had engaged in Union activities. Therefore, the General Counsel urges that the Board sustain the General Counsel's Exceptions in their entirety, reverse the ALJ's

findings of fact and conclusions of law. The General Counsel further urges that the Board order Respondent to cease and desist from engaging in the above conduct, and that Respondent reinstate Yovani Castillo to his former position of employment, make Castillo whole for all lost earnings, benefits, and for all search-for-work and related expenses and consequential damages that Castillo may have incurred as a result of Respondent's unlawful termination,¹⁷ and that Respondent post appropriate Notices to Employees in which Respondent assures employees of their Section 7 rights, as well as any other remedy the Board deems appropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Emily A. Cabrera", with a long horizontal flourish extending to the right.

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DATED AT Brooklyn, New York March 6, 2017.

¹⁷ The Counsel for the General Counsel reiterates its request and argument made in its Brief to the ALJ, at pages 55-60, for all remedies, including reimbursement for consequential damages.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**JAMAICA CAR WASH CORP. D/B/A
SUTPHIN CAR WASH**

and

Case No. 29-CA-169069

**RETAIL, WHOLESALE, &
DEPARTMENT STORE UNION
(RWDSU)**

Date of Emailing: March 6, 2017

STATEMENT OF SERVICE OF: Exceptions to the Administrative Law Judge's Decision and Brief in Support

I, the undersigned employee of the National Labor Relations Board, hereby state, under penalty of perjury that, in according with NLRB Rules & Regulations § 102.114(i), a copy of the foregoing was sent to each party at the addresses listed below and on the date indicated above:

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