

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

ARBOR RECYCLING/ARBOR LITE LOGISITICS,
A SINGLE EMPLOYER

AND

Case Nos. 02-CA-180470; 02-CA-186760;
02-CA-186930; 02-CA-188504;
02-CA-195794

AMALGAMATED LOCAL 1931

**GENERAL COUNSEL'S POST HEARING BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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I.PROCEDUAL HISTORY

On July 19, 2016, Amalgamated Local 1931, herein the Union, filed Case No 2-CA-180470 alleging, in part, that Arbor Recycling, herein Respondent Arbor Recycling and Arbor Lite Logistics, herein Respondent Arbor Lite, as a Single Employer, collectively referred to as Respondent, violated Section 8(a)(1), (3) and (5) of the Act by engaging in the surveillance of its employees' protected and Union activities; by interrogating employees about their Union activities and by threatening to retaliate against employees because they supported the Union (G.C. Exh. 1(A)).

On October 24, 2016, the Union filed Case No 2-CA-186760, alleging that Respondent violated Section 8(a)(1) and (3) of the Act by interrogating employees about their protected and concerted activities and by discharging employees for engaging in protected concerted activities (G.C.Exh. 1(C)). Case 2-CA-186930 was filed by the Union on October 25, 2016. In that charge, the Union alleged that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Jose Luis Urbaez because of his Union activities; by threatening to retaliate against employees because of their support for the Union, by engaging in the surveillance of employees' union activities and by interrogating employees about their union activities (G.C.Exh. 1(E)).

On November 18, 2016, the Union filed the initial charge in Case 2-CA-188504, alleging that Respondent violated Section 8(a)(1) of the Act by threatening employees with retaliation because of their union activities; by engaging in the surveillance of employees' union activities and by interrogating employees about their support for the Union (G.C.Exh.(G)). On December 14, 2016, the Union amended Case 2-CA-188504 to allege, in part, that Respondent violated Section 8(a)(1) of the Act by threatening to lower wages and hours if employees supported the Union (G.C.Exh 1(I)).

On February 27, 2017, the Regional Director for Region 2, issued an Order Consolidating Case, Consolidated Complaint and Notice of Hearing in Case Nos 2-CA-180470;2-CA-186760; 2-CA_186930; and 2-CA-188504 (G.C.Exh. 1(M)). The Consolidated Complaint alleged Respondent as a single employer and that Respondent violated Section 8(a)(1) of the Act by engaging in the surveillance of employees' union activities; by threatening employees with the loss of wages and hours because of their support for the Union; by threatening employees with discharge because of their support for the Union; by threatening employees with unspecified reprisals because of their support for the Union and by interrogating employees about their support for the Union (G.C.Exh. M)). The Consolidated Complaint further alleged that Respondent violated Section 8(a)(3) of the Act by discharging Joel Espinosa Almonte (herein Almonte); Rafael Rosario Guance (herein Guance) and Jose Luis Urbaez (herein Urbaez) because of their support for and activities on behalf of the Union (G.C.Exh. 1(M)). On March 13, 2017, Respondent, by Counsel, Alan Model, filed an Answer to the Region's Consolidated Complaint (G.C.Exh. 1(O)), denying the allegations set forth in the Consolidated Complaint.

The Union filed Case No. 2-CA-195794 on March 27, 2017. This charge alleges, in part, that Respondent violated Section 8(a)(1) of the Act by instructing employees to sign a petition revoking their support for the Union (G.C.Exh. 1(K)).

On May 2, 2017, the Regional Director for Region 2 issued an Order Further Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (G.C.Exh. 1(P)). The Amended Consolidated Complaint alleged Rocco Mongelli, a Respondent Facility Manager as a supervisor within the meaning of Section 2(11) of the Act (G.C.Exh. 1(P)); an additional threat of discharge; the proper name for Wellington Mercado, herein Mercado; and that Respondent violated Section 8(a)(1) of the Act by instructing employees to sign a petition

revoking their support for the Union (G.C.Exh. 1(P)). On May 10, 2017, Respondent filed an Answer to the Amended Consolidated Complaint, denying all allegations (G.C.Exh. 1(R)).

On May 17, 2017, General Counsel filed a Notice of Motion to Amend the Amended Consolidated Complaint to change the name Gleison (LNU) in paragraph 7(b) of the Amended Consolidated Complaint to Glecio (LNU) and to change the name Ed Martindale in paragraph 11 of the Amended Consolidated Complaint to Glecio (LNU) (G.C.Exh. 1(X)). On May 18, 2017, General Counsel filed another Notice to Amend to include the allegation in paragraph 11 of the Amended Consolidated Complaint that Respondent, by David Vega, herein Vega, engaged in the surveillance of employees' Union activities and to include a remedy paragraph (G.C.Exh 1 (W)).

The trial in this matter was held before Administrative Law Judge (ALJ) Kenneth Chu from May 22 through May 24 and July 13, 2017. At trial, General Counsel moved to amend the Amended Consolidated Complaint as set forth in its Notices of Motion to Amend (Tr. 6-7). These Motions were accepted by the ALJ (Tr. 6-7). Also, at trial, General Counsel and Respondent were able to reach the following stipulations: that Respondent constitutes a single employer within the meaning of the Act (Tr. 9); that Ralph Martucci, herein Martucci; Richard Rogich, herein Rogich; Ed Martindale, herein Martindale; DavidVallejo, herein Vallejo; Sammy Lopez, herein Lopez; Wellington Mercado, herein Mercado and Rocco Mongelli, herein Mongelli are supervisors and agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act (Tr. 10-11); and that David Vega, herein Vega, is an agent of Respondent within the meaning of Section 2(13) of the Act (Tr. 10-11). On May 24, 2017, General Counsel withdrew Almonte from paragraph 13(a) of the Amended Consolidated Complaint (Tr. 387).

I. ISSUES

1. Is Glecio Rodriquez DaSilva, herein Da Silva, an agent of Respondent within the meaning of Section 2(13) of the Act?
2. Did Respondent violate Section 8(a)(1) of the Act by engaging in the surveillance of employees' union activities, by threatening employees with unspecified reprisals because of their Union activities and support for the Union; by interrogating employees about their support for the Union; by threatening employees with discharge because of their support for and activities on behalf of the Union; by threatening the reduction in wages if employees support the Union and by instructing employees to sign a petition revoking their support for the Union?
3. Did Respondent violate Section 8(a)(1) and (3) by discharging Guance and Urbaez because of their support for and activities on behalf of the Union?
4. Are the remedies sought by the General Counsel appropriate?

III. FACTS

A. Respondent's Business Operations

Respondent is engaged in the operation of recycling and transporting plastic materials in the Bronx and Bayshore New York. The Bronx facilities are located at 1111 and 1120 Grinnell Place and Respondent's Bayshore facility is located at 135 Pine Aire Drive¹ (G.C.Exh 1(M, R)). Annually, Respondent derives gross revenues in excess of \$50,000 from picking up and processing recyclable materials directly from customers located outside the State of New York. Respondent Arbor Recycling and Respondent Arbor Lite have been affiliated business enterprises with common officers, ownership, directors, management and supervision, have formulated and administered a common labor policy; have shared common premises and facilities, have interrelated operations in the collection, transporting and recycling plastic materials (Tr. 9). At all material times, Respondent Arbor Recycling and Respondent Arbor Lite have been a single employer engaged in commerce within the meaning of Section 2(2), 2(6), and (7) of the Act (Tr. 9).

Ralph Martucci, herein Martucci, has owned Arbor recycling and Arbor Lite since in or about 2000 and is currently the President of both companies (Tr. 25, 26). Richard Rogich, herein Rogich, has been Respondent General Manager and Ed Martindale, herein Martindale, has been Respondent Manager (Tr. 10-11). David Vallejo, herein Vallejo, has been Respondent's Dispatch Manager and Supervisor at the Bronx facility and David Vega, herein Vega, has been Vallejo's assistant and an Agent of Respondent (Tr. 11). Respondent's Facility

¹ The transcript incorrectly identifies the address for Respondent's Bayshore facility as "Pioneer." The correct address is Pine Aire, as admitted by Respondent in its Answer (G.C.Exh.1(R)).

Managers in the Bronx are Wellington Mercado², herein Mercado and Sammy Lopez, herein Lopez, and Rocco Mongelli, herein Mongelli is the Manager at Respondent's Bayshore facility(Tr. 10-11).

During relevant times, herein, Glecio Rodriquez Da Silva, herein Da Silva³, was a salaried employee, who supervised employees work, approved time off for employees and assigned work to employees (Tr. 76, G.C.Exh 23). For example, he ordered employees to empty bags, sweep, clean, and turn on machines (Tr. 76, 277). Da Silva also told the drivers where to park their trucks and recorded the bags of plastic and aluminum the drivers returned to Respondent's warehouse (Tr. 277, 278). Da Silva was not included by Respondent as a bargaining unit employee during the processing of the Union's representation petition in Case No 02-RC-180977(G.C. Exh. 24).

Respondent employs drivers, driver helpers, mechanics and warehouse employees. In the Bronx, there are 15 drivers and 10 driver helpers, one mechanic and approximately 18 warehouse employees (Tr. 29-32). At its Bayshore facility, Respondent employs approximately eight drivers, four driver helpers and 12 warehouse employees (Tr. 30, 32). The Bayshore facility does not employ a mechanic (Tr. 33). The driver and driver helpers collect and transport recyclable materials to Respondent's facilities and the warehouse employees break down the recycled materials. At Respondent's Bronx facility, the warehouse employees work either the morning shift from 7AM to 4PM or the evening shift from 2PM and until 11PM (Tr. 33-34). Due

² At trial, Wellington Mercado was also referred to as "Wellington" and "Martinez."

³ Although General Counsel Amended the Amended Consolidated Complaint to reflect Da Silva's name as "Gleccio," Respondent at trial initially represented that his name was "Hinder Brando Souto" (Tr.7). However, Respondent records show that this individual is Glecio Rodriquez Da Silva (G.C. Exh. 23, 24).

to the fact that Respondent's Bronx operation encompasses two buildings that are across the street from one another, employees and managers move between both buildings (Tr. 27, 444).

B. Local 1931's Organizing Campaign

In early June 2016, the Union began to organize the drivers, driver helpers, mechanics and warehouse employees employed by Respondent at its Bronx and Bayshore facilities. (Tr 296). Union President Cosmo Lubrano, herein Lubrano, and Union Vice President Charlie Clemenza, herein Clemenza, went to Respondent's Bronx facility and spoke to employees about the benefits of the Union. On July 18, 19 and 25, 2016, the Union continued their organizing efforts and returned to Respondent's Bronx facility.

1. Union's July 18 Visit

On July 18, 2016, Lubrano accompanied by Clemenza; Union Secretary Treasurer of the Eastern States Joint Board and Local 298 Joseph Giavenco, herein Giavenco; and Union Organizers Mike Aviles, herein Aviles, Detores Jackson, herein Jackson, Fernando Vidal, herein Vidal, and Nora Roa, herein Roa, visited Respondent's Bronx facility from 6AM-3PM (Tr. 301) . They stood on the corner of Grinnell Place and Garrison, which is down the block from Respondent's Bronx facility. There, the Union Representatives spoke to employees about the Union and gave out Union cards. While employees were speaking to the Union Representatives and signing Union cards, Facility Managers Lopez and Da Silva approached the group and stood by them watching (Tr. 302 G.C.Exh 3). During the same visit, Respondent Facility Manager Martindale confiscated a Union sign posted on a telephone pole (Tr. 306). Although the Police showed up during the Union's visit, the Police told Lubrano that there was nothing wrong with

the Union being on the corner (Tr. 372). This was the only time the Police were called during the Union's campaign (Tr. 373).

2. Union's July 19 Visit

The Union returned to Respondent's Bronx facility on July 19, 2016 between 6-7AM. This time, Lubrano was joined by Union Representatives James Vogt, herein Vogt, Aviles, and Giavenco (Tr. 49, 310, 313, 319). While the Union Representatives stood on the street in front of Respondent's Bronx facility, Respondent Agent Vega stood in an open bay videotaping Lubrano and two other Union representatives talking to a driver, Franklin (Tr. 52, 310, 381 G.C.Exh 9, 20).

3. Union's July 25 visit

On July 25, 2016 at around 8 PM, Lubrano, Vogt and Aviles went to Respondent's Bronx facility to speak to warehouse employees working the evening shift (Tr. 52,322). This time, the Union set up a table to serve sandwiches and drinks to the employees. The table was set up on the sidewalk about 5-10 feet to the left of Respondent's driveway at 1120 Grinnell Place where employees have an already established lunch area (Tr. 323, 373; G.C.Exhs 10, 26). The table did not block Respondent's driveway or operation (G.C.Exh 26). While employees ate sandwiches and talked to Union Representatives, Respondent Night Facility Manager Mercado video-taped them (Tr. 323-326; 373, G.C.Exhs. 10, 26).

C Guance's Discharge

Guance started working for Respondent at its Bronx facility in August 2015 as a warehouse employee and in August 2016 (Tr. 76), he became a driver's helper (Tr. 77). In or

about August 2016, Guance spoke with Union Representative Aviles on the corner of Grinnell and Garrison about the benefits of a union (Tr. 77,79). Aviles gave Guance a Union card, which he did not sign at that time (Tr. 80). While Guance was speaking to Aviles, Respondent Agent Vega stood about 20 feet away watching Guance and Aviles. Vega was standing on Respondent's driveway at 1111 Grinnell Place smoking a cigarette⁴ (Tr. 80-8; 1212). Although Vega smokes cigarettes regularly, this was not his usual smoking area (Tr. 82). When Guance walked passed Vega on his way to work, Vega looked at Guance with an accusatory face (Tr. 130). Later that day, at work, Guance spoke to fellow employees about the working conditions at work. They talked about the unclean bathrooms and the lack of paid vacations (Tr. 86). Vega showed up while the employees and Guance were talking and told them that they should be careful in signing a Union card (Tr. 89) In the evening, while at home, Guance signed the Union card and mailed it to the Union.⁵

About four to five days later, in front of Respondent Dispatch Manager Vallejo's office at Respondent's Bronx facility, Vega again approached Guance and told him that he should be careful signing a Union card because that could cause problems with the Company (Tr. 88).⁶

In late August 2016, Guance went to Vallejo's office in order to ask him a question about an invoice. While there, Vallejo asked Guance if he signed a Union card (Tr 90). Guance said, "yes" and Vallejo said, "OK." (Tr. 90).⁷

⁴ At trial, Respondent Counsel asked Vega whether or not he was smoking a cigarette across the street when Guance was talking to the Union. Vega said that he has "never seen [Guance] speak to the Union (Tr. 522).

⁵ Although Guance testified that he mailed his signed Union card to the Union, Lubrano testified that the Union did not have Guance's signed card (Tr 341).

⁶ At trial, Respondent Counsel asked Vega if he spoke to Guance about the Union or signing a card (Tr. 522). Vega said that he never said "anything" to Guance about signing a Union card." (Tr. 522). Respondent Counsel also asked him whether or not he told Guance to be careful signing a Union card (Tr. 522). Vega said that he never had a conversation with Guance about the Union or about signing a union card or "anything like that." (Tr. 522).

On September 6, 2016, Guance was working with driver, Oliver Germosen, herein Germosen. They were picking up materials from a client, El Ramida, when Oliver backed the truck into a yellow cement pillar at the client's entrance (Tr. 91). Germosen was driving and watching the driver's side as he backed up the truck and hit the pillar (Tr.94). Guance was watching the passenger side (Tr. 92). After hitting the pillar and causing damage to Respondent's truck, Germosen became visibly upset and started to cry, insisting to Guance that he could be discharged for this accident since he had prior accidents with the company (Tr. 92). Guance told Germosen that they should call Respondent (Tr. 93), but Germosen insisted that they make a false report and say that someone else hit them (Tr. 93). Germosen also told Guance that if he didn't corroborate and support what was in the false report, he (Guance) could have problems with the company. Germosen, therefore, told Guance that he couldn't contradict the report (Tr. 95). Germosen then telephoned the Police and told them that another truck hit Respondent's truck (Tr. 93, 94).

At trial, Respondent's witness, Vega, testified that Germosen called him from El Ramida to tell him that they were at a light when another vehicle hit them without stopping (Tr. 517-18). Vega told Germosen that he should call the Police and file a report. According to Vega, he called Germosen and Guance back and was told by Guance that Germosen was giving a report to the Police (Tr. 517-518).

The next day, on September 7, 2016, Vega examined the damaged truck and concluded that the damage was not consistent with a hit and run accident (Tr. 518-19). Vega then told

⁷ At trial, Respondent Counsel asked Vallejo his knowledge of Guance's Union activities (Tr. 466-467). Vallejo said that "no one ever told him that [Guance] signed a Union card" (Tr. 467).

Vallejo about Germosen and Guance's accident and that he believed the damage was not the result of a hit and run incident, as claimed by Germosen and Guance (Tr. 519).

Later that day, Vallejo called Guance into his office to find out more about the accident. Guance told Vallejo that a Pinkski truck hit them (Tr. 95, 460). Although Vallejo testified that he did not believe that a hit and run occurred, Vallejo did not discuss the accident further and sent Guance back to work (Tr. 96, 462-63). Vallejo then spoke to Germosen about the accident. According to Vallejo, Germosen told him that he hit one of the pillars at El Ramida (Tr. 463). After speaking to Germosen, Vallejo called Guance back to his office to tell him that he was being terminated for lying about the accident (Tr. 96, 463-64). Vallejo had a prepared discharged notice for Guance to sign. After signing the discharge notice, Guance then told Vallejo the truth about the accident and that Germosen had threatened him if he contradicted the fake accident report (Tr 98).⁸

After being discharged, Guance spoke to Germosen about his meeting with Vallejo. According to Guance, Germosen told him that he initially gave the false report but then decided to tell the truth to Vallejo (Tr. 132).

At trial, Vallejo, testified that Guance said that he was sorry and that he didn't want to lose his job. Vallejo also testified that he told Guance that he knew what happened and if he wanted to keep his job he should tell the truth. Although Vallejo further testified at trial that Germosin was suspended for the accident and that a disciplinary report detailing Germosen's suspension was prepared, Respondent denied having any suspension report (Tr. 463, 510-511). Germosin is still employed by Respondent (Tr. 509).

⁸ At trial, Vega also testified that during a subsequent conversation with Guance, Guance told him that he lied about the accident because he had to keep his "street code" and not tell anybody (Tr. 521).

D. Urbaez Discharge

Urbaez worked as the sole mechanic for Respondent at its Bronx facility from June 2015 until October 14, 2016 (Tr. 171). As the only mechanic, he serviced and repaired 15 trucks (Tr. 29) from 5 in the morning until 6 in the evening (Tr. 175). The weekly repair work was so extensive that Urbaez worked approximately 20-25 hours of over-time each week (Tr. 176, G.C.Exh. 13).

Urbaez was one of the first employees to show his support for the Union. In early June 2016, when the Union first started its organizing campaign, Urbaez met and spoke to Union Representatives on the street near Respondent's Bronx facility (Tr. 180) and on June 2, 2016, he signed a Union card (G.C.Exh 14). In July 2016, Urbaez greeted Union Representative Fernando Vidal in front of Respondent's 1120 Grinnell facility while he was working (Tr. 184). Afterwards, in July 2016, Urbaez went to Respondent Dispatch Manager Vallejo's office to tell Vallejo that he signed a Union card (Tr. 185-186). Urbaez had heard that employees were being questioned about the Union and he wanted to be sure Vallejo did not have a problem with him signing the Union card (Tr. 244) In fact, Urbaez asked Vallejo if his signing of the card was a problem. (Tr. 185-186) and Vallejo told him that it depends on the point of view of the company (Tr. 186).⁹

In July 2016, Urbaez saw Da Silva having an argument with Union Representatives in front of Respondent's facility. Da Silva was moving his arms in a circular motion, pointing at the Union Representatives (Tr. 191-192). Da Silva also approached a group of employees including Urbaez in Respondent's 1111 Grinnell Place facility and told the employees that they were

⁹ Vallejo denied that Urbaez told him that he signed a Union card or that he told Urbaez he could be suspended or thrown out of the company for signing a Union card (Tr. 488).

dumb asses to pay the Union to represent them and that their salaries could be lowered (Tr. 194; 283).

In July 2016, Urbaez also had a conversation with Night Facility Manager Mercado about the Union. They were standing in the yard with two other employees discussing the amount of work Urbaez had to finish when Mercado asked if the Union was going to bring food for the employees (Tr. 194-195). Mercado also said that one by one, those who had signed a Union card would be out of the company (Tr. 196).

In July 2016, Respondent Agent Vega approached Urbaez to ask him how long he was going to take to complete a work assignment (Tr. 197-98). Urbaez said that it was a lot of work for one person. Vega responded by saying that Urbaez should take advantage of the job he had because he wasn't going to last long working for the company (Tr. 198). Vega also mentioned that Urbaez had signed a Union card (Tr. 199).

Also in July 2016, Vallejo approached Urbaez in the yard and asked him how long he needed to complete a work assignment (Tr. 200-201). Vallejo also asked Urbaez if he filled out a Union card and Urbaez said, "yes." (Tr. 201). He also told Urbaez that he (Urbaez) could be suspended and thrown out of the company because of that (Tr. 201).¹⁰

In October 2016, Vallejo came to the yard to discuss an incident Urbaez had with a gas and oxygen equipment that caused a fire (Tr. 203)¹¹ Urbaez explained what had happened and that there was enough work to warrant assistance (Tr. 203). Vallejo then asked Urbaez if he

¹⁰ At trial, Vallejo, answering leading questions, gave general denials that he didn't have an discussion with Urbaez about being suspended for signing a Union card (Tr. 488).

¹¹ At trial, Vallejo denied that there was any incident (Tr.).

filled out a card for the Union (Tr. 204-205). Vallejo also told Urbaez that the signing of a Union card could be the reason for his discharge from the company (Tr. 205).¹²

On October 14, 2016, Respondent discharged Urbaez (Tr. 206). Urbaez was called into a meeting attended by Vallejo, Respondent General Manager Rogich and Facility Manager Lopez, as the translator (Tr. 207). Speaking on behalf of Vallejo, Lopez told Urbaez that Vallejo decided that he was no longer going to work for Respondent and that he had to sign a piece of paper (Tr. 207, G.C. Exh 5¹³). Lopez translated the piece of paper stating that Urbaez was being discharged because he was not accomplishing his job and because he didn't show respect for Vallejo (Tr. 208). Urbaez refused to sign the paper, stating that it did not represent the truth. Urbaez questioned Respondent's timing of his discharge by asking Vallejo how he could now say that Urbaez was not performing his work when he has been employed by Respondent for one year and four months (Tr. 209).

After the discharge meeting, Urbaez walked out of the facility with Rogich and a friend who acted as a translator (Tr. 213). Rogich told Urbaez that he didn't know why Vallejo was discharging him because Urbaez was doing a good job (Tr. 213). Urbaez told Rogich that the discharge notice was not true (Tr. 213).

At trial, Martucci testified that Urbaez was only discharged for refusing to do his work (Tr. 40). Vallejo testified that Urbaez was discharged for poor performance, the way he interacted with employees and for killing time (Tr. 485).¹⁴ However, Urbaez' discharge notice

¹² Again, at trial, Vallejo denied discussing the Union or being suspending for signing a Union card with Urbaez during the discharge meeting (Tr. 488).

¹³ While at the meeting, Urbaez took a photo of the paper with his cell phone (Tr. 210; G.C.Exh. 15). However, pursuant to GC's subpoena, Respondent produced a more completed discharge letter (G.C.Exh 5).

¹⁴ At trial, Vallejo did not testify about any of the details of the discharge meeting with Urbaez; nor did he deny that the meeting took place (Tr. 485).

states that Respondent was discharging him because he had a negative attitude about work assignments, was not performing his work and was disrespectful toward his coworkers (G.C.Exh 5, 15).

Six months prior to being discharge, on March 4, 2016, Urbaez was suspended for ten days for refusing Vallejo's directive to pick up an automotive part for a truck (Tr. 21, (G.C.Exh 16).¹⁵ Urbaez refused to get the part because the truck did not need the part and Urbaez did not want to be responsible for purchasing an unnecessary part (Tr. 216, 248, 477-478). Aside from that suspension, Respondent did not issue any other disciplinary action to Urbaez during his employment. Respondent never disciplined Urbaez for being slow at work or for not doing his work (Tr. 226). Although Respondent may have questioned Urbaez about the time he needed to complete his work, Urbaez always performed his work, alone, without a helper (Tr. 257). Urbaez may have told Vallejo that he has a lot of work for one person and that he needed a helper, but he always did his work (Tr. 261). In fact, Vallejo always approved overtime hours for Urbaez so that he could perform his work (Tr. 176, G.C. Exh. 13a-b). Urbaez worked approximately 20-25 hours of overtime each week (Tr. 176, G.C. Exh. 13a-b).

Just prior to Urbaez' discharge, on October 5, 2016, Vallejo interviewed a replacement mechanic, Alejandro Lopez (Tr. 492). Although Vallejo had an initial contact through a text message in March 2016, he did not interview Lopez until October 2016 (Tr. 490-495). On October 12, 2016, Vallejo offered Lopez the mechanic job and he started after Urbaez was discharged (Tr. 492,496).

¹⁵ At trial, there was some confusion about when the suspension occurred. While Urbaez testified that he was suspended in May 2016, Respondent's suspension report shows that the suspension occurred in March 2016. Urbaez denied that he received any suspension report (Tr. 219).

E. Petition to Revoke Union Cards

In January 2017, Respondent instructed its Bayshore drivers and warehouse employees to meet with labor consultants. There were four mandatory meetings from January 6, 2016 until February 3, 2017, where two labor consultants told employees that the Union was corrupt, that it would not provide any benefits and that it would take the employees' money (Tr. 148). The labor consultants also described the union election process to the employees (Tr. 146-158). At the February 3, 2016 meeting, the labor consultants told the Bayshore employees that the Union was originally a different union, Local 148, that Lubrano, a former NYPD Officer had been sued several times and that there were discrepancies between the Union's assets and liabilities within their pension funds (Tr. 153). The labor consultants also told employees that the Union would take the employees' money and go on vacations to Florida, that the Union's organizing drive was a wake-up call for Martucci and that if the employees didn't vote for the Union, things at work would improve (Tr. 153).

On February 27, 2016, Respondent Facility Manager Mongelli told Bayshore driver Giscard Bourgeios, herein Bourgeios, to go to his office to sign a piece of paper (Tr. 158). Bourgeios went to Mongelli's office and found two documents- one in English and the other in Spanish (Tr. 158-159). The English document stated that the employees wanted to revoke their Union cards and that they no longer wanted the Union to represent them (158-159). Employees had already signed the bottom of that petition (Tr. 160) While Bourgeios read the English document, Mongelli showed up and told him that he had to sign the document (Tr. 159). Bourgeios refused and left.

Shortly thereafter, Bourgeios returned to Mongelli's office and found only the Spanish version of the document on Mongelli's desk. Bourgeios took a photo of the Spanish version with his cell phone (Tr. 164, G.C Exh.12). Bourgeios also texted Lubrano to inform him that Respondent was having employees sign a petition revoking their support for the Union (Tr. 327, G.C. Exh. 22).

IV. ARGUMENT

A. VALLEJO AND VEGA WERE NOT CREDIBLE WITNESSES

As a general proposition, there are certain principles regarding the assessment of credibility which should guide the Administrative Law Judge's (ALJ) analysis herein. In particular, while uncontradicted testimony need not be automatically accepted, the absence of any rebuttal to specific testimony is a significant factor to consider. "Although the Board may dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation." *Atelier Condominium*, 361 NLRB No. 111 (2014) citing *Missouri Portland Cement Co v. NLRB*, 965 F.2d 217, 222 (7th Cir. 1992). In addition, it has been held that general denials will not ordinarily suffice to refute specific and detailed testimony from an opposing side's witness. See, e.g., *Williamson Memorial Hospital*, 284 NLRB 37, 39 (1987); *Emerson Electric Co. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981). In a similar vein, a professed lack of recollection does not suffice as a rebuttal to detailed and specific testimony. *Indian Hills Care Center*, 321 NLRB 144, 150 (1996). See also *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials and comparative vagueness is generally insufficient to rebut more detailed testimony); *Mercedes Benz of Orlando Park*, 333 NLRB 1017, 1035 (2001), enf. 309 F.3d 452 (7th Cir. 2002) ("It is settled that general or 'blanket' denials by witnesses are

insufficient to refute specific and detailed testimony advanced by the opposing side's witness.”).

Moreover, the Board has further found that when a witness fails to deny or only generally denies without further specificity certain testimony from an opposing witness an adverse inference is warranted. *Atelier Condominium, supra*, citing *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc.*, 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996).

In the instant case, the ALJ should discredit the testimonies of Vallejo and Vega and make an adverse inference since they provided unspecific and general rebuttals to the detailed testimonies provided by General Counsel’s witnesses. Respondent Counsel also asked so many leading questions or questions that provided so many details of the answer (Tr. 466, 467, 488, 522, 529) that the ALJ had to instruct him to find another way to ask the questions (Tr. 487-488). Indeed, even with the benefit of these inappropriate questions, Vallejo and Vega could only muster general denials (Tr. 488, 497, 522, 529) without specifically rebutting the detail testimonies of Guance and Urbaez. For example, Guance provided specific details of a private conversation he had with Vallejo about the Union. He testified that in August 2016, he went to Vallejo’s office to discuss an invoice. While there, Vallejo asked him if he signed a Union card (Tr. 90). To rebut this testimony, Vallejo, testified that “no one ever told him that Rafael signed a Union card” (Tr. 467). Vallejo also testified that he never saw Rafael give a Union card to the Union or a wear a Union shirt (Tr. 467). Although Guance gave a detailed account of the conversation, Vallejo only responded in general terms.

Urbaez also provided specific details of his conversations with Vallejo about signing a Union card (Tr. 200-205). In response to questions that sounded more like testimony, Vallejo, testified that he had no knowledge of whether or not Urbaez supported the Union (Tr. 488); that he had no discussion with Urbaez about a suspension for signing a union card (Tr. 488) and that prior to termination, he had no knowledge of whether or not Urbaez supported the Union (Tr. 488). Vallejo also testified that he never told Urbaez he could be suspended or thrown out of the company for signing a Union card (Tr. 488). Vallejo continued to testify in a general manner when he said that “he never threatened to discharge *any employee* who may have supported the Union; that he “never” threatened or took action against *an employee* for supporting the Union” and that he “never took photos of *employees* talking to the Union” (Tr. 497).

Vallejo’s lack of specificity and general denials are insufficient to rebut the more detailed testimonies of Guance and Urbaez. While Guance and Urbaez gave dates, place and detailed accounts of the above conversations (see below for more details), Vallejo gave no details. Therefore, the ALJ should conclude that Vallejo was not a convincing witness and that he did not sufficiently rebut General Counsel’s witnesses.

Similarly, the ALJ should conclude that Vega’s testimony, in part, is not credible due to his general and vague denials. At trial, Guance gave a detailed account of Vega watching him while he spoke to Union representatives. Guance testified that in August 2016, he spoke to Union representatives at the corner of Grinnell and Garrison Ave. (Tr. 77-79) and that Vega was standing at the driveway of 1111 Grinnell Place smoking a cigarette, watching him (Tr. 80-88). As Guance walked passed Vega, Vega had an accusatory face (Tr. 130). As a rebuttal to

Guance's detailed testimony, Respondent Counsel asked Vega if he was smoking a cigarette across the street (Tr. 522). In response to this question that contained numerous significant facts, Vega testified that he "never saw Rafael speak to a Union" (Tr. 522). Vega's inability to provide more specific details or to be responsive to the question warrants the conclusion that Vega, in part, failed to rebut Guance's testimony and was incredible as a witness. In this regard, Vega failed to testify about his smoking habits and whether or not he smokes cigarettes at this location on a regular basis.

Guance went on to provide a detailed account of when Vega interrupted a conversation he and fellow employees were having in the bathroom about their working conditions. In this regard, Guance testified that Vega told them that they should be careful in signing a Union card (Tr. 88). Guance also testified that a few days later, in a private conversation with Vega in front of Vallejo's office, Vega approached him to say that he should be careful signing a Union card because that could cause problems with the Company (Tr. 88). As a rebuttal to Guance's detailed testimony, Respondent Counsel asked Vega a detail packed question "did you ever make that statement to Rafael and other employees that they should be careful in signing the card that representatives of the Union gave them" (Tr. 522). Vega answered that he "never had a conversation with Rafael about the Union, about signing a Union card or anything like that" (Tr. 522). Such a general and vague response by Vega to a very suggestive question constitutes an insufficient rebuttal and should be discredited.

Respondent may argue that Vega and Vallejo's general denials were proper in order to prove a negative. However, General Counsel's witnesses provided sufficient details about various interactions including the timeframe, place, the presence of other individuals and

specific testimony as to what was said which would have enabled Respondent's Counsel to adduce factually-based denials. However, Vallejo and Vega did not provide such details. Respondent's failure to adduce at trial more than a vague and general denial from its witnesses is an insufficient rebuttal to the specific testimonies from General Counsel's witnesses. Accordingly, the ALJ should not credit Vega or Vallejo. See *Atelier Condominium, supra*.

By contrast, the ALJ should credit Guance and Urbaez. As described above and further below, both witnesses gave specific material details about the events that unfolded during the Union's campaign without any leading questions. They provided specific details such as date, place and time frame of each conversation they had with Respondent's managers and agents. In addition, Guance and Urbaez displayed a high order of testimonial credibility under strong cross examination. Although the translation process at trial was frustrating at times, they were serious, direct, candid and straightforward with their testimonies. And, even though there was some confusion as to when Respondent suspended Urbaez, the ALJ should not seize on this testimony of an immaterial fact to discredit Urbaez. While Urbaez testified that he was suspended in May 2016 instead of the March 2016 date on the suspension report, Urbaez' testimony of the actual suspension and the specific material details of the suspension were accurate and corroborated by Respondent (Tr. 477-478). Therefore, any confusion over the date of the suspension or when Guance met with Union representatives should not be a basis for finding Urbaez or Guance incredible witnesses since such facts are immaterial. See, *Sheet Metal Workers Local 224 (Sheet Metal)*, 297 NLRB 528, 535 (1990); *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 (1996); *Laborers, Local 252*, 233 NLRB 1358, 1359 (1977)(where the Board consistently upheld the ALJ's credibility determinations where a witness was unable to recall with specificity exact dates); *D&D Enterprises, Inc.*, 336 NLRB No. 76 (2001); *Service Spring Co.*, 263 NLRB No. 103, fn 2,8 (1982)(where an omission of an immaterial fact would not raise a credibility question).

For the foregoing reasons, the ALJ should find Guance and Urbaez to be credible witnesses since they displayed honest and straightforward demeanor throughout the hearing. See *Atelier Condominium, supra*.

B. DA SILVA WAS AN AGENT OF RESPONDENT WITHIN THE MEANING OF SECTION 2(13) OF THE ACT

In determining whether or not an employee is an agent of an employer and whether or not his or her conduct is attributable to the employer, the Board applies common law agency principles. If the employee acted with the apparent authority of the employer with respect to the alleged unlawful conduct, the employer is responsible for the conduct. “Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” *In Re D&F Industries, Inc.*, 339 NLRB No. 73 (2003) citing *Hausner Hard-Core of Kennedy, Inc.*, 326 NLRB 426 (1998); *Cooper Industries*, 328 NLRB 145 (1999). The test to determine apparent authority is whether under all the circumstances “the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.” *Id.* citing *Waterbed World*, 286 NLRB 425, 426 (1987). Apparent authority will also be found if the employee in question is “held out as a conduit for transmitting information [from management] to other employees. *Id.*, citing *Hausner-Hard-Core of Kentucky, supra*. Here, the credible evidence establishes that Da Silva acted as an Agent of Respondent within the meaning of Section 2(13) of the Act.

The undisputed evidence shows that Da Silva was more than a warehouse employee or a driver. He instructed drivers where to park and unload their trucks and he kept track of the

number of bags of recycled goods that were brought to Respondent's Bronx facility (Tr. 191). He also assigned work and granted time off to the warehouse employees (Tr. 76). Although Martucci testified that Da Silva was a warehouse employee (Tr. 37), Respondent's correspondence during the Representation proceedings indicates that Respondent considered Da Silva a non-bargaining unit warehouse employee who should not vote in the Union election (G.C.Exh. 24). Da Silva also was not paid an hourly wage like the warehouse employees and drivers. Rather, he was a salaried employee like management. (Tr. 409; G.C.Exh. 23). Under these undisputed circumstances, Da Silva stood out as a manager who acted on behalf of Respondent.

In further support of Da Silva's agency status, the undisputed record evidence shows that Da Silva was associated with and connected to other Respondent Supervisors. Lubrano testified that Da Silva and Lopez, a Respondent Supervisor, approached and stood by a group of employees and Union representatives while the employees signed Union cards (Tr. 302 G.C.Exh. 3). In fact, a photograph clearly shows Da Silva with a clip board standing by an employee as he signed a Union card (G.C.Exh 3). Such evidence demonstrates that Da Silva acted and stood out as a manager. Therefore, under all these circumstances, the ALJ should conclude that an employee would reasonably believe that Da Silva was a manager reflecting company policy and that he had the authority to speak and act on behalf of Respondent. Accordingly, Da Silva, during all material times herein, was an Agent of Respondent within the meaning of Section 2(13) of the Act.

C. RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY THREATENING EMPLOYEES WITH DISCHARGE BECAUSE OF THEIR ACTIVITIES ON BHEALF OF AND SUPPORT FOR THE UNION.

The Board has long held that it is a violation of Section 8(a)(1) of the Act for an employer, including its supervisors and agents, to threaten employees with discharge or loss of work if they support a union and engage in union activities such as signing a union card. *Hospital Shared Services Inc. & International Guards Union of America*, 330 NLRB No. 40 (1999). As set forth below, the unrefuted evidence clearly shows that several of Respondent's supervisors and agents threatened employees with discharge and loss of work because they supported the Union.

1. Mercado threatened employees with discharge

Urbaz testified that in July 2016, after he informed Vallejo that he signed a Union card (Tr. 185-186), Mercado approached him in the yard and asked if the Union was returning to the yard to bring food to the employees (Tr. 194-195). Mercado also told Urbaz that one by one, those who signed a Union card would be out of the company (Tr. 196). Such a statement from Mercado, a supervisor, is coercive and constitutes a violation of Section 8(a)(1) of the Act.

The ALJ should credit Urbaz's testimony regarding this conversation. First, Urbaz, as described above, displayed a serious and straightforward demeanor while testifying throughout the hearing. With respect to his conversation with Mercado, Urbaz provided sufficient material details of the conversation for the ALJ to find it convincing and credible. In contrast, Respondent failed to call Mercado as a witness and therefore failed to rebut Urbaz's testimony. An adverse inference may be drawn regarding any factual questions on which a witness is likely to have knowledge and it may be inferred that the witness, if called to testify, would have

testified adversely to the party on that issue. *In Re Desert Pines Golf Club*, 334 NLRB No. 36 (2001). Accordingly, the ALJ should draw an adverse inference here based on Respondent's failure to have Mercado testify about this conversation and conclude that Respondent, by its supervisor Mercado, violated Section 8(a)(1) of the Act by threatening employees with discharge because of their support for the Union. *Atelier Condominium, supra*.

2. Vega threatened employees with discharge

In July 2016, after Urbaez had already informed Vallejo that he signed a Union card (Tr. 185-186), Vega approached Urbaez in the yard to discuss his work. During that conversation, Vega told Urbaez that he was taking too long to complete his work assignment and that he should take advantage of having a job because he was not going to last long at the job (Tr. 197-198). Vega also mentioned that Urbaez had signed a Union card (Tr. 199) and that he (Urbaez) wasn't going to be with the company much longer (Tr. 199).

For the reasons set forth above, the ALJ should credit Urbaez and conclude that Vega threatened him with discharge because of his support for the Union. At trial, Vega denied making this statement in response to Respondent Counsel's fact filled question. Respondent's Counsel asked Vega, "Did you ever say to Jose Luis that he should take advantage of the job and that he wouldn't last long working in that company because he signed a union card (Tr. 529)? Vega's general denial to such a loaded question is not a proper rebuttal to Urbaez' detailed account of the conversation. In addition, Vega's threat is connected to Urbaez' Union activities (the signing of a Union card) since Vega mentioned the signing of the Union card during the same conversation. Accordingly, the ALJ should credit Urbaez and conclude that Vega's statement was a coercive threat of discharge in violation of Section 8(a)(1) of the Act.

3.Vallejo threatened employees with discharge.

In July 2016, Urbaez had a conversation with Vallejo about the Union. Vallejo approached Urbaez and after discussing a work assignment, he asked Urbaez if he had signed a Union card (Tr. 201). Vallejo also said that Urbaez could be suspended or thrown out of the company for signing the card (Tr. 201).¹⁶

Urbaez further testified that in October 2016, about a week before he was discharged, Vallejo called him into his office to ask if he (Urbaez) filled out a Union card (Tr. 204-205). Vallejo also told Urbaez that the signing of the Union card could be a reason for his discharge (Tr. 205).

The ALJ should credit Urbaez' testimony about these conversations with Vallejo since he was the only witness who gave a detailed account of what happened on direct and cross examinations. In addition, Urbaez displayed a candid and straightforward demeanor throughout his testimony. By contrast, Vallejo failed to give any details of these conversations to make his testimony convincing. Rather, he just gave a general denial that he didn't have a discussion with Urbaez about being discharged for signing a Union card (Tr. 488). In light of the absence of a detailed response in Vallejo's testimony, the ALJ should find his testimony an insufficient rebuttal and that Vallejo's above threats of discharge are a violation of Section 8(a)(1). See *Atelier Condominium, supra*.

¹⁶ Although the word suspension instead of discharge was used in the initial translation of Urbaez' testimony (Tr. 201), Urbaez also testified that Vallejo said that he could be "thrown out of the company" (Tr. 201). Based on Urbaez' overall testimony regarding this conversation, the ALJ should find that the term "suspended" meant termination. Additional support for this finding is the undisputed fact that Urbaez was eventually terminated.

D.RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY ENGAGING IN THE SURVEILLANCE OF EMPLOYEES' UNION ACTIVITIES.

Employees should be free to participate in union organizing campaigns without fear that members of management are peering over their shoulders, taking note of who is involved in union activities and in what particular ways. *Durham School Services, LP*, 361 NLRB No. 44 (2014). An Employer engages in surveillance or creates an impression of surveillance by indicating that it is closely monitoring the degree of an employees' union involvement. *Id.*, citing *Flexsteel Industries*, 311 NLRB 257 (1993).

General Counsel acknowledges that the Board has long held that “an employer’s mere observation of open, public union activity on or near its property does not constitute unlawful surveillance” and that “union representatives and employees who choose to engage in their union activities at an employer’s premises should have no cause to complain that management observes them. *California Acrylic Industries, Inc.*, 322 NLRB No. 10 (1996) citing *Roadway Package System*, 302 NLRB 961 (1991); *Heartland of Lansing Nursing Home*, 307 NLRB 152 (1992) and *Hoshton Garment Co.*, 279 NLRB 565, 567 (1986). However, the observance of open union activity will be unlawful if the employer observes employees in a way that was out of the ordinary. *Durham School Services, LP, supra*. In the instant matter, as provided below, Respondent’s supervisors, Mercado and Lopez and agents, Vega and Da Silva crossed the line of “mere observation” and engaged in the unlawful surveillance of employees’ Union activities.

1.Lopez and Da Silva engaged in the unlawful surveillance of employees’ Union activities

The undisputed evidence shows that on July 18, 2016, Union representatives

Lubrano, Clemenza, Aviles, Jackson, Vidal and Giavinco met with employees on the corner of Grinnell Place and Garrison in order to discuss the Union. While there, employees also signed Union cards (Tr. 301-310; G.C.Exh. 3). The undisputed evidence also shows that Respondent Supervisor Lopez and Respondent Agent Da Silva approached the group of employees and Union representatives and stood there watching as employees signed Union cards (Tr. 305; G.C.Exh. 3). A photograph of Da Silva shows him standing next to an employee watching him sign a Union card (Tr. 305; G.C.Exh. 3). These facts are not in dispute since Respondent failed to properly rebut them by having Lopez and Da Silva testify about this matter. Accordingly, the ALJ should draw an adverse inference against Respondent since it failed to call two witnesses who were in a position to testify about this matter and credit General Counsel's evidence regarding Lopez' and Da Silva's observation of employees' Union activities.

The ALJ should also conclude that Lopez and Da Silva's observation was unlawful surveillance in violation of Section 8(a)(1). The undisputed evidence shows that the Union and employees were standing in a public area down the block from the Employer's Bronx facility. Lopez and Da Silva were not working or standing on Respondent's premises while observing these employees. Nor were they just walking by the employees on their way to another destination. Rather, the undisputed evidence shows that Lopez and Da Silva deliberately approached the group with the intention of watching employees sign Union cards. Such conduct was more than a "mere observation of open and public union activity." *California Acrylic Industries, Inc.*, supra. Lopez and Da Silva's observation of employees in this deliberate way was out of the ordinary. *Durham School Services, LP*, supra, and more importantly, it was coercive and intended to frighten employees that their Union involvement was being closely

monitored by Respondent. Accordingly, the ALJ should conclude that Lopez and Da Silva engaged in the unlawful surveillance of employees' Union activities in violation of Section 8(a)(1) of the Act.

2.Vega engaged in the unlawful surveillance of employees' Union activities

The undisputed evidence further shows that on July 19, 2016, at approximately 6:22 AM, Vega stood in the bay of Respondent's Bronx facility taking a video of employees engaging in Union activities (Tr. 530 G.C.Exh. 20). While Lubrano and Vogt may not have known the subject matter of Vega's photographs or videos (Tr. 58-59;379), Vega testified that he took a video of Lubrano talking to Franklin, a driver (Tr. 530). Such conduct is more than a "mere observation of public Union activity" *California Acrylic Industries, LP, supra*. While it may be ordinary and reasonable for Vega to be standing at Respondent's bay at 6:22AM on July 19, it was not ordinary for him to be videotaping employees engaging in Union activities. The act of video- taping employees' Union activities is also more than a "mere" observation. Rather, it is an intimidating and coercive way of monitoring protected activity. Therefore, the ALJ should conclude that Vega's conduct constitutes an unlawful surveillance in violation of Section 8(a)(1) of the Act.

Respondent may argue that Vega's conduct was reasonable and lawful since he was video-taping Lubrano's encounter with employee Franklin for safety reasons. However, Respondent failed to present any evidence, including Vega's video-tape, to support this claim. Respondent's failure to introduce Vega's video-tape into evidence warrants an adverse inference that Respondent's safety claim lacks merit. *In Re Desert Pines Golf Club*, 334 NLRB No. 36 (2001).

Moreover, Respondent failed to present sufficient evidence at trial to show that the Union, including Lubrano, interfered with or obstructed its operations in any other manner. Although there was testimony about employees working on the sidewalk and in the streets, and cars parked on Grinnell Place, Respondent never introduced any evidence of obstruction or interference on the part of the Union (Tr. 364-377) Therefore, based on undisputed evidence, the ALJ should find Respondent's safety claim unconvincing and conclude that Vega's conduct was unlawful.

The undisputed evidence also shows that in August 2016, before work, Guance was on the corner of Grinnell and Garrison talking to Union representative Aviles about the Union. Guance even took a Union card from Aviles, which he later signed (Tr. 81-820) During this time Vega stood outside Respondent's 1111 Grinnell facility, about 20 feet away, staring and displaying an accusatory and disapproving look at Guance (Tr. 82, 130).

General Counsel argues that Vega's conduct was more than a mere observation of public union activity and therefore unlawful. Although Guance was standing with the Union in public, the undisputed evidence shows that Vega was standing and smoking a cigarette in a location that was out of the ordinary. Guance testified that he never saw Vega stand or smoke a cigarette in front of 1111 Grinnell before that day and that Vega usually smoked inside the company (Tr. 82). Although Vega testified at trial, he did not refute Guance's detailed testimony. Rather, in response to leading questions, Vega gave general denials that he never saw Guance speak to the Union (Tr. 522). Even when Respondent Counsel asked the fact filled question of whether or not Vega recalled any instances where he was outside the building at 1111 Grinnell smoking a cigarette and watching Rafael across the street with Union reps (Tr.

522), Vega gave the most general and nonresponsive answer that he never saw Guance speak to the Union (Tr. 522). Vega offered no specific details about where he was standing, where he usually smokes cigarettes, or that he regularly smokes cigarettes in front of 1111 Grinnell (Tr. 522). Therefore, Respondent's failure to elicit this detail testimony supports a finding that Respondent failed to sufficiently rebut Guance's testimony that Vega's surveillance conduct was out of the ordinary. Accordingly, the ALJ should conclude that Vega engaged in the unlawful surveillance of employees' Union activities in violation of Section 8(a)(1) of the Act.

The totality of the circumstances further supports General Counsel's assertion that Vega's conduct constitutes an unlawful surveillance of employees' Union activities. *Westwood Health CareCenter*, 330 NLRB 935 (2000), See also *Patagonia Baking Co.*, 339 NLRB 515 (2003) (otherwise lawful interrogation occurring in the context of other unfair labor practices deemed unlawful); *Timisco, Inc.*, 819 F.2d 1173 (D.C.Cir. 1987) (cumulative effect of seven exchanges found to be coercive). In the instant case, the same day Vega stood outside staring at Guance talking to the Union, Vega interrupted a conversation Guance was having with other employees in the bathroom to tell them that they better be careful signing a Union card (Tr. 86,87). The ALJ should credit Guance's testimony about Vega's threat of unspecified reprisals (see below for further discussion) since once again Vega failed to rebut this evidence. At trial, Respondent Counsel simply asked Vega if he ever made a statement to Rafael (Guance) and other employees that they should be careful in signing the card that the rep of the Union gave them (Tr. 522-523). In response, Vega gave another general denial that he never had a conversation with Rafael (Guance) about the Union, about signing a Union card or anything like that (Tr. 523). Such an unresponsive and general denial fails to sufficiently rebut

Guance's detailed account of what happened. Therefore, the ALJ should conclude that Vega's surveillance of Guance's protected activities was coercive and unlawful especially in the context of Vega's continued unfair labor practices including the threat of unspecified reprisals.

Westwood Health Care Center, supra, Timsco, Inc., supra.

3. Mercado engaged in the unlawful surveillance of employees' Union activities

The undisputed evidence also shows that on July 25, 2016 at approximately 8:33 PM, Mercado video-taped employees engaged in Union activities. The uncontroverted testimony of Lubrano and the video tape he took show that the Union was meeting with employees at a table located in the employee lunch area, a few feet to the side of Respondent's driveway at 1120 Grinnell (Tr. 322; G.C.Exh. 26). For three to five minutes, Mercado stood in the middle of the street video-taping employees and Union representatives (Tr. 326; G.C.Exh. 26). Since Respondent failed to call Mercado as a witness to rebut this evidence, the ALJ should draw an adverse inference and conclude that the undisputed evidence supports a finding that Mercado engaged in the video-taping of employees meeting with the Union on July 25, 2016.

The ALJ should also conclude that there were no legitimate safety concerns to warrant Mercado's conduct that day. While there is evidence that employees and supervisors cross the street to move to and from Respondent's facilities on Grinnell Place and that trucks go in and out of the driveway, there is no evidence of the Union obstructing or interfering with Respondent's operation on July 25, 2016 (G.C.Exh. 26). In fact, the video Lubrano took that evening clearly shows Union representatives and employees at a table located at the established employee lunch area to the right of Respondent's driveway (Tr. G.C. Exh. 26). The table and Union representatives did not block the driveway and employees and supervisors

were not working or crossing the street at that time (G.C. Exh. 26). Moreover, had there been a legitimate safety concern, it is highly possible that Respondent would have introduced the video-tape Mercado took that evening and have Mercado testify. Respondent's failure to introduce the video and have Mercado testify warrants an adverse inference that the video and testimony would have contradicted Respondent's safety claims. Accordingly, based on the credible evidence presented by Lubrano, the ALJ should conclude that Mercado engaged in the unlawful surveillance of employees' Union activities in violation of Section 8(a)(1) of the Act when he video-taped employees with the Union on July 25.

Moreover, the ALJ should conclude that Mercado's video-taping was out of the ordinary and therefore unlawful. Although the Union and employees were in a public area, Mercado's video-taping was more than a "mere observation." *California Acrylic Industries, Inc.*, supra. As mentioned above, Mercado stood in the street for several minutes video-taping employees with the Union. Without any other legitimate justification for this conduct, the ALJ should conclude that Mercado's conduct was coercive and constitutes the unlawful surveillance of employees' protected activities.

E.RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY INTERROGATING EMPLOYEES ABOUT THEIR ACTIVITIES ON BEHALF OF AND SUPPORT FOR THE UNION

Section 8(a)(1) of the Act makes it an unfair labor practice "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." In considering the lawfulness of communications from an employer to employees, the Board applies the "objective standard of whether the remark tends to interfere with the free exercise

of employee rights.” In determining whether an interrogation violates Section 8(a)(1) of the Act, the Board considers “whether under all the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act.” *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This is an objective standard, and it does not turn on whether the “employee in question was actually intimidated.” *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001); *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). This principle also applies to employees who were not known union supporters. *Sunnyvale Medical Center*, 277 NLRB 1217 (1985).

Among the factors that may be considered in making such an analysis are the identity of the questioner, the place and method of the interrogation, the background of the questioning, the nature of the information sought, and whether the employee is an open union supporter. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57 (2011) (incorporating by reference, in relevant part 353 NLRB 1294, 1295 (2009)); See also *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) (relevant factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation and the truthfulness of the reply).

Throughout the trial, General Counsel’s witnesses testified about numerous coercive encounters with Respondent supervisors and agents where statements of hostility toward the Union or Union activities were made in violation of Section 8(a)(1). *Parts Depot*, 332 NLRB 670, 673 (2000); *Cumberland Farms, Inc.*, 307 NLRB 1479 (1992); *Advance Waste System*, 306 NLRB 1020 (1992). Here, in most of the instances of coercive conduct, it was Respondent’s manager

or agent involved who initiated the discussion of unionization, a further indication of coercive conduct. *Gloria Oil & Gas Co.*, 337 NLRB 1120, 1122 (2002); *Sundance Construction Management*, 325 NLRB 1013(1998). Finally, General Counsel contends that the totality of the circumstances, including the number of instances of alleged unlawful conduct viewed in light of other alleged unlawful threats taken as a whole imbued each individual conversation with heightened impact. *Westwood Health Care Center*, 330 NLRB 935 (2000). See also *Patagonia Baking Co.*, 515, 516 (2003) (otherwise lawful interrogation occurring in the context of other unfair labor practices deemed unlawful); *Timsco, Inc.*, 819 F.2d 1173 (D.C. Cir. 1987) (cumulative effect of seven exchanges found to be coercive).

1.Vallejo violated Section 8(a)(1) of the Act by interrogating employees about their activities on behalf of and support for the Union.

(a)Vallejo interrogated Urbaez about his Union activities.

Urbaez testified that in July 2016, while in the yard, Vallejo approached him and inquired about the length of time he needed to fix a trailer (Tr. 200). After Urbaez explained that it takes time because he was working alone, Vallejo asked him if he filled out a Union card (Tr. 201). Such a statement is coercive especially since Vallejo, a high level manager, approached Urbaez and initiated the conversation about Urbaez' Union activities. *Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002); *Sundance Construction Management*, 325 NLRB 1013 (1998). The coercive nature of Vallejo's questioning is further supported by Vallejo's continued threats. Immediately after asking Urbaez if he signed a Union card, Vallejo told him that he could be discharged, "thrown out" because he signed a Union card (Tr. 201). *Westwood Health Care*

Center, supra. Based on the credible evidence and case law, the ALJ should conclude that Vallejo unlawfully interrogated Urbaez in July 2016 in violation of Section 8(a)(1) of the Act.

Although the translation of Urbaez' testimony about Vallejo's interrogation reads like a declarative statement ("[Vallejo] told me you filled out the card of the Union?") (Tr. 201), it was asked in the form of a question. In fact, the official transcript (Tr. 201) correctly has a question mark at the end of this testimony, which clearly shows that Urbaez' intonation at trial meant that Vallejo's statement was a question and that Vallejo asked Urbaez if he signed a Union card. Even Respondent Counsel heard the testimony as a question (Tr. 286).

Moreover, as discussed above, the ALJ should credit Urbaez regarding Vallejo's interrogation. While Urbaez displayed a serious demeanor and provided specific details of his conversation with Vallejo, Vallejo gave general denials to numerous leading and fact filled questions from Respondent Counsel. There were so many leading and suggestive questions that the ALJ had to repeatedly ask Counsel to rephrase the questions (Tr. 487, 488). With just an answer of "no," Vallejo denied that Urbaez ever came to his office to talk about the Union; that he had no knowledge of Urbaez signing a Union card; that he didn't have any knowledge of whether or not Urbaez supported the Union and that he never told Urbaez that he could be suspended or thrown out of the company for signing a card (Tr. 487-488). The ALJ should not find these general denials without any details convincing. Accordingly, the credible testimony from Urbaez supports General Counsel's allegation that Respondent, by its supervisor, Vallejo violated Section 8(a)(1) of the Act by interrogating employees.

(b) Vallejo interrogated Guance about his Union activities.

Guance testified that a week before his discharge on September 7, 2016, he was in

Vallejo's office to discuss an invoice (Tr. 90).¹⁷ While there, Vallejo asked Guance if he signed the Union card and Guance said, "yes"(Tr. 90). Such questioning is coercive since it was asked by Vallejo, a high level manager who discharges employees and the conversation occurred in Vallejo's office. *Atelier Condominium, supra*, citing *Advance Waste Systems*, 306 NLRB 1020 (1992). Accordingly, the ALJ should conclude that Vallejo's statement to Guance constitutes an unlawful interrogation in violation of the Act.

Although Respondent denies that Vallejo made this statement, Vallejo, at trial, again, failed to provide specific testimony that this interrogation did not take place. Rather, Vallejo gave general and vague denials that he didn't know that Guance supported the Union, that he didn't see Guance give a Union card to the Union, that Guance never wore a Union t-shirt and that no one ever told him that Guance signed a union card (Tr. 466-467). Vallejo's failure to provide a direct and specific account about this conversation is insufficient to overcome Guance's detailed and credible account of what occurred. Therefore, the ALJ should not credit Vallejo's general denials, but instead find that Vallejo unlawfully interrogated Guance.¹⁸

F.RESPONDENT VIOLATED SECTION 8(A)(1) BY THREATENING EMPLOYEES WITH UNSPECIFIED REPRISALS FOR ENGAGING IN UNION ACTIVITIES

Section 7 of the Act guarantees employees "the right to self organization, to form, join, or assist labor organizations...and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid and protection..." An employer may not retaliate

¹⁷ General Counsel requests a correction to page 90 of the official transcript. The transcript incorrectly states that Guance and Vallejo's above discussion occurred a week before "December 7." However, the undisputed evidence shows that Guance was discharged on September 7, 2016 (G.C.Exh. 7)). Therefore, the date on page 90 of the transcript should read "September 7."

¹⁸ General Counsel moves to withdraw the following allegation set forth in the Amended Consolidated Complaint: Paragraph 10-that David Vega, in or about August 2016 interrogated employees about their support for the Union at Respondent's Bronx facility (G.C.Exh. (M)).

against an employee for exercising these rights. *Portola Packaging, Inc.*, 361 NLRB No 147 (2014) citing *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001).

Further, the Board has found that an employer violates the Act when threats of unspecified reprisals are made because employees engage in union activity. *Portola Packaging Inc., supra*. Admonitions to an employee to “be careful” or other similar words, in the context of a union organizing campaign “convey[s] the threatening message that union activities would place an employee in jeopardy.” *Gaetano & Associates*, 344 NLRB 531, 534 (2005); *St. Francis Medical Center*, 340 NLRB 1370, 1383-1384 (2003) (supervisor's statement to employee to “be careful” in context of union activity held to be unlawful); *Jordan March Stores Corp.*, 317 NLRB 460, 462 (1995) (supervisor's statement to “watch out” are unlawful implied threats). Based on the foregoing, the ALJ should find that Respondent by its Supervisor, Vallejo and Agent, Vega made threats of unspecified reprisals in violation of Section 8(a)(1) of the Act.

1.Vallejo threatened Urbaez with unspecified reprisals because he engaged in Union activities.

In July 2016, Urbaez went to Vallejo’s office to tell Vallejo that he signed a Union card (Tr.186-187). Urbaez also asked Vallejo if the signing of the card would be a problem and Vallejo responded that it would depend on the point of view of the company. (Tr. 186-188). Vega was also present for this conversation and just smiled (Tr. 188).

Vallejo’s statement to Urbaez is coercive and constitutes a threat of unspecified reprisals that some level of discipline or reprisal was at stake due to Urbaez’ protected

activities. Therefore, Vallejo's threat of unspecified reprisals is a violation of Section 8(a)(1) of the Act.

Respondent's rebuttal to Urbaez' testimony is unconvincing and should not be given any credit. First, Vallejo, in response to one of many leading questions, gave a general denial that Urbaez came into his office to talk about the Union (Tr. 487). Vallejo also gave another general denial that he had any knowledge of Urbaez signing a Union card (Tr. 487). In addition, Vega gave a nonresponsive and general denial to the leading question of whether or not he was present in Vallejo's office when Urbaez came in to talk about a union or union card. In response to that leading question, Vega said that Urbaez never came upstairs talking about any union (Tr. 529). Although Urbaez gave so many material details about this conversation including the time frame, place, persons present and a full account of the conversation, Respondent's witnesses could not provide any specific details in their account of what happened. These general denials to leading questions without any specific details do not sufficiently rebut General Counsel's evidence. *Atelier Condominium, supra*. Therefore, the ALJ should credit Urbaez and conclude that Vallejo made a threat of unspecified reprisals in violation of Section 8(a)(1) of the Act.

2.Vega threatened Guance with unspecified reprisals because he engaged in Union activities

As described above, in August 2016, Guance had a conversation with employees about Respondent's working conditions (Tr. 86). While the employees were talking, Vega arrived and told the employees that they should be careful signing a Union card (Tr. 87). Days later, Vega approached Guance and repeated this threat by telling him that he should be careful signing

the Union card because there could be problems with the company (Tr. 88). These threats, which came immediately after Vega unlawfully engaged in the surveillance of Guance's Union activities are coercive and constitute a threat of unspecified reprisals for employees signing Union cards.

Respondent, again, provided general denials of this threat. In response to leading questions, Vega testified that he never had a conversation with Guance about the Union, about signing a Union card or anything like that (Tr. 522). These general denials without any specificity cannot be considered a serious and sufficient rebuttal. Therefore, the ALJ should credit Guance's testimony and find that Vega violated Section 8(a)(1) of the Act by making threats of unspecified reprisals.

G.RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY THREATENING EMPLOYEES WITH THE LOSS OF WAGES BECAUSE OF THEIR UNION ACTIVITIES.

The Board has held that an employer violates the Act by threatening a loss in benefits, including wages, because employees support a Union or engaged in Union activities. Such threats predictably would have a dampening effect on prounion ardor and inhibit union activity in violation of Section 8(a)(1) of the Act. *McGaw of Puerto Rico, Inc.*, 322 NLRB No. 73 (1996) citing *299 Lincoln Street, Inc.*, 292 NLRB 172, 191 (1988).

Urbaez testified that in July 2016, after he signed a Union card, he was talking to a group of employees about Respondent's working conditions near the area where plastic bottles are recycled (Tr. 193). Da Silva approached them and called them dumbasses because they had to pay to have the Union represent them (Tr. 194). Da Silva also told the employees that Union representation could cause the lowering of their salaries (Tr. 194). As an Agent of Respondent,

Da Silva's comments were coercive and a threat that employee's support for and activities on behalf of the Union will cause a loss in their wages. Such a threat is a violation of the Act.

The ALJ should credit Urbaez' account of this conversation since throughout the trial Urbaez' demeanor was candid and straightforward. His testimony was filled with specific details, which should have allowed a sufficient rebuttal from Respondent. However, Respondent failed to call Da Silva as a witness. Based on Respondent's failure to call Da Silva so that he could deny or present evidence about this conversation, the ALJ should draw an adverse inference, *In Re Desert Pines Golf Club, supra.*, and conclude that Respondent violated Section 8(a)(1) of the Act by unlawfully threatening a loss of wages because employee's support and engage in activities on behalf of the Union.

H .RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY INSTRUCTING EMPLOYEES TO SIGN A PETITION REVOKING THEIR SUPPORT FOR THE UNION.

An employer may lawfully inform employees of their right to revoke their authorization cards even if employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right or offers any assistance or otherwise creates a situation in which employees would tend to feel peril in refraining from such revocation. *R. L. White Co.*, 262 NLRB 575 (1982). Here, there is undisputed evidence that Respondent instructed employees to sign a petition to revoke their Union cards and support for the Union (Tr. 158, G.C.Exh. 12). Respondent's conduct is clearly a violation of the Act.

The undisputed evidence shows that from January 6 until February 10, 2017, Respondent instructed employees at its Bayshore facility to attend four meetings conducted by labor consultants (Tr. 146-157). The labor consultants told the employees that the Union was

corrupt, that Lubrano had been sued several times, that the Union would take their money and use it for vacations and that the Union was not financially sound (Tr. 146-157). The labor consultants also told the employees not to vote for the Union (Tr. 153).

Shortly thereafter, on February 27, 2017, Respondent Bayshore Facility Manager Mongelli instructed Bayshore driver Bourgeois to go to his office and sign a document (Tr. 158). Bourgeois went to Mongelli's office and saw two documents, one in English and one in Spanish. After reading the document written in English, Bourgeois decided not to sign it. The document stated that employees no longer wanted to be represented by the Union and that they revoked their support and Union cards (Tr. 159; G.C.Exh. 12). Several employees had already signed the English version of this petition (Tr. 160). Mongelli then appeared in the office and told Bourgeois that he had to sign the document (Tr. 159). Bourgeois refused and walked out. A few minutes later, Bourgeois returned to Mongelli's office and after finding only the Spanish version of this petition, took a photograph with his phone (Tr. 159; G.C.Exh. 12).¹⁹ Bourgeois also sent a text message about this petition to Lubrano (G.C.Exh. 22).

Evidence of these meetings and Mongelli's unlawful instruction for Bourgeois to sign the petition were undisputed by Respondent. Although Martucci testified at trial on two occasions, he did not testify about these meetings or the petition. In addition, Respondent failed to call its Bayshore Manager Mongelli to testify. Therefore, Respondent's failure to present evidence of these meetings and petition signing warrants an adverse inference. *In Re Desert Pines Golf Club*,

¹⁹ At trial, General Counsel introduced G.C.Exh 12 into evidence along with an English translation. As stated at trial, the English translation was prepared by the Region's translator and a certification of this translation was attached to the exhibit. The ALJ allowed the translation into evidence "subject to verification as to the accuracy of the Board agent doing the translation." General Counsel hereby submits that the certification already in evidence clearly verifies the accuracy of the agent's translation. In addition, Respondent, at trial, failed to sufficiently rebut the translation of this exhibit. Accordingly, the ALJ should conclude that the English translation of G.C.Exh 12 is accurate.

supra. Accordingly, the ALJ should conclude that Respondent violated Section 8(a)(1) of the Act by unlawfully instructing Bourgeois to sign the petition. Clearly, Respondent's instructions to sign the petition were more than a passive offer of assistance to employees who were seeking to revoke their Union support. *R. L. White Co., supra*; See also *Space Needle, LLC*, 362 NLRB No 11 (2015). In fact, the evidence fails to show that any employee, on their own, was seeking to revoke their Union card and support. Rather, it was Respondent who initiated, prepared, pressured and instructed employees to sign the petition in its continued attempt to get rid of the Union. Accordingly, the ALJ should find that Respondent's conduct was coercive and in violation of the Act since employees would predictably feel their jobs were in peril if they did not sign.

I. RESPONDENT VIOLATED SECTION 8(A)(1) AND (3) OF THE ACT BY DISCHARGING GUANCE AND URBAEZ.

In order to establish unlawful discrimination under Section 8(a)(1) and (3) of the Act, General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Management*, 462 U.S. 393, 395, 403, fn7 (1983); *Wright Line*, 251 NLRB 1083,1089 (1980).

Evidence that may establish a discriminatory motive, ie., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee includes: (1) statements of animus directed to the employee or about the employees' protected

activities (See, e.g., *Austal USA LLC*, 356 NLRB No. 65 (2010)(unlawful motivation found where HR director interrogated and threatened union activist, and supervisors told activist that management was “after her” because of her union activities); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employees (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee’s protected activities and the discipline; (4) the existence of other unfair labor practices that demonstrate that the employer’s animus has led to unlawful actions (see, e.g., *Mid Mountain Foods*, 332 NLRB 251, n.2 (2000), enf. mem 169 LRRM 2188 (4th Cir. 2001)(relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer’s asserted reason for the employees’ discipline was pretextual, e.g. disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct or providing nondiscriminatory explanation that defies logic or is clearly baseless (see, e.g., *Lucky Cab Company*, 360 No 43 (2014); *ManorCare Health Services-Easton*, 356 NLRB No. 39 (2010); *Greco & Haines, Inc.*, 306 NLRB 634 (1992); *Wright Line*, *supra*).

Once the General Counsel has established that the employee’s protected activity was a motivating factor in the employer’s decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same

adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management, supra*. The employer has the burden of establishing that affirmative defense. *Id.* Here, the credible evidence shows that Respondent discharged Guance and Urbaez because of their Union activities in violation of the Act.

1. Respondent violated Section 8(a)(1) and (3) of the Act by discharging Guance because of his Union activities.

All of the elements of a *prima facie* case have been established concerning Respondent's decision to discharge Guance. First, the undisputed evidence shows that Guance engaged in Union activities by openly demonstrating his support for the Union. In this regard, the evidence shows that in August 2016,²⁰ Guance met with Union representatives at the corner of Grinnell and Garrison to discuss the benefits of Union representation (Tr. 77-79). Guance also told Vallejo, one week before his discharge, that he signed a Union card (Tr. 90). Although Respondent may deny Guance's support for and activities on behalf of the Union since the Union was unable to present a signed Union card, a signed Union card is not the only evidence that shows an employee's engagement in protected activities. Rather, Guance's meeting with Union representatives on the street corner and his announcement to Vallejo that he signed a Union card sufficiently establishes his engagement in protected activity under the Act. Second, Respondent was well aware of Guance's support for the Union inasmuch as Vega stood by monitoring Guance's meeting with the Union (unlawful surveillance) and Guance

²⁰ Although there is no evidence of the Union visiting Respondent's Bronx Facility in August 2016, the ALJ should not seize on this immaterial fact to discredit Guance. Guance testified about meeting Union representatives and mailing a signed Union card in August. The dates of these events are immaterial when compared with Guance's detail testimony about the conversations he had with Respondent managers. See *Laborers', Local 252*, 233 NLRB 1358, 1359 (1977); *Sheet Metal Workers Local 224 (Sheet Metal)*, 297 NLRB 528, 535 (1990); *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 (1996). See also *D&D Enterprises, Inc.*, 336 NLRB No. 76 (2001); *Service Spring Co.*, 263 NLRB No. 103, fn 2,8 (1982)(where an omission of an immaterial fact would not raise a credibility question).

openly told Vallejo that he signed a Union card (Tr. 90). Therefore, Respondent clearly had direct knowledge of Guance's protected activity. Third, Guance suffered an adverse employment action when Respondent discharged him on September 7, 2016. There is also an abundance of evidence showing Respondent animus toward the Union, in general, and against Guance because of his support for and activities on behalf of the Union. Respondent by its supervisors and agents unlawfully monitored Guance's protected activity, interrogated him about his support for the union, threatened him with unspecified reprisals because of his support for the Union and threatened him with discharge because he supported the Union (see above). Based on this credible evidence, as well as evidence of disparate treatment (as fully discussed below) General Counsel has established a *prima facie* case that Respondent discharged Guance because of his Union activities in violation of the Act.

Under a *Wright Line* analysis, in order to rebut General Counsel's *prima facie* case, Respondent must demonstrate that the same personnel action would have taken place for legitimate, non-discriminatory reasons, even in the absence of Guane's Union activities. In this regard, General Counsel submits that the totality of circumstances establishes that Respondent would not have discharged Guance if he did not engage in Union activity and therefore Respondent violated Section 8(a)(1) and (3) of the Act.

At trial, Respondent maintained that Guance was discharged for lying about an accident (Tr. 44, G.C.Exh .7). The evidence shows that on September 6, 2016, Guance and Germosen went to pick up recycled goods from a client, El Ramida. There is no dispute that Germosen was the driver and Guance was his helper on this day. Germosen drove the truck and Guance sat in the passenger seat. While at the client's facility, Germosen backed the truck into a pillar

(Tr. 94). Germosen was in the driver's seat operating the truck and watching the driver's side while Guance was watching the passenger side (Tr. 92). The undisputed evidence shows that Germosen, while backing up, hit the pillar, which caused damage to the truck (Tr. 92).

The evidence further shows that Germosen pressured Guance to lie to Respondent about the cause of the accident. Although Guance wanted to tell Respondent the truth, Germosen pleaded with Guance to tell Respondent that they were hit by another vehicle (Tr. 93-95). Germosen was so scared that he would lose his job that he threatened Guance with problems at work if Guance didn't corroborate this fictional story (Tr. 95). After being pressured and threatened, Guance finally agreed to go along with Germosen's version of the accident. Germosen called Vega to tell him that someone else hit them and he filed a false report with the Police stating that a Plinksi truck hit them (Tr. 93-94, 517-518). This evidence is undisputed and is corroborated by Vega (Tr. 517-518). Therefore, the record evidence clearly shows that Germosen lied to Vega about the accident.

The next day, Vallejo spoke to Guance about the accident and after Guance gave the fictional version of what happened, Vallejo told him to go back to work (Tr. 96, 463-463). Vallejo then spoke to Germosen and according to Vallejo, Germosen told him the truth that he hit a pillar (Tr. 463). However, Guance spoke to Germosen after he talked to Vallejo and according to Guance, Germosen said that he first gave the fictional version to Vallejo before he decided to tell the truth (Tr. 132). Since Vallejo never denied Gaunce's testimony or provided more specific details about his conversation with Germosen, the ALJ should credit Guance's testimony and conclude that Germosen initially lied to Vallejo before telling the truth.

After speaking to Germosen, Vallejo called Guance into his office. Without asking Guance anything further, Vallejo handed Guance a discharge notice (Tr. 96, 463-46), which stated that he was being discharged for lying about the accident (G.C. Exh 7). Although Respondent may claim that Guance, unlike Germosen, continued to lie and refused to tell Vallejo the truth about the accident, the ALJ should not find this argument convincing. First, as discussed above in detail, Vallejo was not a credible witness. Throughout the trial, Vallejo testified in the most general and vague manner. Even when he was asked questions that suggested an answer, Vallejo still failed to provide specific details. Accordingly, the ALJ should not credit Vallejo's account of what happened in his meeting with Guance.

In addition, the evidence shows that Vallejo did not give Guance an opportunity to tell the truth before getting discharged. As mentioned above, the undisputed evidence shows that Vallejo walked into the second meeting with Guance with a discharge notice (Tr. 96, 463-464). Therefore, prior to that meeting, Vallejo had already decided to discharge Guance. Vallejo immediately handed the discharge notice to Guance without giving him any opportunity to tell the truth. It was after Vallejo discharged Guance that Guance told the truth about the accident and that Germosen threatened him if he didn't go along with his fictional version of the accident (Tr. 98).

Furthermore, Respondent demonstrated its intent to discriminate against Guance because of his support for the Union by engaging in the disparate treatment of Guance as compared to Germosen. Respondent maintains that lying is a legitimate reason for discharging an employee. However, Respondent's treatment of Germosen, the clear instigator of the lie not

only to Respondent but the Police, as well, was permitted to keep his job, indeed, without any disciplinary consequences.

At trial, Respondent failed to show that it has a long established policy and practice of discharging or disciplining employees for lying. Respondent did not introduce any employee handbook, any prior dismissals or any testimony that would convince the ALJ that Guance's discharge was consistent with an established employment practice. Absent any such employment practice, Respondent decided to discharge Guance. Guance was not the driver of the truck and he did not cause the accident. And Guance was not the only employee who lied. The undisputed evidence, which is corroborated by Vega, shows that Germosen lied to the Police and lied to Vega about the accident (Tr. 93-94, 517-518). But Respondent did not discharge Germosen (Tr.45). In fact, Respondent did not discipline Germosen, at all (Tr. 509). Such disparate treatment clearly supports a finding that Respondent's decision to discharge Guance was unlawfully motivated. Respondent seized this September incident as a pretext for that discharge.

The timing of Guance's discharge is also suspicious and indicative of unlawful motivation. *Bliss Cleaning Niagra, Inc.*, 344 NLRB No. 26 (2005;) citing *Davey Roofing, Inc.*, 341 NLRB 222 (2004). As discussed above, Guance started to engage in Union activities in August 2016 when he met Union representatives on the corner of Grinnell and Garrison. From that day on, Respondent unlawfully monitored Guance's Union activities, threatened him with unspecified reprisals and discharge and even interrogated him about his Union activities one week before his discharge (Tr. 90). Then, immediately following these unfair labor practices, Respondent made good on its threat and discharged Guance on September 7. The timing of this

discharge is highly suspect and provides further support that Respondent discharged Guance because of his support for and activities on behalf of the Union.

Based on the above credible evidence, the ALJ should conclude that Respondent failed to meet its burden of establishing that it would have discharged Guance even if he had not engaged in Union activities, and that the General Counsel has established that Respondent's discharge of Guance violated Section 8(a)(1) and (3) of the Act.

2. Respondent violated Section 8(a)(1) and (3) of the Act by discharging Urbaez because of his Union activities.

As with Guance, General Counsel has established a *prima facie* case concerning Respondent's decision to discharge Urbaez. First, the record evidence shows that Urbaez engaged in Union activities. He signed a Union card on June 2, 2016 and openly spoke to Union representatives about the Union in front of Respondent's Bronx facility (Tr.180; G.C.Exh. 14). Respondent also had direct knowledge of Urbaez' protected activities since Urbaez went to Vallejo to tell him that he signed a Union card (Tr. 185-186). As described above, the record is also replete with animus toward the Union in general and toward Urbaez. Respondent interrogated Urbaez about his support for the Union and threatened him with unspecified reprisals, discharge and the loss of wages because of his Union activities (See above). Then, on October 14, 2016, Respondent discharged Urbaez for pretextual reasons. Based on the above credible evidence, as well as evidence of disparate treatment (see below) General Counsel has established a *prima facie* case showing that Respondent discharged Urbaez in violation of Section 8(a)(3) of the Act.

Under a *Wright Line* analysis, Respondent must rebut General Counsel's *prima facie* case by showing that its decision to discharge Urbaez was not motivated by Urbaez' protected activities. General Counsel submits that Respondent has failed to meet its burden and that Respondent's action violated Section 8(a)(1) and (3) of the Act.

On October 14, 2016, Urbaez was called into Vallejo's office and given a discharge notice that stated he was being discharged for lack of job performance, for having a negative attitude when told to perform job assignments and for being disrespectful to coworkers (G.C.Exh. 5). General Counsel contends that the reasons proffered by Respondent for its discriminatory action are clearly pretextual and therefore indicative of illegal motivation.

The undisputed evidence shows that for over a year, Urbaez worked for Respondent as a mechanic. And as the only mechanic at the Bronx facility, Urbaez was the only one responsible for repairing 15 trucks on a daily basis. Every morning around 5 AM, Urbaez inspected the trucks to make sure they were operable for that day (Tr. 174-175, 474). Some trucks needed more repair work and he spent the day working on them. During his tenure with Respondent, Urbaez never received any discipline for poor work performance (Tr. 215-216). Although Mercado, Vega and Vallejo questioned Urbaez on a few occasions about the time he needed to complete an assignment, Respondent never wrote him up or suspended him for not performing his job in an efficient and timely manner. (Tr. 194-195; 197-198; 200-201; 215-219).

In addition, as the sole mechanic, Urbaez worked approximately 20-25 hours of overtime each week, which was approved by Vallejo (Tr. 176; G.C.Exh. 13). Evidence of this extensive overtime confirms that Respondent recognized that Urbaez had so much work that it was impossible to complete his assignments without overtime. Indeed, Respondent clearly

knew that Urbaez had a lot of work and was satisfied with his job performance since they repeatedly approved his overtime week after week.

In addition, Vallejo testified that Respondent sends out big and difficult repair work to an outside mechanic (Tr. 475). Therefore, General Counsel submits that had Respondent truly been dissatisfied with Urbaez' work performance and truly believed that Urbaez' overall work performance caused a delay in operations (Tr. 474), Respondent had the opportunity to send the work to an outside mechanic. Since Respondent failed to present any evidence of this or that Urbaez' work performance delayed operations, the ALJ should conclude that Urbaez' work performance had been acceptable by Respondent.²¹

The record evidence also fails to show that Urbaez engaged in any of the other misconduct set forth in Urbaez' discharge notice to warrant his discharge. As mentioned above, Urbaez did not receive any prior written warnings or suspensions for poor job performance (Tr. 215-216). Nor did Vallejo mention during the discharge meeting any assignments that were poorly performed by Urbaez or any incidents of Urbaez displaying a negative attitude (Tr. 206-212). Vallejo also did not mention the ways in which Urbaez acted disrespectful to his coworkers (Tr. 206-212). Therefore, Respondent failed to identify any instances where Urbaez engaged in the alleged misconduct that warranted his discharge. In addition, at trial, Respondent did not introduce any evidence of misconduct by Urbaez leading up to his discharge. In fact, Urbaez testified that Rogich told him he didn't know why Vallejo discharged

²¹ Although Respondent introduced documents that purport to show that Urbaez' work performance delayed operations (Resp. Exh. 8), the ALJ should conclude that these documents and Martucci's testimony regarding these documents during cross examination do not show the reasons for the time frame in which trucks leave and return to the facility (Tr. 555-557). In fact, Martucci had no idea why certain trucks left at certain hours (Tr. 555-557). In addition, Urbaez provided credible testimony that Moya was delayed in leaving the yard because Vallejo told him that his route was not ready (Tr. 562). Moreover, Urbez did not lie about working on Moya's truck (Tr. 430).

him since he was a good mechanic (Tr. 213). Since Respondent failed to rebut this testimony and failed to call Rogich as a witness, the ALJ should draw an adverse inference and conclude that Respondent's reasons for discharging Urbaez are pretextual and that the discharge of Urbaez was unlawfully motivated.

Since Urbaez had not engaged in any misconduct to warrant his discharge, the evidence shows that Respondent seized on a six month old suspension of Urbaez to come up with conduct that would justified their decision to discharge him. Specifically, on March 4, 2016, Urbaez was suspended for blatant disregard for a supervisor's directive, for a poor work attitude/ethic and for being disrespectful towards a supervisor and fellow employees (G.C.Exh 16).²² The incident related to the suspension involved Vallejo's directive to Urbaez to go to an auto parts store in order to pick up a part for a truck (Tr. 216). Urbaez refused because as the sole mechanic he determined that the truck in question did not need the part and that Vallejo was unnecessarily causing Respondent to purchase the part (Tr. 216, 248). Due to his moral character, Urbaez refused to do something he felt was not right. As a result, Vallejo suspended him for 10 days. Vallejo's interpretation of this incident was that Urbaez displayed a poor work attitude and showed disrespect towards a supervisor and fellow workers (G.C.Exh 16). At trial, Respondent failed to introduce any evidence that would support Vallejo's interpretation.

²² Although Urbaez testified that the suspension occurred in May 2016 instead of March 2016, Urbaez did provide an accurate account of the reasons for the suspension, a material fact. In fact, the reasons for the suspension are not in dispute. Accordingly, the ALJ should not discredit Urbaez for not properly recalling the date of the suspension, which is an immaterial fact. See *Laborers', Local 252*, 233 NLRB 1358, 1359 (1977); *Sheet Metal Workers Local 224 (Sheet Metal)*, 297 NLRB 528, 535 (1990); *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 (1996). In addition, Urbaez' denial of his signature on the suspension notice is not grounds for finding Urbaez an incredible witness. Urbaez repeatedly gave consistent and accurate testimony about the suspension including the reasons for the suspension. Therefore, his ability to testify about the material facts makes him a credible witness. *D&D Enterprises, Inc.*, 336 NLRB No. 76 (2001); *Service Spring Co.*, 263 NLRB No. 103, fn 2,8 (1982)(where an omission of an immaterial fact would not raise a credibility question).

Respondent's reasons for discharging Urbaez- a negative attitude, being disrespectful- are quite similar to the March 4th suspension. However, Respondent failed to introduce any evidence at trial that would show that Urbaez continued to engage in the same alleged misconduct after he returned from the March 2016 suspension. From March 4, 2016 until his discharge on October 14, 2016, Urbaez did not receive any additional written warnings or suspensions for any other misconduct. The absence of any further disciplinary action or misconduct and Respondent's reliance on a six month old suspension clearly shows illegal motivation. Respondent obviously did not think Urbaez was a mediocre mechanic until Urbaez openly expressed his support for the Union in July 2016. At that moment, Respondent began to display animus toward Urbaez and to look for any pretext to get rid of a strong Union supporter. Respondent found its pretextual reasons in an old suspension notice. Respondent relied on misconduct from the six month old suspension notice since Urbaez had not engaged in any further misconduct. Accordingly, the pretextual nature of Respondent's proffered reasons for discharging Urbaez is quite apparent.

Additional evidence of pretext regarding Urbaez' discharge is the shifting reasons given at trial for his discharge. In addition to the multiple reasons for Urbaez' discharge given in Respondent's discharge notice (see above), Respondent President Martucci testified that the only reason Urbaez was discharged was for refusing to do his work (Tr. 40). Vallejo, at trial, provided a third reason for Urbaez' discharge. He testified that Urbaez was discharged for poor performance, because of the way he interacted with fellow employees and for killing time (Tr. 485). Vallejo testified about these reasons without giving any instances where or when Urbaez supposedly engaged in this conduct. General Counsel contends that Respondent's shifting

reasons as to its basis for discharging Urbaez, emphasizes the pretextual nature of its decision and reveals its unlawful motivation stemming from Urbaez' Union activities. *Lucky Cab Co.*, 360 NLRB No. 43 (2014); *Airport 2000 Concessions*, 346 NLRB 958 (2006).

The record evidence further shows that Respondent's disparate treatment of Urbaez indicates that Respondent's decision to discharge Urbaez was motivated by unlawful considerations. On January 5, 2017, Vallejo recommended the discharge of driver Mariano Mata because he refused to perform an assignment (Tr. 505; G.C.Exh. 25A). The recommendation notice stated that Mata had refused other job assignments "numerous times before", that he showed a "blatant disregard for all the tasks given to him" and that he had "numerous confrontations with co-workers and supervisors due to his lack of respect." (G.C.Exh 25A). The notice also said that Mata showed "insubordinate behavior on a regular basis and lacks the proper work ethic/attitude to continue employment." (G.C.Exh 25A). Although it appears that Mata repeatedly engaged in serious and offensive misconduct, Respondent did not discharge him (Tr.505). However, unlike Mata, Urbaez was discharged when Respondent lacked the justification for Urbaez' adverse employment action. Accordingly, Respondent's disparate treatment of Urbaez as compared to Mata, shows that Respondent's decision to discharge Urbaez was based on Urbaez' protected activities.

General Counsel further contends that Respondent's attempt to suggest that its decision to discharge Urbaez was made in March 2016, well before Urbaez engaged in Union activities, is without merit. Although Vallejo testified that in March 2016 he began texting another mechanic, Alejandro Lopez, to see about replacing Urbaez (Tr. 489-492), the evidence fails to show that Respondent did anything to advance that decision until after Urbaez became a

known Union supporter. From March until October 5, 2016, the evidence fails to show that Respondent did anything but make initial contact with Lopez (Tr. 489-495). Vallejo testified that he interviewed Lopez on October 5, 2016 and offered him the mechanic position on October 12, 2016 (Tr. 489-496). Even assuming Vallejo's testimony regarding his search for a replacement mechanic were truthful, the evidence fails to support Respondent's argument that its decision to discharge Urbaez predates his Union activities. First, Respondent made initial contact with Lopez in March 2016 while Urbaez was out on suspension (Tr. 490; Resp. Rejected Exh. 9). After that contact, Respondent's efforts to find a replacement contact went dormant. There is no evidence to show that from March to October 2016, Respondent engaged in any genuine job search for a new mechanic. Surely, evidence of meaningless texts to one mechanic, months before Urbaez was discharged, is not a serious search. Therefore, the ALJ should conclude that Respondent had not made the decision to discharge Urbaez in March 2016. Rather, it was not until Urbaez engaged in protected activities from June through October 2016 that Respondent decided to discharge Urbaez.

Based on the record evidence, the ALJ should conclude that Respondent has failed to meet its burden under *Wright Line, supra*, to come forward and show, by a preponderance of credible evidence, that it would have discharged Urbaez, a long term employee, absent his Union activities. The general and vague testimony of Respondent's witnesses and Respondent's failure to present other management witnesses on significant matters do not constitute a credible and sufficient rebuttal to General Counsel's credible witnesses and *prima facie* case. Therefore, the ALJ should find that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Urbaez because of his Union activities.

V. CONCLUSION AND REMEDY

Counsel for the General Counsel contends that the probative evidence as set forth fully above clearly proves that Respondent violated Sections 8(a)(1) and (3) as alleged in the Amended Consolidated Complaint, herein. Therefore, General Counsel seeks a make whole remedy to include the immediate reinstatement of Urbaez and Guance, backpay with interest and excess tax liability and the posting and reading of an appropriate Notice.

As part of the remedy for the unlawful discharges of Guance and Urbaez, Counsel for the General Counsel also seeks an order requiring that Respondent reimburse them for all search-for-work and work-related expenses regardless of whether they received interim earnings in excess of these expenses, or at all, during any given quarter or during the overall backpay period.

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for Respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment²³; the cost of tools or uniforms required by an interim employer²⁴; room and board when seeking employment and/or working away from home²⁵; contractually required union dues and/or initiation fees, if

²³ *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).

²⁴ *Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965).

²⁵ *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

not previously required while working for respondent²⁶; and/or the cost of moving if required to assume interim employment.²⁷

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. See *W. Texas Utilities Co.*, 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); see also *N Slope Mech.*, 286 NLRB 633, 641 n.19 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees who meet their statutory obligations to seek interim work²⁸ but who, through no fault of their own, are unable to secure employment or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary

²⁶ *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

²⁷ *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

²⁸ *In Re Midwestern Pers. Servs., Inc.*, 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

focus clearly must be on making employees whole." *Jackson Hosp. Corp.*, 356 NLRB No. 8, slip op. at 3 (2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also *Pressroom Cleaners & Serv. Employees Intl Union, Local 32bj*, 361 NLRB No. 57, slip op. at 2 (2014) (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at *5, available at 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), aff'd *Georgia Power Co. v. US. Dep't of Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole...." *Don Chavas, LLC*, 361 NLRB No. 10, slip op. at 3 (2014). In order for employees truly to be made whole for their

losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.²⁹ These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. See *Jackson Hosp. Corp.*, 356 NLRB No. 8, slip op. at 1 (2010) (interest is to be compounded daily in backpay cases).

Counsel for the General Counsel also seeks an Order requiring that at a meeting or meetings scheduled during all shifts at Respondent's Bronx and Bayshore facilities to ensure the widest possible attendance, Respondent's representatives Ralph Martucci and David Vallejo read the Notice to Employees in English, Spanish, and in additional languages if the Acting Regional Director of Region 2 decides that it is appropriate to do so, on work time in the presence of a Board Agent and a representative of the Union, or in the alternative that Respondent promptly have a Board Agent, or a translator paid for by Respondent if necessary, read the Notice to Employees in English, Spanish, and in additional languages if the Regional Director of Region 2 decides that it is appropriate to do so, during work time in the presence of Respondent's supervisors and agents identified in paragraph 5 of the Amended Consolidated Complaint and amended on the record. The date and time of the Notice reading should also be approved by the Acting Regional Director. A Notice reading is necessary and essential to properly remedy Respondent's conduct for several reasons. First, the Board has held that a Notice reading is more effective at remedying violations during an organizational campaign

²⁹ Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 at *2(1953).

than a traditional Notice posting because of the greater impact an employer has on employees when standing and reading before them. See *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993), enfd. mem 55 F.3d 684 (D.C. Cir. 1995). The reading of the Notice will also "ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the Respondent's bulletin boards." *Excel Case Ready*, 334 NLRB No. 2, 4, 5 (2001). Second, testimony established that the breadth and severity of Respondent's unfair labor practices was so wide-reaching and severe that extraordinary remedies are necessary. The Board has held the remedy of reading a notice by a company representative is appropriate when the unfair labor practices are "so numerous, pervasive and outrageous" that extraordinary remedies are necessary "to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (unfair labor practices found to be "egregious and notorious"). Here, the scope of Respondent's unfair labor practices include numerous forms of surveillance of employees' Union activities, interrogation of employees' support for the Union, threats of discharge, unspecified reprisals and loss of wages due to employees' Union activities and support for the Union; instructions to employees to sign a petition to revoke their support for the Union and the discharges of Urbaez and Guance. Moreover, many of the unfair labor practices were committed by high ranking officials in the facility, making the need for a notice reading even greater. *OS Transport LLC*, 358 NLRB 117 (2012) (relying on senior officials involvement in the commission of unfair labor practices to require a notice reading). A Notice reading is also necessary because the impact and awareness of the unfair labor practices was unit wide. *OS Transport LLC, supra* (relying on awareness of unfair labor practices within the unit to require a notice reading). Respondent's unfair labor

practices were proliferated unit-wide in both Respondent facilities. These unfair labor practices were directed to the entire workforce, and they have not been corrected or sufficiently disavowed. Finally, a Notice reading, and specifically a Notice reading in English and Spanish because Urbaez and Guance are Spanish speaking and Respondent employs a mostly Spanish speaking workforce. Thus, a Notice reading would be more effective at reaching Respondent's diverse workforce than only a traditional posting.

General Counsel is also seeking consequential damages as a remedy. Under the Board's present remedial approach, some economic harm that flows from a respondent's unfair labor practices is not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *E.g., Graves Trucking*, 246 NLRB 344, 345 n.8 (1979). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondents to compensate employees for all consequential economic harms sustained, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm is well within the Board's remedial power. The Board has "broad discretionary" authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is

to “make whole” employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers’ Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore “the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

Moreover, the Supreme Court has emphasized that the Board’s remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must “draw on enlightenment gained from experience.” *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require reimbursement for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (change from computing simple interest on backpay awards to computing daily compound interest); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress”). Compensation for employees’ consequential economic harm would further the Board’s charge to “adapt [its] remedies to the needs of particular situations so ‘the victims of discrimination’ may be treated fairly,” provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the

victims of unfair labor practices to bear the consequential costs imposed on them by a respondent's unlawful conduct.

Reimbursement for consequential economic harm achieves the Act's remedial purpose of restoring the economic status quo that would have obtained but for a respondent's unlawful act. *Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.³⁰ Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (employee entitled reimbursement for out-of-pocket medical expenses incurred during backpay period and it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).³¹

³⁰ However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

³¹ Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (employee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (employee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (Oct. 24, 2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union had just successfully negotiated a CBA with the employer). In these circumstances, the employee would not have incurred the consequential financial loss absent respondent's original unlawful conduct; therefore, compensation for these costs was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the

time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.³² In *Nortech Waste, supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent

³² This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

liable for consequential medical expenses); *Lee Brass Co.*, 16 NLRB 1122, 122 n. 4 (1995).³³

Respectfully submitted,



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³³ The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized “damages for ‘future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.’” *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007) (“[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages” for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).