

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARBOR RECYCLING/ARBOR LITE LOGISTICS,
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 BRIEF IN SUPPORT OF
EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

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Pursuant to Section 102.46 of the Board's Rules and Regulations, General Counsel hereby files the following Brief in support of exceptions to certain portions of the Decision and Recommended Order by Administrative Law Judge Kenneth Chu, herein referred to as ALJ, dated March 26, 2018, in the above-captioned matter insofar as the ALJ erred in failing to find that Arbor Recycling/Arbor Lite Logistics, a single employer, herein Respondent, violated Section 8(a)(1) of the Act by engaging in unlawful surveillance and by failing to order Respondent to post a Notice at its Bronx facility.¹

I. PROCEDURE AND ALJ DECISION AND ORDER

On July 19, 2016, Amalgamated Local 1931, herein the Union, filed Case No 2-CA-180470 alleging, in part, that Arbor Recycling and Arbor Lite Logistics, herein Respondent, as a Single Employer, 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

¹ In this supporting brief, the Administrative Law Judge will be referred to as the "ALJ," the National Labor Relations Board will be referred to as the "Board," Amalgamated Local 1931 will be referred to as the "Union" or "Charging Party," and Arbor Recycling/Arbor Lite Logistics will be referred to as "Respondent." Citations to the ALJ's decision will be referred to as "ALJD" followed by the page and line numbers specifically referenced.

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 Cases, 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)² (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

² At trial, the parties stipulated to Glecio's proper name, Clesio Rodriguez Da Silva, herein Da Silva (Tr. 405).

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; David Vallejo, 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).

On March 26, 2018, the ALJ issued his decision finding that Respondent violated Section 8(a)(1) of the Act by instructing employees at its Bayshore facility to sign a petition revoking their support for the Union (ALJD 30:10-47; 40:1-37; 41:1-4). The ALJ dismissed the remaining Section 8(a) (1) and (3) allegations. However, General Counsel, contends that the ALJ failed to find that Respondent violated Section 8(a)(1) of the Act by engaging in unlawful surveillance on July 18 and July 25, 2016.³

³ All dates hereinafter are in 2016.

To remedy the Section 8(a)(1) violation, the ALJ ordered Respondent to take the affirmative action of posting a notice at only Respondent's Bayshore facility. General Counsel contends that the ALJ failed to provide the appropriate remedy to this violation by limiting the posting to only one of Respondent's two facilities. (ALJD 42:6-19).

II. ISSUES

1. Did the ALJ err in failing to find that Respondent Agent Da Silva, herein Da Silva, violated Section 8(a)(1) of the Act by engaging in the unlawful surveillance of employees' Union activities on July 18 (ALJD 22:4-22)?
2. Did the ALJ err in failing to find that Da Silva's observation of employees signing union cards was not out of the ordinary (ALJD 22:4-12; 24:13-26; 25:1-10)?
3. Did the ALJ err in failing to find that Respondent Night Shift Facility Manager Mercado, violated Section 8(a)(1) of the Act by engaging in the unlawful surveillance of employees' Union activities on July 25 (ALJD 24:5)?
4. Did the ALJ err in concluding that safety considerations existed when Mercado videotaped the Union representatives and an employee on July 25. (ALJ 24: 6-11)?
5. Did the ALJ err in ignoring Union Representative Lubrano's testimony and videotape of Mercado on July 25 (G.C.Exh. 26)(ALJD 24: 5-26; 25:1-14)?
6. Did the ALJ err in failing to draw an adverse inference that Respondent Supervisor Mercado engaged in unlawful surveillance on July 25 (ALJD 24:5-26; 25:1-10)?
7. Did the ALJ err in concluding that Mercado's videotaping of an employee speaking to Union representatives on July 25 was nothing more than a mere observation (ALJD 24:5-26; 25:1-10)?
8. Did the ALJ err in limiting the notice posting requirement to Respondent's Bayshore facility. (ALJD 42: 6-19)?

III. FACTS

Respondent, a single employer, is engaged in the operation of recycling and transporting plastic materials in the Bronx and Bayshore, New York. Respondent employs drivers, driver's helpers, warehouse employees and one mechanic, who services the Bronx and Bayshore facilities (ALJD 2:15-38; 3:1-474:1-16).

In early June 2016, the Union began to organize the drivers, driver helpers, warehouse employees and mechanic employed by Respondent at its Bronx and Bayshore facilities (Tr. 296; ALJD 4:30-36). The Union's organizing campaign and representation case extended into February 2017 for both Respondent's Bronx and Bayshore facilities (Tr. 146-147; 332; G.C.Exh 24). At the Bayshore facility, Respondent instructed employees to meet on several occasions with labor consultants from January 6 until February 10, 2017. The labor consultants told employees that the Union was corrupt and that they should not vote for the Union (Tr. 146-157). On February 27, 2017, Respondent Manager Rocco Mongelli unlawfully instructed employees to sign a petition that stated that the employees wanted to revoke their support for the Union and Union cards (Tr. 159; G.C.Exh. 12; ALJD 40:13-24).

1. Union's July 18 Visit

On July 18, 2016, Lubrano accompanied by Union VP Charlie 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, Respondent Agent Da Silva approached the group and while holding a clip board in his hand, stood by them watching for a few minutes (Tr. 302 G.C.Exh 3).

2. Union's July 25 visit

On July 25 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 already had an established lunch area (Tr. 322-326, 397-398; G.C.Exhs 10, 26). The table and Union representatives did not block Respondent's driveway or operation (G.C.Exh. 26). In fact, a videotape taken by Lubrano shows that Respondent's truck was parked in the bay facing out to the street with no obstruction (G.C.Exh 26). While an employee ate and talked to a Union Representative (Tr. 322; G.C.Exh 26), Respondent Night Facility Manager Mercado videotaped them for approximately 3-5 minutes (Tr. 322-326; 397-398, G.C.Exhs. 10, 26).

IV. ARGUMENT

A. THE ALJ ERRED IN FAILING TO FIND THAT RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY ENGAGING IN UNLAWFUL SURVEILLANCE OF EMPLOYEES' UNION ACTIVITIES ON JULY 18.

In his Decision, the ALJ found that Da Silva, an agent of Respondent (ALJD 22:fn27), did not engage in unlawful surveillance as he stood in a public area with employees who were talking to Union representatives (ALJD 22:5-7). The ALJ determined that Da Silva was engaged in nothing more than a mere observation since he did not talk to employees, did not interfere with employees and only observed for mere minutes (ALJD 22:4-1-8; 24:13-26).

To support his finding, the ALJ relied on *Wal-Mart Stores, Inc.*, 340 NLRB 1216, 1217 (2003). In *Wal-Mart, supra*, the Board found that a manager's 30 minute observation of union handbilling in a public area, while sitting on a bench outside the store, unaccompanied by coercive behavior, did not constitute unlawful surveillance (ALJD 24:20-23). In that case, the Board emphasized that the manager acted in response to a complaint from a customer. Additionally, the parking lot where the union handbilling occurred was under the manager's jurisdiction. *Wal-Mart, supra*. General Counsel submits that the facts in the instant matter are distinguishable from the facts in *Wal-Mart* and therefore, the ALJ erred in finding that Da Silva's conduct was not unlawful.

Unlike the manager in *Wal-Mart*, Da Silva did not observe employees engage in public protected activity by standing in front of Respondent's facility. Rather, the undisputed evidence shows that Da Silva was off Respondent's premises and deliberately approached employees who were standing with Union representatives on a public corner down the block and out of view of Respondent's facility. The photograph entered into evidence at trial clearly shows Da Silva standing with Union representatives and employees while employees sign Union cards (ALJD 21:4; G.C.Exh 3). As the photograph shows, Da Silva was standing a few feet away from employees (G.C.Exh. 3). Although Da Silva may not have interrupted or interfered with employees engaging in protected activity in a public area, the totality of the circumstances clearly shows that Da Silva's conduct was out of the ordinary and more than a mere observation.

Unlike *Wal-Mart, supra*, the record evidence fails to show that Da Silva had any legitimate reason for being on the corner at the time employees were talking to Union representatives and signing Union cards. At trial, Respondent failed to present evidence to show that Da Silva was there to monitor any safety or trespass concerns or that Da Silva was just passing the corner on his way to work. Nor does the record show that Da Silva had any business justification for standing on that corner while the employees engaged in protected activities. On the other hand, the photograph of Da Silva standing with the employees shows him with a clip board, which gives the impression that he was deliberately at the corner to write down the names of the employees speaking to the Union (G.C.Exh 3). Absent a legitimate reason for Da Silva's close proximity to employees engaging in open union activities, the Board should conclude that Da Silva's conduct was more than a "mere observation of open and public union activity" *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 *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986). Similarly, without any legitimate justification for his presence, the Board should find that Da Silva's presence at the corner at the time employees were meeting with Union representatives was clearly out of the ordinary. *Durham School Services, LP*, 361 NLRB No. 44 (2014). General Counsel submits that the undisputed evidence shows that Da Silva's observation of the employees speaking to the Union was coercive and intended to frighten employees that their Union involvement was being closely monitored by Respondent. Accordingly, contrary to the ALJ's Decision, the Board should conclude that Da Silva engaged in the unlawful surveillance of employees' Union activities in violation of Section 8(a)(1) of the Act.

B.THE ALJ ERRED IN FAILING TO FIND THAT RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY ENGAGING IN THE SURVEILLANCE OF EMPLOYEES' UNION ACTIVITIES ON JULY 25

1. The ALJ ignored the Union's testimony and videotape of Mercado photographing/videotaping employees speaking to Union Representatives

The undisputed evidence shows that on July 25 at approximately 8 PM, Respondent night shift Facility Manager Mercado photographed/videotaped an employee engaged in Union activities.⁴ Lubrano testified that on that evening, the Union set up a table located in the employee lunch area, a few feet away from Respondent's

⁴ While the ALJ concluded that Mercado was taking photographs on July 25 (ALJD 24:5-11), Lubrano testified that for 3-5 minutes Mercado held his phone up, moved it right to left, and that there was a flash (Tr. 323). Lubrano's videotape of Mercado shows Mercado holding up his phone and moving it (G.C.Exh 26). Since Mercado did not testify, it is unclear whether Mercado was photographing or videotaping the employee's activities with his phone. In either case, he was recording the employee's activity, which is more than a mere observation.

driveway at 1120 Grinnell in order to meet with Respondent's evening shift employees.(Tr. 322-326, 397-398; G.C.Exhs. 10, 26). Lubrano further testified that while the Union representatives met with an employee, Mercado stood in the street videotaping them (Tr. 322- 326, 397-398). In addition to Lubrano's uncontroverted testimony, General Counsel introduced at trial, the videotape Lubrano took of Mercado that evening (G.C.Exh 26). Lubrano's videotape clearly shows Mercado standing in the middle of the street recording an employee and Union representatives at the Union's table on his phone (Tr. 326, 397-398; G.C.Exhs. 10, 26).

In his Decision, however, the ALJ ignored Lubrano's videotape and concluded that there were no employees present when Mercado stood in the middle of the street taking photographs (ALJD 23:21-46; 24:1-11). General Counsel contends that the Board should conclude that General Counsel's videotape (G.C.Exh 26), which is part of the record, provides valuable uncontested evidence that Mercado photographed/videotaped an employee with Union representatives on July 25. Not only does Lubrano's videotape show an employee standing with a Union representative, but Lubrano, at trial, described the details of the videotape including the presence of an employee (Tr. 397-398). Lubrano clearly described the employee at the Union's table in the right hand corner of the video screen and Mercado photographing/videotaping them (Tr. 397-398). Accordingly, the Board should find that the ALJ ignored undisputed record evidence by ignoring Lubrano's videotape (G.C.Exh. 26).

2. The ALJ incorrectly found that Respondent photographed/ videotaped employees due to safety concerns

In his Decision, the ALJ determined that Respondent had legitimate safety concerns to warrant Mercado's photographing/videotaping on July 25 (ALJD 24:1-11). To reach this conclusion, the ALJ improperly relied on testimony from Respondent Supervisor David Vallejo, herein Vallejo, who was not present when Mercado photographed/videotaped the employee and Union representatives (ALJD 24:1). Vallejo's testimony was clearly speculative as he had no firsthand knowledge regarding the reasons for Mercado's actions. Vallejo also had no firsthand knowledge as to what occurred during the evening of July 25. Specifically, Vallejo testified that he "believed Mercado was taking a picture of parked vehicles as verification that [the cars] were blocking the ingress and egress of [Respondent's] trucks" (ALJ 24:1-4). General Counsel contends that the ALJ erred in crediting Vallejo's testimony regarding this incident.

At trial, Vallejo also provided testimony about the way vehicles park on the street in front of Respondent's Bronx facility and how Respondent uses traffic cones to make sure no one blocks Respondent's driveways (Tr. 443-456). Vallejo also testified that he thought a photograph taken on July 25 (G.C.Exh. 10) showed cars parked in the wrong direction on the street (Tr. 500) and that they were very close to Respondent's driveway (Tr. 501). However, Vallejo did not testify that Respondent's driveways and bay areas were blocked the evening of July 25 (443-508). In addition, Vallejo did not testify that the Union interfered with Respondent's operation on July 25 and that trucks were not

able to enter Respondent's driveways on July 25 (Tr. 443-508). In fact, none of Respondent's witnesses testified about the existence of any obstruction or safety concerns on July 25, or at any other time. Therefore, the ALJ erred in believing that Vallejo's testimony presented a legitimate safety concern to warrant Mercado to photograph/videotape the Union representatives and Respondent's employee on July 25.

While there is evidence that Respondent's trucks enter and depart Respondent's facility driveway and that employees move across the street from one facility to the next, the credible evidence presented at trial does not show trucks entering or departing Respondent's driveway the evening of July 25. Lubrano's photograph (G.C.Exh. 10) and videotape (G.C.Exh 26) do not show any Respondent trucks trying to enter the facility and being blocked by the Union or by the Union's parked cars. Moreover, there is no evidence that the Union obstructed or interfered with Respondent's operation that evening (G.C.Exh. 26).

Therefore, based on the credible and uncontroverted evidence presented by Lubrano and his videotape, the Board should conclude that Respondent did not have any legitimate safety or trespass concerns the evening of July 25 to warrant the photographing/videotaping of employees and Union representatives.

3. The ALJ erred in failing to draw an adverse inference that Respondent engaged in unlawful surveillance

General Counsel further contends that had Respondent had a legitimate safety or trespass concern, Respondent would have called Mercado as a witness and presented the photograph/videotape he took on July 25. However, Respondent did not call Mercado and the ALJ refused to draw an adverse inference in this matter. Although an ALJ may have the discretion to draw such an inference (ALJD 32:fn35), the evidence herein clearly warrants that such an inference should be made. The evidence shows that Mercado, Respondent's night shift Facility Manager, is still employed by Respondent (Tr. 10) thus, Respondent still had control to call Mercado as a witness at trial. Mercado is also the primary Respondent witness who had direct knowledge as to what occurred the evening of July 25. However, Respondent failed to call him and failed to introduce the photograph or videotape he was taking the evening of July 25. General Counsel maintains that based on the undisputed record evidence, an adverse inference herein is warranted and that the Board should draw such an inference and conclude that Mercado was engaged in the unlawful surveillance of employees' protected union activity in violation of Section 8(a)(1) of the Act. *Atelier Condominium*, 361 NLRB No. 111 (2014) 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).

4. Mercado's surveillance of an employee on July 25 is more than a mere observation of employees' protected Union activity.

In his Decision, the ALJ cites cases that address the issue of public area surveillance and whether a manager's observation was "out of the ordinary" activity and more than a "mere observation" to constitute unlawful surveillance in violation of Section 8(a)(1) of the Act. *Aladdin Gaming, LLC*, 345 NBLRB 585 (2005); *Arrow Automotive Industries*, 258 NLRB 860 (1981); *Brown Transport Corp.*, 294 NLRB 969 (1989); (ALJD 20:2947; 21:1-3; 24:13-26; 25:10). Although the ALJ cites relevant case law, he failed to properly apply the relevant standard in the case herein and therefore, failed to arrive at the correct conclusion that Mercado's conduct violated Section 8(a)(1) of the Act.

As mentioned above, the evidence clearly shows that Mercado was videotaping/photographing the Union representatives speaking to an employee by the Union's table on July 25. While Mercado had every right to be outside in a public area crossing the street during working hours, *Brown Transport Corp.*, *supra*, his videotaping/photographing of an employee speaking to Union representatives was out of the ordinary. The record evidence fails to show that Mercado or any other supervisor regularly videotapes/photographs the public area for safety and trespass concerns or that the Union obstructed the ingress and egress of Respondent's trucks and equipment at any time to warrant the photographing /videotaping of their conduct (G.C.Exh 26). And while Mercado did not physically interfere with the employee's activity or make any threatening comments to the employee, he did stand unreasonably close for a few minutes taking a videotape/photograph of the employee's conduct. Absent any

legitimate safety or business justification, the Board should find that Mercado's videotaping/photographing alone, is threatening and coercive and in violation of the Act. *California Acrylic Industries, Inc., supra*. Accordingly, contrary to the ALJ's Decision, the Board should find that Mercado's videotaping/photographing on July 25 constitutes unlawful surveillance in violation of Section 8(a)(1) of the Act.

C THE ALJ ERRED IN ORDERING RESPONDENT TO POST A NOTICE AT ONLY ITS BAYSHORE FACILITY⁵

In his Decision, the ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by instructing its Bayshore employees to sign a petition revoking their support for the Union (ALJD 39:10-47; 40:1-37; 41:1-4). However, the ALJ limited the Notice posting to only Respondent's Bayshore facility (ALJD 42:6-19). While the allegation involving the petition to revoke employee support occurred at Respondent's Bayshore facility, Respondent's unlawful conduct affected employees at both facilities and therefore the ALJ's remedy should be modified by the Board to include Respondent's Bronx facility, as well.

The Board has "broad discretionary authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *In re Technology Service Solutions*, 334 NLRB No 18 (2001); citing *Indian Hills Care Center*, 321 NLRB 144 fn3 (1996), quoting *NLRB v. J.H. Rutter-Rex Mfg Co*, 396 U.S. 258 (1969). In

⁵ The Board need not reach this conclusion if the Board finds merit to General Counsel's exceptions concerning Respondent's unlawful surveillance at its Bronx facility in violation of Section 8(a)(1).

exercising that authority, the Board crafts its posting requirements of the Notice to ensure that a respondent employer actually apprises its employees of the Board's decision and their rights under the Act. The Board has also modified its traditional posting requirement to adapt to varying circumstances on a case by case basis so that employees are informed of their rights under a decision. See *In re Technology, supra*, and cases cited therein.

In *Fresh Organics*, 350 NLRB No 35 (2007), the ALJ ordered the respondent employer to post the notice not only at its California stores directly implicated in the case, but also at any retail operation respondent may have outside of California. The Board accepted the respondent's exceptions that the evidence failed to provide a basis for such an expansive notice posting requirement. There was little evidence at all about the stores outside of California, much less evidence sufficient to demonstrate that the respondent's unlawful conduct affected employees in those stores. Therefore, consistent with the record evidence and the Board's single employer finding, the remedy was modified to require the notice posting only in respondent's California stores.

General Counsel asserts that the instant case requires modification of the ALJ's posting requirement. Although a traditional remedy normally requires a notice posting only at the facility where the violation occurred, the posting of the notice at only Respondent's Bayshore facility would be inadequate to inform Respondent's employees about the ALJ's finding of an unfair labor practice and the action Respondent is required to take to remedy the violation. See *In re Technology Service Solutions, supra*.

The record evidence shows that Respondent, as a single employer, maintains identical operations at its Bayshore and Bronx facilities. (ALJD 2:15-35; 3:1-8). The evidence also shows that these facilities have some interrelationship since the mechanic at the Bronx facility services the Bayshore facility (ALJD 3: 6-7). Furthermore, the Union's organizing campaign and Representation case covered employees from both facilities (ALJD 4:130-35; 9:35-38, 39:1-47; 40:1-26; G.C.Exhs. 11; 12; 24⁶) and the unfair labor practice being remedied, including the surveillance allegations set forth herein, affect the employees from both facilities.

Therefore, consistent with current Board law, a notice posting at Respondent's Bronx and Bayshore facilities would not be an expansive notice posting requirement. *CF. Fresh Organics, supra*. Rather, a notice posting at Respondent's Bronx and Bayshore facilities will effectuate the Board's objective of informing affected employees about the outcome of the proceeding and the nature of their rights under the Act.

⁶ G.C. Exh. 24 is a letter from Respondent that was submitted in the Union's Representation case, 2-RC-180977. In this letter, Respondent provided the names of individuals who should not be part of the bargaining unit. The letter included management personnel from the Bronx Facility (DaSilva) and Bayshore facility (Rocco Mongelli) (Tr. 158).

Accordingly, the Board should modify the ALJ's Order and require Respondent to post the notice at its Bronx and Bayshore facilities.

Dated at New York, New York
This 23rd day of April 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ruth Weinreb". The signature is written in a cursive, flowing style.

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