

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

TRINITY SERVICES GROUP, INC.,

and

Case 28–CA–212163

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

Judith Dávila, Esq.
for the General Counsel.

Frederick C. Miner, Esq.
Littler Mendelson, P.C.
for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. This case was tried before me in Bisbee, Arizona on July 17, 2018, based upon charges filed by the United Food and Commercial Workers Union, Local 99 (Union), and a complaint and notice of hearing dated March 30, 2018 (Complaint). The Complaint, as amended at trial, alleges that Trinity Services Group, Inc., (Respondent or Trinity) violated Section 8(a)(1) of the National Labor Relations Act (Act) by: informing employees that collective bargaining between Trinity and the Union would be futile; interrogating employees; and disparaging the Union. Respondent denies the allegations.

Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by the General Counsel and Respondent, I make the following findings of fact and conclusions of law.¹

I. JURISDICTION AND LABOR ORGANIZATION

Trinity admits that it is a corporation with an office and place of business in Douglas, Arizona, where it provides institutional food services to correctional facilities. It further admits that, in conducting its business operations, the company purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Arizona. Respondent admits, and I

¹ Testimony contrary to my findings has been discredited. Unless otherwise noted, witness demeanor was the primary consideration used in making credibility resolutions.

find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Trinity also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. FACTS

A. *Background*

Trinity is a food service company that contracts with prisons across the country to prepare and serve meals to inmates. In Arizona, Trinity is contracted by the State of Arizona to provide food preparation and delivery services to the prisoners housed at the state prison in Douglas, Arizona. Approximately 1,800 inmates are housed at the Douglas prison. Respondent employs about 18 people at the facility, including statutory supervisors; twelve of Respondent's Douglas employees are represented by the Union.² (Tr. 18–21, 114)

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In Douglas, Respondent's employees oversee the inmates, who actually cook and serve the food to the prison population, ensuring the food is prepared properly, using the correct recipes. Respondent's employees who perform this work are referred to as "food supervisors." (Tr. 156–57)

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The Union has represented Respondent's food service workers, warehouse aides, and drivers working at the Douglas prison for about 20 years. The parties were signatories to a collective-bargaining agreement whose terms ran from July 2013 through June 30, 2017 (2013 CBA). Trinity's Douglas workforce is the company's only unionized facility. (Tr. 21, 36; GC. 3, 13)

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Jesus Puentes (Puentes) serves as Trinity's Food Service Director at Douglas. Puentes testified that, although he lives and has an office in Douglas, he only visits the Douglas prison every 4 or 6 months; he spends most of his time at the company's office near Phoenix.³ Gustavo Luna (Luna) is the Assistant Food Service Director, and is the day-to-day supervisor of Respondent's Douglas employees and managers. Sergio Rivera (Rivera) is the Unit Manager and supervises the Douglas kitchen employees, including the food supervisors. This case concerns statements that Puentes, Luna, and Rivera allegedly made to employee Marisol Victoria (Victoria), who works as a food supervisor, at a time when Respondent and the Union were in the middle of negotiations for a successor agreement. (Tr. 15–18, 25, 76, 113, 133–34)

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B. *Negotiations for a successor agreement*

Respondent and the Union began negotiations for a successor agreement in June 2017. The parties held a total of four negotiating sessions in 2017 (one in June, August, October, and

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² Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel and Respondent exhibits are denoted by "GC." and "R." respectively. Transcript and exhibit citations are intended as an aid, as factual findings are based upon the entire record as a whole.

³ Douglas, Arizona is about 230 miles Southeast of Phoenix; the Douglas prison is about 10 miles from the border with Mexico. I take judicial notice of this geographical information. Fed. R. Evid. 201; *United States v. Johnson*, 726 F.2d 1018, 1021 (4th Cir. 1984) ("geographical information is especially appropriate for judicial notice.")

December) before employees ratified a successor agreement in April 2018. Autumn Mitchell, who works for the Union, was its lead negotiator. It is unclear who served as the company’s lead negotiator. However, Luna attended both the August and December negotiating sessions and Puentes also attended the December meeting. Victoria, along with other employees, also attended some of the negotiations. (Tr. 21–22, 41–42, 49, 54, 74–75, 92, 113)

At the initial June 2017 meeting, Respondent presented the Union with information regarding the benefits and policies the company offers workers at its non-union facilities similar in size to Douglas. It also presented an initial contract proposal, including a new proposal on Personal Time Off (PTO), which mirrored the benefits Respondent offers workers at its non-union facilities. (Tr. 12–13; GC. 4, 13)

The parties met again on August 9, 2017 where they discussed topics including PTO and insurance. Respondent had proposed moving employees from their existing Union sponsored health plan to one the company was offering its non-unionized employees. Victoria testified that, by mid-August the Union had presented proposals to Respondent on wages and PTO. However, other than this brief testimony, there is no evidence in the record about the Union’s initial bargaining proposals. (Tr. 45–46, 97–98, 113–114, 120)

The next meeting was in October 2017, and the parties reached agreements on various subjects. Respondent was still advocating a move to its own health plan, and promoting the benefits of moving to the PTO plan used at its non-union facilities. The company explained it was very challenging to administer the existing PTO plan which applied only to Douglas employees. (Tr. 41–42, 46; GC. 8, 14)

The next meeting was scheduled for December 6, 2107. On December 1 the Union presented a proposal regarding wages, health insurance, and PTO. The Union offered to agree to Respondent’s PTO proposal subject to certain conditions, including rolling over unused PTO to the next year, and the understanding that PTO hours rolled over from 2017 would not expire. (Tr. 62–63; GC. 7, 8)

When the parties met on December 6, at the Union’s request, Trinity presented its last, best, and final contract offer. Under the proposal, employees would maintain their existing Union medical plan, and the company would increase its contributions to the cost of the plan. The last, best, and final offer was rejected by the Union. Ultimately some changes were made to the proposals, and a new agreement was ratified in April 2018. (Tr. 47–48, 55–56; GC. 7)

C. Negotiation News

After each negotiating session, Luna would distribute to employees a newsletter titled “Negotiation News,” which was drafted by Respondent’s attorney and detailed what was occurring during negotiations. The newsletter would be emailed to Luna, and he generally distributed it the next day.⁴ (Tr. 13–14, 115–19, 128–29; GC. 7, 11, 13, 14)

⁴ The newsletters contain a date in the upper right hand corner. Luna testified that the date signifies the day the newsletter was created and issued. He also testified that the newsletter dated December 8, 2017 was actually distributed on January 7, 2018. (Tr. 117–118, 130)

D. Personal Time Off

The 2013 CBA provided for only one type of paid leave—Personal Time Off. Douglas employees use PTO for both vacation and sick leave. (Tr. 101) Under the 2013 CBA employees received a fixed number of PTO days at the beginning of each year, depending upon their seniority, and would also accrue additional PTO days, per month of employment, as follows:

Completed Years of Service	Accrual per Month	Not to exceed
1–7 years	.92 days	11 days
8–14 years	1.33 days	16 days
15 plus years	1.75 days	21 days

Based on the contract language, workers with between one and three years of service would be entitled to five days of PTO at the beginning of each year and could earn up to an additional 11 days of PTO, for a total of 16 days. Employees with three or more years of service received 10 days of PTO at the start of each year, and could also earn anywhere from 11 to 21 additional days of PTO, depending upon their total years of service. The contract required PTO to be used in the year accrued, and it could not be rolled over to the next year. The 2013 CBA also contained a provision stating that unused PTO would not be cashed out at termination. (GC. 3)

Under the company’s 2017 bargaining proposal, which had been implemented at non-union facilities similar to Douglas, employees would not receive a lump sum number of PTO hours at the beginning of each year. Instead, workers would accrue PTO hours per pay period, as set forth below, based upon years of service.

Months of Service	Accrual per Pay Period	Max. Allowed Balance
up to 24	4 hours	13 days
25–60	4.62 hours	17 days
61–120	5.54 hours	21 days
121–180	6.46 hours	25 days
181 or more	7.69 hours	28 days

The company also proposed eliminating the prohibition on PTO rolling over to the next year, up to the maximum allowance, and provided for payment of PTO upon termination. (GC. 4)

The subject of PTO ultimately became one of the major issues during bargaining. There were problems with how PTO was being used and accrued, and how the existing contract language was being interpreted. The Union contended that Respondent had changed its interpretation of the contract regarding PTO, and was no longer properly crediting employees for all the additional PTO time they earned. Trinity had implemented a new software system where accrued PTO would appear on employee paychecks/time cards, and it became increasingly more challenging for the company to administer a PTO benefits system that applied only to the Douglas employees. Starting in about December 2016 and continuing throughout 2017 the

Union filed various grievances to ensure employees were being allowed to use their accrued PTO benefits. In June 2017 the Union requested arbitration over one of the PTO grievances. Puentes testified that he could not remember the specifics of the dispute, but that it involved the issue of employee PTO balances related to the lump sum hours received at the beginning of each year. (Tr. 22, 32–36, 56–61, 67–68; GC. 6, 14)

As the Union was filing grievances, various management officials were corresponding with one another regarding Douglas employee PTO accrual. In a February 2017 email exchange one person argued that, pursuant to the 2013 CBA, Douglas employees could not accrue more 11, 16, or 21 days of PTO, depending on their years of service, for the entire year. On February 17, in response to an email from human resources regarding “the PTO plan for your union team members,” Puentes wrote asking why Douglas employees were loaded with 40 hours on the system, and whether this was correct. In a series of March 2017 emails, Respondent discussed a spreadsheet with corrected PTO balances for Douglas employees, and the need to communicate with Douglas workers individually to advise them of their correct PTO balances. (GC. 9, 10)

E. August 14 conversation

1. Marisol Victoria’s Testimony

Victoria has worked for Respondent in Douglas for over six years, overseeing inmates as they prepare and distribute food to their fellow prisoners. Victoria testified that, in 2017 she experienced issues related to her PTO accrual balance and the balance reflected on her check stub did not correspond with the actual PTO time she had accrued. (Tr. 73–76)

On August 14, 2017, just before noon, Victoria went to the Douglas office to print her paycheck stub; she was getting ready to start her shift. The Douglas office building is located within the prison grounds, but outside of the prison units. The building is actually a trailer, with various offices and cubicles inside, including one that employees use to print their pay stubs. There is also a bathroom and kitchen area in the trailer. Outside the trailer is a porch with some benches. (Tr. 76–77, 94, 160–62)

Victoria testified that, as she entered the office, Puentes and Luna were coming out of the office onto the porch. They exchanged greetings, with a kiss on the cheek and a hug, which was a normal greeting in their community.⁵ Victoria printed her check stubs, and then exited the office walking out onto the porch. Luna and Puentes were sitting on a bench; Luna was smoking a cigarette. Puentes invited Victoria to join them and he asked how she and her kids were doing; the two discussed her family. A little bit into the conversation, Luna brought up the subject of the Union, asking what the Union was doing for workers and saying that it was not really presenting anything on their behalf at the negotiating table. Victoria replied saying “[w]hat was going on was what it was.” (Tr. 78) Luna said that the money they were paying the Union was not being used to present anything at the bargaining table for negotiations and that the Union was not doing anything for employees. Then Puentes asked whether the members were paying fees to the Union and said the money they were paying to the Union was being thrown away. Luna

⁵ Luna testified that it is a custom in the Douglas area Hispanic culture is to greet someone with a hug and kiss on the cheek and “see how they are doing.” (Tr. 122)

said that what employees were paying was \$20 per week.⁶ Victoria did not respond, and then Puentes told Victoria that if she would like to throw her money away, to throw it away and give it to him. Both Luna and Puentes started laughing. According to Victoria, she “also laughed in a way” but was actually mad about the circumstances as they were talking about her money. (Tr. 5 79) Victoria said that “money comes and goes,” handed her paycheck stubs to Puentes and said “you can have it for me.” (Tr. 80) Then, Victoria saw Union steward Jose Pedrego (Pedrego) walking towards the office. She said goodbye and walked towards Pedrego. When she joined up with Pedrego, she told him that she was glad he was there “because these mother f***ers made me mad.” (Tr. 80–81) Pedrego asked her what happened, and she said that Puentes and Luna were talking about the Union. Pedrego told her to wait for him, and that he would talk to her in a bit. (Tr. 77–81, 94–98)

On cross-examination Victoria initially attributed the statement that the Union was not doing anything on behalf of workers at bargaining to Puentes. However, when asked by Respondent’s counsel if she asked “him what he meant by that,” Victoria appeared to correct herself by asking “[t]o Luna?” and said she did not. On redirect she again affirmed that it was Luna who said that the Union had not put anything on the table at bargaining. When asked on cross examination how the topic of Union dues came up during the meeting, Victoria replied that it was because Luna said the Union was not using the money workers were paying to present anything at the table for negotiations. (Tr. 97–98, 102)

2. Jose Pedrego’s testimony

Pedrego works in the warehouse as a truck driver, has worked for Respondent for 21 years, and is the Union shop steward. He testified that, on August 14, as he was coming out of the warehouse next to the office, Victoria stopped him saying that she could not believe what was just said. She told him that Luna said the Union was not putting anything on the negotiating table and that Puentes told her employees were giving their money away, extended his hand, and said to give him the money because they were just giving it away.⁷ She also told Pedrego that they said the Union was not doing anything for the workers. Pedrego asked her what she wanted to do, and Victoria told him that he could call the Union if he wanted. According to Pedrego, Victoria raised the issue at a Union meeting a few months later. (Tr. 103, 105–110)

3. Jesus Puentes’s testimony

According to Puentes, he was sitting on the porch with Luna at about 11:45 a.m. when Victoria approached the office, giving both he and Luna a hug and a kiss. Victoria went into the office and came out about five minutes later. Puentes testified that, when Victoria came out of the office onto the porch she approached Luna and started making comments about how she was a single mom and did not know what to do—referencing the ongoing Union negotiations. He

⁶ Victoria testified that, at one point, workers were paying \$20 every other week in dues, but are now paying \$20 per week. However, it is not clear when the change occurred.

⁷ Respondent made a hearsay objection to Pedrego’s testimony. However, I find that his testimony is admissible as a present sense impression. Fed. R. Evid. 803(1); *United States v. Peacock*, 654 F.2d 339, 350 (5th Cir.1981) (statement that was otherwise hearsay was properly admitted because it was immediately repeated to a third party and “[t]here was no time for [the declarant] to consciously manipulate the truth.”)

testified that Luna told Victoria to get a piece of paper, draw a line, put her pros and cons about negotiations on the paper and make the best decision for herself. According to Puentes, Luna did not initiate the discussion about negotiations, and Victoria simply brought up the matter by starting to ask him question on the subject. (Tr. 135–37)

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When asked if he recalled Luna and Victoria discussing any particular issues, Puentes replied “[n]ot at all. I didn’t pay attention, to be honest, to the conversation.” Puentes agreed with the statement from Respondent’s counsel that Luna made a line on a piece of paper, saying that “[y]es, about pros and cons.” However, when asked whether Luna had any papers with him or in his hand, Puentes testified “[n]o, sir.” (Tr. 138)

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Puentes testified that he did not hear anything else regarding the conversation between Victoria and Luna, and then Victoria said that she had to leave and get to work. When Victoria left, she gave Puentes a hug and kiss, and told him to have a good day. Puentes said that Victoria was not upset when she left, and that the subject of Union dues never came up during the discussion. According to Puentes he did not hear Luna say anything about the Union not doing anything for Victoria, or that the Union was not worth the money workers were paying in dues. He denied saying anything himself about union dues, denied telling Victoria that she was throwing her money away on dues, or that it was a bad idea to pay union dues. Puentes could not recall whether Victoria had any papers in her hand when she came out of the office, but denied that Victoria offered him any papers, or asked him or Luna to look at anything. (Tr. 139–141)

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4. Gustavo Luna’s Testimony

Luna testified that on August 14 he was on the office porch with Puentes, smoking a cigarette and having a cup of coffee. Victoria approached and they greeted each other with a hug and kiss on the cheek. Victoria then went inside to conduct some business, and when she exited Luna asked her if she had seen the Negotiation News and the proposal that Trinity was offering.⁸ Victoria replied that she was a single mom and was concerned about the money. According to Luna, he suggested that she look at the proposal, especially the insurance, and compare what she currently received to what Trinity was offering. Luna testified that he had a piece of paper with him, and pen in his pocket, and that he demonstrated by holding up a piece of paper and motioned the drawing of a “T” on the paper, and told her to put the pros on one side and the cons on another. (Tr. 120–23, 131)

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Luna recalled them discussing insurance, saying that Victoria had a lot of concern about the cost of insurance going up. Then, according to Luna, Victoria spoke with Puentes, exchanging pleasantries, and said she was leaving as it was getting close to the start of her shift. He gave her a hug and kiss and told her to have a good shift. (Tr. 123–24) According to Luna, the conversation was very pleasant and Victoria did not appear to be upset. He denied telling Victoria that the Union was not doing anything for her, and denied the topic of union dues was ever discussed. He also denied that Puentes said anything about union dues, or that employees were throwing away their money by paying dues to the Union. (Tr. 124–26)

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⁸ Luna was referring to the August 4 Negotiation News. (Tr. 127; GC. 13) This newsletter states that Trinity was proposing the same medical coverage it offers to its non-union workers at other similar facilities. There is no discussion in the newsletter about the cost of this proposal to employees. (GC. 13)

F. December 15 discussion

1. Marisol Victoria’s Testimony

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Victoria testified that, the morning of December 15 she received a text message from Rivera, her supervisor, telling her to report to the office to make a change on her time card. When she arrived, office manager Frank Romero (Romero) was present. Victoria explained the text message to Romero and said she was there to make a change on her time card. Romero
 10 replied saying that she needed to sign for a change that was made because she no longer had any PTO. As he gave Victoria her time card, Rivera arrived. Victoria agreed to make the change, but said that she believed she still had three days of PTO remaining. Romero said there was a problem as the system reflected that she no longer had any PTO, even though her time card reflected she still had PTO days remaining. According to Victoria, Rivera then said “that is a
 15 problem that the Union created regarding PTO. You need to fix that with the Union.” (Tr. 85) Victoria said that everything was okay, she knew they were not the people in charge of the system, and did not have any problems towards them. However, she said that they should be taking care of giving employees the correct PTO. Victoria testified that Rivera replied “yes, I know, but that’s the problem with the Union.” (Tr. 85) She then said that there was not a
 20 problem, signed her time card, and went to work. According to Victoria, she had requested three days of PTO in December because she was sick, but was only granted one day of leave. Victoria claims to have filed a grievance over the matter, but it is unclear from the record the outcome of the grievance. (Tr. 25, 74, 83–87, 100–01)

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2. Francisco “Frank” Romero’s Testimony

Romero is the office manager at Trinity. According to Romero his duties include handling accounts, paying bills, and answering the phones. Romero testified that he is not involved with the administration of PTO and denied ever speaking with Victoria about her PTO.
 30 Romero said that he was likely working on December 15, because it was a Friday. However he could not remember whether he saw Victoria in his office that day, could not remember whether he spoke with her, or whether he had a discussion with both Victoria and Rivera. He testified that Rivera was “probably” working at the Trinity office that day, and would have either been working out of Romero’s office or the kitchen. (Tr. 159–161)

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3. Sergio Rivera’s Testimony

Rivera denied that he spoke with Victoria in December 2017 about PTO, and further denied that he spoke with her about disallowing a PTO request. He also denied that he requested
 40 that she come to the office to revise/adjust her PTO. However, he admitted hearing that there had been issues regarding employee PTO generally. (Tr. 26, 144–47, 153)

According to Rivera, he spoke with Victoria in the office on December 15; however it was nothing more than just saying hello and goodbye. He testified that he was working in the
 45 manager’s office that day, in the area that employees use to copy their paycheck stubs and view their PTO hours; Romero was working in his office finalizing the inventories. He remembered

Victoria walking by and saying hello/good morning, but nothing more. Rivera denied telling Victoria that the Union was to blame for the problems with PTO. He also denied knowing that employees had issues with how their PTO was being tracked or that there were discrepancies between the employee PTO balance in the computer system and the balance listed on their paychecks. (Tr. 147–156)

III. ANALYSIS

A. The August 14 conversation

1. Witness credibility

There is a divergence in the testimony as to what occurred and what was said during the August 14 discussion between Victoria, Puentes and Luna. After assessing the demeanor of the different witnesses, I credit Victoria. I found Victoria to be forthright in her testimony, trying to remember events that occurred nearly a year earlier. Along with demeanor, I also note that Victoria was a current employee of Respondent at the time of the hearing and was therefore testifying against her pecuniary interest, which also supports her credibility. *Flexsteel Industries*, 316 NLRB 745, 745 (1995). Although Respondent points to some inconsistencies in her direct and cross-examination testimony, those inconsistencies are minor and do not diminish my determination as to her credibility. *Doral Building Services*, 273 NLRB 454, 454 fn. 3 (1984) *enfd.* 786 F.2d 1175 (9th Cir. 1986) (Table) (minor inconsistencies do not diminish employees' credibility established in part by their demeanor, nor do they render credible the rejected testimony offered by respondent's witnesses).

Moreover, the testimony of Puentes and Luna as to how the conversation started, and what transpired, are inconsistent and do not ring true. Puentes testified that, when Victoria walked out of the office she approached Luna and, without prompting, started talking about being a single mother and not knowing what to do in reference to negotiations with the Union. Puentes did not, and could not, explain why Victoria would just start speaking about negotiations and being a single mother when nobody had previously breached the topics; I do not believe his testimony.⁹

Luna's testimony conflicted with that of Puentes as to how the topic of the Union arose. According to Luna, when Victoria exited the office and walked onto the porch, he asked her if she had seen the August 4 edition of the Negotiations News and the proposal Trinity was offering. It is then, Luna testified, that Victoria said she was a single mother and concerned about money. In response, Luna told her to look at the proposal, particularly the insurance, and make comparisons. He then testified that he took a pen from his pocket and a piece of paper and demonstrated that she should make a "T" with the pros on one side and cons on the other and make her decision. However, Puentes specifically testified that Luna did not have any paper with him, which contradicts Luna's testimony. Moreover, the August 4 Negotiation News

⁹ Also detracting from Puentes's credibility is his testimony that he could not remember the specifics about the issues the company and the Union were having regarding PTO, despite previously agreeing that PTO was one of the major issues between the Union and Respondent. (Tr. 22–23) Also, Puentes was copied on several company emails regarding the PTO issues, and initiated at least one of those emails. (GC. 9)

simply states that the company was proposing the same medical coverage that it was offering to its non-unionized employees at other facilities. There is no discussion in the newsletter, or anywhere in the record, whether the company’s proposed medical coverage would cost employees more, less, or the same as they were currently paying. There is no explanation why Victoria would somehow start discussing purported concerns about money based upon the evidence in the record as to what was occurring during negotiations at the time. I do not credit Luna’s testimony.

Accordingly, the credited evidence shows that, on August 14 when Victoria exited the office, Puentes and Luna were on the porch and Puentes asked her to join them. After a short discussion about Victoria’s family, Luna brought up the subject of the Union and negotiations, asking what the Union was doing for employees and saying that the Union was not really presenting anything on their behalf at the bargaining table. Victoria replied saying that what was occurring at bargaining was what it was. Luna then said that the money they were paying the Union was not being used to present anything at bargaining and the Union was not doing anything for employees. Puentes asked if the members were paying fees to the Union and that the money they were paying to the Union was being thrown away. Luna then said employees were paying \$20 per week. Victoria did not respond and Puentes said that if she wanted to throw her money away, to throw it away and give it to him. Both Luna and Puentes then started laughing. Although Victoria chuckled, she was mad and said that money comes and goes, handed her check stubs to Puentes and, alluding to her money, said “you can have it for me.” She then saw Pedrego approaching, walked over to him and told him about her conversation with Luna and Puentes.

2. Threat of Futility

Paragraph 5(a) of the Complaint alleges that the comments made by Luna and Puentes, asserting the Union was not bringing anything to the bargaining table, and that Victoria was throwing her money away and should give it to Puentes instead, amounted to unlawful statements that collective bargaining between Respondent and the Union would be futile. An employer violates Section 8(a)(1) by threatening employees with the futility of unionization. *NLRB v. E.I. DuPont De Nemours*, 750 F.2d 524, 527–28 (6th Cir.1984). In determining whether a statement is a threat, the Board considers the “total context” of the situation and “is justified in determining the question from the standpoint of employees over whom the employer has a measure of economic power.” *Id.* (internal quotations omitted)

In support of this allegation, the General Counsel cites to *Wellstream Corp.*, 313 NLRB 698 (1994) and argues that the statements made to Victoria, coming during contract negotiations, would cause employees to believe that continuing to support the Union would be futile and their efforts would be purposeless. *GC. Br.*, at 13-14. In *Wellstream Corp.*, the Board found a violation where the company president told employees that no “son of a bitch” would bring a union into the company and he would see to it that the company was never unionized, as the statements were intended to, and did, convey to employees the futility of supporting the union. 313 NLRB at 706.

Respondent, citing *Trailmobile Trailer, LLC.*, 343 NLRB 95 (2004), and *W&F Building Maintenance*, 268 NLRB 849, 858 (1984), argues that the comments by Luna and Puentes were protected by Section 8(c) of the Act, and that nothing in the words themselves conveyed that collective-bargaining would be futile. *Resp't Br.*, at 13–15. In *Trailmobile Trailer, LLC.*, the Board found no violation where a manager told employees who were engaged in protected activity that: he could teach monkeys to weld; could replace all the painters within 10 minutes; the people in the union were stupid; the union steward was being used by a union official who was “worthless and no good;” and the union official was a “fat ass . . . living up at the Holiday Inn on the employees’ dues.” 343 NLRB at 95–96. The Board observed that the “Act countenances a significant degree of vituperative speech in the heat of labor relations.” *Id.* at 95. And, while the comments were disparaging, they did not suggest that the employees’ union activities were futile, did not reasonably convey any threats, and did not constitute harassment that would tend to interfere with employee Section 7 rights. *Id.* In *W&F Building Maintenance Co.*, 268 NLRB 849, 849 fn. 1 (1984), a supervisor told employees that “it was a waste of money to join the union and that their job security was not with the union but in doing good work.” The Board found no violation finding the comments were mere expressions of opinion privileged under Section 8(c) of the Act.

Here, I find that the statements made by Luna and Puentes are more similar to those found lawful by the Board in *Trailmobile Trailer* and *W&F Maintenance Co.*, than the those found unlawful in *Wellstream Corp.* While the statements were disparaging and distasteful, they were not accompanied by any threats, nor did they otherwise suggest that employee union activity was futile. Moreover, as of August 14, 2017, it is unclear from the evidence what, if any, bargaining proposals the Union had actually presented to Respondent; the record contains only one written bargaining proposal from the Union dated almost three months later.¹⁰ (GC. 8) Compare *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985), *enfd. sub nom NLRB v. Pratt & Whitney*, 789 F.2d 121 (2d Cir. 1986) (finding employer’s communications “criticizing the Union’s demands and tactics” were protected by Section 8(c) because “employees ought to be fully informed as to all issues relevant to collective-bargaining negotiations and the parties’ positions as to those issues”) with *Miller Electric Pump and Plumbing*, 334 NLRB 824, 825 (2001) (owner’s comment to employee that he was “wasting his time” because the company would shut its doors and would not go union was an unlawful expression of futility as the statement that the employee was “wasting his time” was made in conjunction with the owner’s unlawful threat of plant closure and indicated to employees that seeking union representation would be futile because it would result in the business closing) and *Weis Markets, Inc.*, 325 NLRB 871, 872 (1998) *enfd. in pertinent part* 265 F.3d 239 (7th Cir. 2001) (manager’s statements to employees that the union “could do nothing for them” unlawfully conveyed the futility of selecting the union as their bargaining representative as it was made contemporaneously with, and linked to, the manager’s unlawful threats to close the store and put employees out of work if they voted to unionize).

Here, the comments made by Luna and Puentes appear to be their personal assessment of the Union’s value at the bargaining table at the time. And, because the comments were not made

¹⁰ While Victoria testified on cross-examination that, by August the Union had presented proposals on PTO and wages, Victoria is not a Union official and, other than this brief testimony, there is no evidence of these proposals, what they entailed, or when/how they were presented.

contemporaneously with, or linked to, any explicit or implicit threats, while obnoxious, they do not constitute a threat of futility. Accordingly, I recommend this allegation be dismissed.

3. Interrogation

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Complaint paragraphs 5(b) and (c) allege that the statements made by Luna and Puentes about dues payments to the Union constitute an unlawful interrogation. In determining whether an unlawful interrogation occurred, the Board looks at a number of factors based on the totality of the circumstances. *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). See also *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). These factors include: the background, i.e. whether there is a history of employer hostility and/or discrimination against employee protected conduct; the nature of the information sought, e.g. whether the interrogator was seeking information about protected activity, or on which to base taking action against an employee; the identity of the questioner and their place in the management hierarchy; the place and method of the interrogation, e.g. whether there was an atmosphere of unnatural formality, or if the employee was called from work into the bosses' office; the truthfulness of the reply; whether the employer had, or conveyed, a legitimate purpose for the question; and whether assurances against reprisals were provided. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000) (citing *Bourne v. NLRB*, 332 F.2d at 48); *RHCG Safety Corp.*, 365 NLRB No. 88 slip op. at 1-2 (2017). These and other factors are not applied mechanically. Instead, they are “useful indicia that serve as a starting point for assessing the ‘totality of the circumstances.’” *Westwood Health Care Center*, 330 NLRB at 939 (2000) (citing *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998)). In the end, the “task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.” *Westwood Health Care Ctr.*, 330 NLRB at 940. Applying these factors here, I find that the questions from Puentes inquiring as to whether employees were paying fees to the Union constituted an unlawful interrogation.¹¹

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While there is no history of employer hostility and/or discrimination, the information sought by Puentes related directly to whether employees were continuing to support the Union financially by paying fees. Thus, Puentes was seeking to determine whether Victoria and her coworkers were still financial supporters of the Union, at a time when the Union was bargaining a successor agreement. While the setting was informal, Puentes is a high level management official, and Luna is Respondent's highest day-to-day official at the jobsite. Puentes is the one who initiated the questioning as to whether members were paying Union fees and neither Puentes nor Luna conveyed a legitimate purpose for their questions. Nor did they provide Victoria with assurances against reprisals. *RHCG Safety Corp.*, 365 NLRB No. 88 slip op. at 1-2 (2017) (that employer did not have or communicate any legitimate purpose for the question and did not provide assurances against reprisals supports a finding of an unlawful interrogation). Accordingly, assessing all the factors, I find that Respondent violated Section 8(a)(1) of the Act

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¹¹ Whether or not Victoria was intimidated by the questioning, or actually considered discontinuing her union dues, does not preclude the finding of a violation as “the Board does not consider the subjective reaction of the individual involved but rather whether, under all the circumstances, the conduct reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed under the Act.” *Con-Way Central Express*, 333 NLRB 1073 (2001).

by interrogating Victoria as to whether employees were paying fees/dues to the Union. *Creutz Plating Corp.*, 171 NLRB 1, 13 (1968) (general manager’s asking employee whether he was going to continue to pay dues to the Union was for no legitimate purpose and constituted an unlawful interrogation); *Ridgewood Management Co., Inc.*, 171 NLRB 148, 150 (1968)
 5 (employer had no legitimate reason for interrogating employees about various matters, including whether they paid a fee to the Union, and did not provide assurances against reprisals).

In its brief, Respondent argues that no violation should be found, inferring that Victoria was an open and active union supporter, and referring to her as “an observer for the Union” at various bargaining sessions.¹² *Resp’t Br.*, at 10, 13. While it is undisputed that Victoria attended some of the bargaining sessions, there is no evidence whatsoever that she did so as an “observer for the Union,” as argued by Respondent. Indeed, the record shows that up to five different employees attended some of the bargaining sessions. (Tr. 41, 92) Victoria was not a Union steward, and there is no evidence that she was a member of the Union’s bargaining committee, or
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 15 that the Union even had a bargaining committee.

Also, there is no evidence that, before the August 14 discussion, Puentes knew Victoria had attended any of the bargaining sessions, or that she supported the Union in any way whatsoever. According to Puentes, at the time he was not involved in the negotiations in
 20 Douglas; the only bargaining session he attended was in December 2017. (Tr. 22, 137–38) Moreover, Puentes’s inquiry was not limited to only Victoria, but he asked whether members in general were paying fees to support the Union. In these circumstances, while relevant, whether Victoria was or was not an open Union supporter is not determinative. *Abramson, LLC*, 345 NLRB 171, 171 fn. 1 (2005) (fact employee was open union supporter and wearing union t-shirt at time of questioning was relevant, but not determinative and considering all the circumstances supervisor’s questions to employee constituted an unlawful interrogation); Cf. *Premier Rubber Co.*, 272 NLRB 466, 466 (1984) (no violation where vice president asked if employee’s husband “worked for a union” and “how much the dues were” as the inquiry was not intended to elicit information about employee union activities or sympathies, and the questions did not involve
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 30 respondent’s employee “nor necessarily a member of the union.”)

Finally, Complaint paragraph 5(b) alleges that Luna also interrogated Victoria during this August 14 discussion. The credited evidence shows that, after Puentes said members were throwing their money away by paying it to the Union, Luna stated that employees were paying
 35 \$20 per week to the Union. It appears that this statement was more or less accurate.¹³ Thus, it does not appear that Luna was trying to elicit information from Victoria about the amount of Union dues, or who was or was not paying. Cf. *Belcher Towing Company*, 238 NLRB 446, 459 (1978) (provocative statements to employees about union activity, while declarative in nature,

¹² Respondent also refers to Puentes’s statement that Victoria could throw her money away by giving it to him as a “joke” which Victoria “went along with,” and asserts that she added to the “levity” by saying money comes and goes. *Resp’t Br.*, at 6. However, I credit Victoria’s testimony that she was mad about what was occurring; for Victoria this was no joke. And her testimony that she also “laughed in a way,” does not change this finding. Two high level officials were bad mouthing the Union in her presence and mocking employees who paid dues to the Union—that Victoria would try to humor her bosses is understandable under the circumstances. Victoria, who has worked for Trinity for over six years, is economically dependent upon Respondent for her livelihood.

¹³ It is unclear from Victoria’s testimony exactly when employees went from paying \$20 every two weeks in Union fees to \$20 per week. (Tr. 79)

were “designed to bring forth employee sentiments about union representation.”); *Eddyleon Chocolate Co.*, 301 NLRB 887, 898 (1991) (“Although . . . statement was declarative in form rather than interrogative, it was clearly intended to elicit” information regarding employee’s participation in union activities.) Instead, Luna was stating his understanding of the weekly dues that Union members were paying. In her brief, the General Counsel does not address this allegation. *G.C. Br.*, at 15–16. Considering all the circumstances, I find that the General Counsel has failed to meet her burden of proof and I recommend that Complaint paragraph 5(b) be dismissed.

B. The December 15 discussion

1. Witness credibility

As with the August 14 discussion, based upon the demeanor of the witnesses, I credit Victoria’s testimony as to what occurred over that of Rivera and Romero. I did not find Rivera to be a credible witness. Along with assessing his demeanor, I note that his testimony kept changing regarding the issue of PTO. When asked initially, Rivera testified that he had heard about the issues employees were having regarding PTO. (Tr. 26) However, he later backtracked—saying he was not sure, and then saying he did not know. (Tr. 28) At one point, Rivera testified that does not deal with PTO but with vacation requests instead, testifying that employees “ask me for a vacation. I give them vacation.” (Tr. 26) However, he later testified that PTO is used for vacations, a personal day, or for sick leave.¹⁴ (Tr. 27) When asked by Respondent’s counsel if he received any PTO requests from employees in December 2107, Rivera initially testified “no.” (Tr. 143) However, he then changed his testimony to say that, not only did he receive PTO requests, but December 2017 was a busy month and it caused him some stress because there were so many requests. (Tr. 147–49) In sum, I found his entire testimony regarding the PTO issue, PTO requests and their approval/denial, and the December 15 conversation with Victoria as not credible.

As for Romero, he struck me as someone who tried to be honest, but also wanted to avoid saying anything that would disrupt Respondent’s case. Thus, when generally asked by Respondent’s counsel whether he had ever spoken to Victoria about her PTO, he answered “no.” (Tr. 159) However, he then testified that, while it was likely both he and Rivera were working in the office on December 15, he did not remember whether he saw Victoria in the office, did not remember whether he spoke with her individually, or whether both he and Rivera had a discussion with her. (Tr. 159–160) Accordingly, I do not credit that part of his testimony where he denied ever speaking with Victoria about PTO; it was clear he simply could not remember his interaction with Victoria on December 15, or what was said that day.

Accordingly, the credited evidence shows that, on December 15, when Victoria was in the office, Romero told her that she needed to sign for a change on her timecard because she no longer had any PTO. As he gave Victoria her time card, Rivera arrived. After agreeing to make the change, Victoria expressed her belief that she still had three days of PTO left. Romero replied saying there was a problem as the system reflected that she no longer had any PTO, even

¹⁴ Indeed, under the expired CBA there is no distinction between vacation days, PTO, and sick leave. Employees only earn and use PTO days. (GC 3)

though her time card reflected she still had PTO days remaining. Rivera then said that is a problem that the Union created regarding PTO, and Victoria needed to fix that with the Union. After Victoria said everything was okay but they should ensure employees received the correct PTO, Rivera agreed but said that is the problem with the Union. Victoria, who had requested three days of PTO in December because she was sick, was only granted one day of leave.

2. Analysis

The General Counsel asserts that Rivera’s comments, blaming the Union for the PTO issues, unlawfully disparaged the Union in violation of Section 8(a)(1). *GC. Br.*, at 17. Respondent argues there can be no violation as the comments were neither disparaging nor critical of the Union, and whatever Rivera said was simply an expression of personal opinion protected by Section 8(c). *Resp’t Br.*, at 18.

“Words of disparagement alone concerning a union or its officials,” even if they are flip and intemperate, are “insufficient for finding a violation of Section 8(a)(1).” *Sears, Roebuck & Co.*, 305 NLRB 193, 193, 198 (1991) (no violation where regional manager told employees that the union might send someone out to break their legs in order to collect fees.) Such statements are unlawful however when they threaten reprisals or promise benefits, *Children’s Center for Behavioral Development*, 347 NLRB 35, 36 (2006), or when, in context, they have a reasonable tendency to interfere, restrain, or coerce employees in the exercise of their Section 7 rights. See, e.g., *Turtle Bay Resorts*, 353 NLRB 1242, 1278 (2009), incorporated by reference 355 NLRB 706 (2010), *enfd.* 452 Fed.Appx. 433 (5th Cir. 2011).

The balancing of the rights of employer expression guaranteed by section 8(c), with the rights of employees to be free from threats prohibited by section 8(a)(1), must take into account the economic dependence employees have on their employer and, because of this relationship, “the necessary tendency” of employees to pick up on the employer’s intended implications “that might be more readily dismissed by a more disinterested ear.” *Mesker Door, Inc.*, 357 NLRB 591, 595 (2011) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). Thus the Board views “employer statements ‘from the standpoint of employees over whom the employer has a measure of economic power.’” *Id.* (quoting *Henry I. Siegel Co. v. NLRB*, 417 F.2d 1206, 1214 (6th Cir. 1969).

Here, I find that Rivera’s statements have a tendency to interfere, restrain, and coerce employees in the exercise of their Section 7 rights, and constitute a violation. The record evidence shows that there was a dispute regarding how PTO was being earned and calculated, along with a problem relating to how PTO was displayed on employee paychecks/time cards versus Respondent’s computer system. Rivera admitted he had heard there were issues regarding employee PTO. For whatever reason Victoria was denied two days of PTO in December, one thing is certain—there is no evidence that the PTO problems were created by the Union or that her denial of PTO was because of the Union. Accordingly, considering Rivera’s statements in context, and from the standpoint of employees, I find his comments blaming the Union for creating the PTO problem and telling Victoria to fix the problem with the Union violated Section 8(a)(1) of the Act. Cf. *Webco Industries, Inc.*, 327 NLRB 172, 173 (1998) *enfd.* 217 F.3d 1306 (10th Cir. 2000) (employer “violates Section 8(a)(1) of the Act when it takes adverse action

against employees and falsely blames its action on the union.”); *Faro Screen Process, Inc.*, 362 NLRB No. 84 slip. op. at 1–2 (2015) (citing *RTP Co.*, 334 NLRB 466, 468, 470–71 (2001) (blaming the union for preventing a wage increase was a violation)); *Westminster Community Hospital, Inc.*, 221 NLRB 185, 193 (1975), *enfd.* in relevant part 566 F.2d 1186 (9th Cir. 1977) (table) (“by placing responsibility for the absence of greater benefits, which Respondent assertedly desired to confer, exclusively on the Union, which had no role in the matter, [Respondent] was attempting to disparage the Union in the eyes of employees so as to discourage membership in the Union.”) Rivera’s statements occurred while the parties were still bargaining for a successor contract, and while the Union’s grievances about PTO were still outstanding. Thus, I believe Rivera’s statements to Victoria, who was denied two days of time off, coercively suggested to employees that support for the Union “results in damage to their terms of employment,” and constitute a violation. *Webco Industries, Inc.*, 327 NLRB at 173.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by interrogating employees about their financial support of the Union.

4. The Respondent violated Section 8(a)(1) of the Act by informing employees who were denied personal time off that the Union was responsible for creating problems regarding PTO and they needed to fix that with the Union.

5. The Respondent did not violate the Act as further alleged in the complaint.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. The Respondent shall be required to post the attached notice, in both English and Spanish, in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁵

ORDER

Respondent Trinity Services Group, Inc., its officers, agents, successors, and assigns, shall:

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Coercively interrogating employees about their union membership, activities, or support.

(b) Disparaging the Union by telling employees who were denied personal time off that the Union was responsible for creating problems regarding PTO and to fix that with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

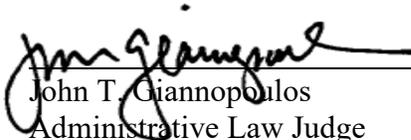
2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post (in both English and Spanish) at its Douglas, Arizona facility, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facilities any time since August 14, 2017.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this order.

3. IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 7, 2018


 John T. Giannopoulos
 Administrative Law Judge

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 416-4755.