

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK REGION**

DEEP DISTRIBUTORS OF GREATER
NY D/B/A THE IMPERIAL SALES

and

Case Nos. 29-CA-147909
29-CA-157108

LOCAL 660, UNITED WORKERS OF
AMERICA

and

HENRY HERNANDEZ, an Individual

**MOTION TO STRIKE PORTION OF RESPONDENT'S ANSWER AND TO
PRECLUDE RESPONDENT FROM QUESTIONING WITNESSES REGARDING
IMMIGRATION STATUS**

I. Summary

The undersigned Counsel for the General Counsel seeks an Order striking Respondent's baseless affirmative defense regarding employees' immigration status and moves to preclude Respondent from questioning any witness in this compliance proceeding regarding their immigration status. The instant motion is based upon Respondent's failure to comply with the requirements of the Board's Rules and Regulations 102.56, and the Board's holding in *Flaum Appetizing, Corp.*, 357 NLRB 2006 (2011), which require that Respondent set forth in detail a factual basis for its affirmative defense of discriminatees' lack of work authorization. Rather than present any factual support for its affirmative defense, Respondent chose not to respond at all to the General Counsel's Motion for a Bill of Particulars or to the Administrative Law Judge's

Order to Show Cause. Consequently, Respondent is engaged in nothing more than a fishing expedition, misusing the Board's compliance proceedings to fish for evidence in the hopes of thwarting its obligations by intimidating the discriminatees and trying to disqualify them from receiving a backpay award.

Respondent's efforts to evade its obligations are particularly egregious in this case since Respondent was already found to have violated Section 8(a)(1) of the Act by engaging in similar harassing conduct, namely by threatening to report the discriminatees to immigration authorities if they testified in the underlying unfair labor practice proceeding. Now, through this unfounded, baseless affirmative defense, Respondent is improperly intimidating workers again by making baseless claims about their immigration status in an effort to avoid compliance with the enforced Board Order. Consequently, Respondent's immigration related affirmative defense should be struck and Respondent should be precluded from questioning any witnesses to this compliance proceeding about their immigration status.

II. Background

The undersigned Counsel for the General Counsel, upon the facts stated below and upon the attached exhibits, moves that an Order be issued striking portions of Respondent's Answer to the Compliance Specification. In addition, Counsel for the General Counsel moves that an Order be issued precluding Respondent from questioning employees regarding their immigration status in the upcoming compliance hearing scheduled for September 24, 2019. In support of these motions, Counsel for the General Counsel asserts as follows:

A. On June 27, 2019, the Regional Director for Region 29, of the National Labor Relations Board issued a Compliance Specification and Notice of Hearing setting forth, in detail, the backpay amounts that Respondent owed to each discriminatee pursuant to the Board's June 20,

2017, Decision and Order, which was enforced by the Second Circuit on October 24, 2018.

(Attached hereto as Exhibit A.)

B. On July 12, 2019, Respondent filed a Request for an Extension of Time to File an Answer to the Compliance Specification. On July 17, 2019, the Regional Director for Region 29 issued an Order granting the Respondent's request and extending the due date for Respondent's filing its Answer to August 1, 2019.

C. On August 1, 2019, Respondent filed its Answer to the Compliance Specification in which it asserted as an affirmative defense that the discriminatees were not entitled to backpay due to their "illegal immigration status" and their "violation of federal immigration laws."

(Attached hereto as Exhibit B.)¹

D. On September 24, 2019, Counsel for the General Counsel filed a Motion for a Bill of Particulars seeking an order to compel Respondent to provide the General Counsel a clear and concise description of the evidence in support its affirmative defense that no backpay is due to discriminatees because of their immigration status and alleged violation of federal immigration laws. (Attached hereto as Exhibit C.)

E. On September 6, 2019, Administrative Law Judge Benjamin Green issued an Order to Show Cause requiring that Respondent provide the General Counsel a Bill of Particulars containing a description of the evidence in support of its affirmative defense that discriminatees are not entitled to backpay because of their immigration status. The Order set forth a deadline of September 12, 2019, for Respondent's opposition and evidence in response to the Motion for a Bill of Particulars. (Attached as Exhibit D.)

¹ Counsel for the General Counsel has also filed a Motion for Partial Summary Judgment with the Board regarding other portions of Respondent's Answer which, in the General Counsel's view, fail to comply with the requirements set forth in the Board's Rules and Regulations Section 102.56. That Motion is still pending before the Board.

F. Respondent failed to file an opposition to the Judge's Order and failed to file any evidence in support of its affirmative defense asserting that the discriminatees' are not entitled to backpay. Further, during a September 13, 2019, conference call with Judge Green, Respondent stated that it was not going to file an opposition and that rather, it was going to withdraw its affirmative defense. To date, Respondent has not withdrawn the affirmative defense.

III. Argument

- a. *Respondent's failure to present any evidence in support of its immigration related affirmative defense shows that Respondent is engaged in nothing more than an impermissible fishing expedition which requires that the defense be struck.*

Respondent's failure to provide any evidence in response to the Motion for a Bill of Particulars shows that it is engaged in nothing more than a fishing expedition to uncover evidence regarding the discriminatees' immigration and work authorization status in order to intimidate them in the hopes of either chilling their participation in these proceedings or finding something Respondent can use to argue that such discriminatee is not entitled to backpay.

As already set forth in the General Counsel's Motion for a Bill of Particulars, the Board in *Flaum Appetizing Corp.*, recognized that "to permit the pleading of an affirmative defense based on immigration status in the complete absence of any articulable reason... would contravene the policies underlying *both* IRCA and the NLRA." 357 NLRB 2006, at 2010 (emphasis in original.) Consequently, the Board struck Flaum's affirmative immigration defense regarding certain discriminatees since the respondent "failed to provide dates on which the discriminatees allegedly committed the wrongdoings attributed to them and failed to describe the nature of the documentation and photo identification submitted by each of the discriminatees or explain why it was fraudulent." *Id.* at 2008 n.4. The Board noted that "it was the filing of the unfair labor practice charge, the discriminatees' participation in this case, and the Board's order of

reinstatement and backpay to the discriminatees that motivated the pleading at issue...” *Id.*, at 2009.

Respondent herein failed to provide any facts or evidence at all to support its claim that the discriminatees’ lacked work authorization or that they violated immigration laws during any relevant time period. The only conclusion that can be drawn from this failure is that Respondent interposed the affirmative defense solely to intimidate the discriminatees (as it was found guilty of doing during the underlying unfair practice proceeding *see Deep Distributors of Greater NY* 365 NLRB No. 95 (2017)), and in order to engage in an unfounded fishing expedition. This is precisely what the Board in *Flaum* sought to prevent. The Board prevents employers from raising an immigration status-based defense, “with the mere hope of discovering evidence to support it.” *Flaum Appetizing*, 357 NLRB 2006, 2009. By virtue of its complete failure to respond to the Judge’s Order to Show Cause, it is clear that Respondent has no evidence that any discriminatee lacked work authorization status at any time or that any discriminatee violated any immigration law. Consequently, Respondent’s affirmative defense regarding immigration status should be struck, and Respondent should be precluded from questioning any witness about immigration or work authorization status.

b. Respondent’s Baseless Accusations Regarding Employee’s Work Authorization Status are Nothing More than an Effort to Chill Employees’ Participation in the Compliance Proceedings

As it did during the underlying unfair labor practice proceeding, Respondent is once again attempting to utilize baseless immigration related accusations in order to intimidate discriminatees from participating in Board proceedings. In its enforced Decision and Order, the Board found that Respondent, through its attorney, threatened employees with legal action in retaliation for the participation in the Board hearing and threatened to report employees to

government authorities in order to intimidate witnesses and to discourage them from participating in Board processes. *Deep Distributors of Greater NY*, 365 NLRB No. 95 at 2, 20 (2017).

In this compliance proceeding, Respondent continues this unlawful conduct by again making unsubstantiated immigration-related accusations in the absence of any evidence. Respondent employed the majority of the discriminatees for significant periods of time and presumably complied with all hiring requirements set forth in the Immigration Reform and Control Act. Thus, the only conclusion that can be drawn by Respondent's interposing of an immigration related affirmative defense, where it has not a scintilla of evidence to support its claims, is that the defense was interposed only for the purposes of intimidation in the hopes that the discriminatees might choose not to participate in these compliance proceedings.

As the Board in *Flaum* noted, "Numerous federal courts have recognized that such formal inquiry into immigration status and facts arguably touching on it is intimidating and chills the exercise of statutory rights...even documented workers may be chilled by the type of discovery at issue here. Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends..." *Flaum*, supra, 357 NLRB 2006, 2012. Respondent should be precluded from engaging in these intimidation tactics and employees' statutory rights to participate in these proceedings should be protected.

III. Conclusion

Because Respondent utterly failed to provide any factual basis to support its affirmative defense and failed to even oppose the Motion for a Bill of Particulars, Respondent's immigration

related affirmative defense should be stricken and Respondent should not be permitted to question any witness to this proceeding about their immigration or work authorization status.

Accordingly, Counsel for the General Counsel seeks the following:

WHEREFORE, Counsel for the General Counsel respectfully requests that an Order issue:

- (a) Striking the portion of Respondent's Answer that asserts the affirmative defense that the discriminatees have an illegal immigration status and that the discriminatees violated federal immigration laws; and
- (b) Precluding Respondent from questioning witnesses about their immigration or work authorization status during the upcoming compliance proceeding.

Respectfully submitted this 17th day of September 2019.

/s/ Emily Cabrera

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EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Deep Distributors of Greater NY d/b/a The Imperial Sales, Inc. and United Workers of America, Local 660 and Henry Hernandez. Cases 29–CA–147909, 29–CA–157108, and 29–RC–146077

June 20, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

On May 6, 2016, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and cross-exceptions with a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions as discussed below and to adopt the recommended Order as modified and set forth in full below.²

This consolidated unfair labor practice and representation case involves allegations that the Respondent violated Section 8(a)(1) and (3) during an organizing campaign. The Respondent also filed objections alleging that certain conduct by the Union warrants setting aside the

¹ The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, several of the Respondent’s exceptions allege that the judge’s rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge’s decision and the entire record, we are satisfied that the Respondent’s contentions are without merit.

² We shall modify the judge’s recommended Order in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and to conform to our findings and standard remedial language. We shall substitute a new notice to conform to the Order as modified.

In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), *enfd. in rel. part, King Soopers, Inc. v. NLRB*, _ F.3d _ (D.C. Cir. June 9, 2017), we shall also order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). For the reasons stated in his separate opinion in *King Soopers*, *supra* at 12–16, Chairman Miscimarra would adhere to the Board’s former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

election, which the Union won by a vote of 9 to 5, with 5 challenged ballots, a potentially determinative number. The judge found that the Respondent violated Section 8(a)(1) of the Act by threatening employees with termination and unspecified reprisals, giving employees the impression their protected activities were under surveillance,³ interrogating employees,⁴ promulgating new

³ In adopting the judge’s finding that the Respondent violated the Act when Amjad Malik gave employees the impression that their protected concerted conduct was under surveillance, we disregard the Respondent’s bare exception to the judge’s finding. In doing so, we note that not only did the Respondent fail to brief the exception, but the Respondent failed to cite to any portion of the judge’s decision addressing the surveillance issue and failed to cite record evidence in support of its exception. *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005) (“The [r]espondent merely recites the findings excepted to and cites to the judge’s decision without stating, either in its exceptions or its supporting brief, on what grounds the purportedly erroneous findings should be overturned. . . . [W]e find, in accordance with Sec. 102.46(b)(2), that the [r]espondent’s exceptions . . . should be disregarded.”), *enfd.* 456 F.3d 265 (1st Cir. 2006). See also, *New Concept Solutions, LLC*, 349 NLRB 1136, 1136 fn. 2 (2007).

Moreover, we find no merit in the Respondent’s exception to the judge’s finding that Malik was a supervisor. The record supports the judge’s finding that Malik had authority to assign and direct employees, approve time off, and discipline employees. See *Oakwood Healthcare*, 348 NLRB 686, 687 (2006). In particular, we note the un rebutted testimony that Malik disciplined one employee and terminated two others. To the extent that evidence of Malik’s authority to terminate employees rested upon hearsay testimony, there were no hearsay objections made by the Respondent at trial and it filed no exceptions on that basis.

In concurring with his colleagues’ finding that Amjad Malik is a supervisor under Sec. 2(11) of the Act, Chairman Miscimarra relies solely on Malik’s possession of authority to discipline and discharge employees. Chairman Miscimarra disagrees, however, that Malik’s February 17, 2015 comments to employees Jose Michel Torres and Jose Wilfredo Argueta created the impression that those employees’ union activities were under surveillance. Chairman Miscimarra recognizes that under Sec. 102.46(b)(2) of the Board’s Rules and Regulations, the Board may disregard an unargued exception. The Board is not required to do so, however, and Chairman Miscimarra believes it is appropriate to address unargued exceptions in certain circumstances, including where the record evidence is insufficient to support an unfair labor practice finding. See *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180, slip op. at 6–7 fn. 5 (2015) (Member Miscimarra, dissenting in part). That is the situation here. The record shows that Jose Michel Torres and Jose Wilfredo Argueta openly engaged in union activity by speaking with the Union’s representative while standing next to his vehicle, which was parked directly across the street from the Respondent’s facility—“in direct view of the Respondent’s business,” as the judge found—and on which a large “Local 660” flag was prominently displayed. All this was readily visible to anyone looking out of the Respondent’s office window. When union activity is conducted openly, it is unreasonable to conclude that statements indicating that the activity has been observed create an impression of surveillance. See, e.g., *Waste Management of Arizona*, 345 NLRB 1339, 1339–1340 (2005) (manager did not create impression of surveillance by telling employee “he knew that employees had held a union meeting,” where the General Counsel did not show that the meeting was held in secret, and “given the various other ways in which [the manager] might have learned of the nonsecret meeting”); *Michigan Roads Maintenance Co.*,

work rules in response to Section 7 activity, telling employees it would be futile to select the Union as their collective-bargaining representative, and threatening employees with deportation for testifying at the Board hearing.⁵ The judge also found that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating eight employees for engaging in union and protected concerted activity. The judge ordered some, but not all, of the special remedies requested by the General Counsel.⁶ In the representation case, the judge recommended overruling the Respondent's objections.⁷

344 NLRB 617, 617 fn. 4 (2005) (manager did not create impression of surveillance by telling employee who had just finished placing union flyers on vehicles parked in employer's parking lot not to "start that union stuff on this property," where the employee's union activity was conducted "in the open"). Moreover, Malik did not reveal detailed knowledge of the employees' union activities. Cf. *United Charter Service*, 306 NLRB 150, 151 (1992) (even assuming employees' union meeting at a restaurant was common knowledge, manager created an impression of surveillance when he "went into detail about the extent of the [meeting] and the specific topics [employees] discussed"). Accordingly, Chairman Miscimarra would dismiss the allegation that the Respondent unlawfully created an impression of surveillance.

⁴ Chairman Miscimarra agrees with his colleagues that the Respondent, by its manager Tony Bindra, coercively interrogated employee Roberto Reyes in violation of Sec. 8(a)(1) of the Act when Bindra questioned Reyes about an FLSA lawsuit that had been filed on behalf of Reyes and his fellow employees. He finds it unnecessary to pass on the judge's finding that Bindra's questions about the lawsuit posed during a subsequent employee meeting also violated Sec. 8(a)(1) because this additional finding does not affect the remedy and is therefore merely cumulative.

⁵ The Respondent initially contested the General Counsel's allegation that it violated Sec. 8(a)(1) of the Act by threatening employees with unspecified reprisals and discharge and telling employees that it would be futile to select the Union as their collective-bargaining representative. When confronted with an audio recording of these threats at the hearing, the Respondent amended its answer to the complaint and admitted the violations. Although the Respondent subsequently filed exceptions to the judge's finding of these violations, it failed to present any supporting argument. We find, pursuant to Sec. 102.46(b)(2) of the Board's Rules and Regulations, that these exceptions should be disregarded. See, e.g., *New Concept Solutions, LLC*, supra, 349 NLRB at 1136 fn. 2.

⁶ The judge recommended, among other remedies, that the Respondent be ordered to publish the Notice to Employees in three publications of local interest, twice a week, for a period of 8 weeks, and to supply the Union with the names and addresses of current bargaining-unit employees, updating that list for a period of 2 years. Contrary to our colleague, we find these remedies to be justified based on the number and serious nature of the violations found. We also note that on July 5, 2016, the United States District Court for the Eastern District of New York granted temporary injunctive relief under Sec. 10(j), ordering, among other things, immediate reinstatement of five discharged employees. *Drew-King v. Deep Distributors of Greater NY, Inc.*, 194 F. Supp.3d 191 (E.D.N.Y. 2016). The Respondent has not appealed the district court's order. The General Counsel, asserting that the Respondent has not fully complied with the order, has petitioned the court to hold the Respondent in contempt. These circumstances provide further support for the enhanced publication remedy. See *Ishikawa Gasket America*, 337 NLRB 175, 176 (2001) (Board may impose addi-

We agree with the judge's findings for the reasons set forth in his decision as further discussed below. In addition, as discussed below, we will refer Respondent's counsel to the Board's Investigating Officer in connection with his apparent aggravated misconduct at the hearing in this case.

1. As stated above, the judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating eight employees: Jose Michel Torres, Jose Martin Torres, Jose Wilfreda Argueta, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon. For the reasons stated by the judge, we affirm his findings that the Respondent violated the Act by discharging Jose Michel Torres, Jose Martin

tional remedies "where required by the particular circumstances of a case."), *enfd.* 354 F.3d 534 (6th Cir. 2004).

Chairman Miscimarra does not believe that a publication remedy is warranted in the circumstances of this case. Although he agrees that the Respondent has committed numerous unfair labor practices warranting a broad cease-and-desist order and a notice-reading remedy, Chairman Miscimarra does not believe that the violations in this case are comparable to the extreme and recurring unlawful conduct in the rare cases in which a publication remedy has been ordered by the Board. See, e.g., *Pacific Beach Hotel*, 361 NLRB No. 65 (2014) (publication remedy ordered where recidivist respondents were found to have violated multiple provisions of the Act, the violations were severe and pervasive and continued over the course of a decade, and the respondents exhibited open contempt for the Act's requirements); *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993) (publication remedy ordered where recidivist respondent committed flagrant and repeated violations of the Act, including laying off and discharging pro-union employees, verbally abusing and physically assaulting employees, blocking employees from exiting its office, instructing employees not to speak to other employees, and having supervisors clap their hands when employees looked up from their work), *enfd.* mem. 55 F.3d 684 (D.C. Cir. 1995), *cert. denied* 516 U.S. 1093 (1996). If the Respondent has failed to comply with the district court's order in a 10(j) proceeding, it is entirely appropriate for the General Counsel to seek a court order holding the Respondent in contempt. But this is a matter for the district court to address, and Chairman Miscimarra does not believe the Board should rely in part on a mere assertion by the General Counsel regarding the extent of the Respondent's compliance with the district court's order to support ordering a publication remedy in this proceeding. Further, Chairman Miscimarra would order a names-and-addresses remedy conditionally, the condition being that the revised tally of ballots show that the Union failed to receive a majority of the valid ballots cast. If the revised tally shows that the Union won the election, it will be certified as the unit employees' bargaining representative and entitled to ask the Respondent to furnish it with information regarding the unit employees it represents. Because such information is presumptively relevant to a union's duties as collective-bargaining representative, the Respondent would be duty bound to provide it, rendering a names-and-addresses remedy unnecessary.

⁷ The judge recommended remanding the representation case to the Regional Director to open and count four of the challenged ballots and issue a revised tally. There were no exceptions to the judge's resolution of the challenges (beyond the supervisory status of Amjad Malik, discussed above).

Torres, and Jose Wilfredo Argueta.⁸ In analyzing the terminations of the other five employees, the judge found that the Respondent's purported reason for the discharges—that the employees refused to sign new work rules—was pretextual, and that the actual reason was that the employees had engaged in union activity and protected concerted activity. In the alternative, the judge found that the Respondent violated the Act by terminating the employees for refusing to sign the unlawfully promulgated work rules.

We agree with the judge that the terminations were unlawful, but we rely only on the finding that the Respondent discharged these employees because they refused to sign unlawfully promulgated rules.⁹ In adopting that finding, we do not rely on the judge's application of *Tuscaloosa Quality Foods*, 318 NLRB 405, 411 (1995). Instead, we rely on *Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1–2 (2016), in which the Board found that the employer violated Section 8(a)(1) by discharging an employee for refusing to consent to an unlawful rule.

2. In adopting the judge's recommendation to overrule the Respondent's election objections, we agree with the judge's determination that the alleged objectionable conduct—a confrontation between the union president and two of the Respondent's agents—would not “reasonably tend to interfere with the employees' free and uncoerced choice in the election.”¹⁰ *Robert Orr-Sysco Food Services, LLC*, 338 NLRB 614, 615 (2002) (citing *Baja's*

⁸ Chairman Miscimarra agrees with the judge and his colleagues that the Respondent violated Sec. 8(a)(3) and (1) of the Act when it discharged employees Jose Michel Torres, Jose Martin Torres, and Jose Wilfredo Argueta. As evidence that the employees' union activities were a motivating factor in the Respondent's decision to discharge these three employees, Chairman Miscimarra relies on the statements made by the Respondent's warehouse manager Herbert Miller just 4 days after these employees were discharged, in which Miller told employees it would be futile to select the Union to represent them and threatened employees with discharge and unspecified reprisals if they selected the Union to represent them. However, Chairman Miscimarra believes the Respondent did not create the impression that it was engaging in surveillance of employees' union activities. Accordingly, unlike the judge and his colleagues, Chairman Miscimarra does not rely on the creation of an impression of surveillance as evidence of the Respondent's anti-union animus.

⁹ We do not pass on the judge's finding that the employees were discharged because they had engaged in union and other protected concerted activity.

Member Pearce joins his colleagues in adopting the judge's finding that the Respondent violated the Act by terminating employees for refusing to sign unlawfully promulgated rules. Member Pearce would also adopt the judge's finding that the Respondent terminated the five employees because they engaged in union and other protected concerted activity.

¹⁰ In the absence of exceptions, we adopt the judge's decision to overrule Respondent's Objection 1.

Place, 268 NLRB 868 (1984)). The judge found that Union President Gilberto Mendoza, Respondent's President, Danny Bindra, and the Respondent's attorney, Saul D. Zabell, exchanged words and had very brief physical contact when Mendoza attempted to exit the election area in order to verify that the Respondent's video surveillance cameras were shut down before voting began.¹¹ We find that this single interaction would not tend to affect the election results, particularly in the absence of evidence that any employee other than the Union's own observer was aware of it before voting.¹²

3. The record here suggests that during the course of the hearing, Respondent's attorney, Zabell, engaged in a persistent pattern of aggravated misconduct that interfered with the judge's attempts to conduct the hearing.¹³ The judge put Zabell “on notice that this is an admonishment and a reprimand” on four separate occasions.¹⁴

After reviewing the record, we have concluded that it is appropriate under Section 102.177(d) and (e)(1) of the Board's Rules to bring the allegations concerning Mr. Zabell to the attention of the Investigating Officer for investigation and such disciplinary action as may be appropriate.¹⁵ See *Bethlehem Temple Learning Center, Inc.*, 330 NLRB 1177, 1177 fn. 3 (2000) (Board referred alleged attorney misconduct to the Investigating Officer for appropriate disciplinary action, based on judge's recommendation); see also *McAllister Towing & Transport-*

¹¹ It is undisputed that the stipulated election agreement required that the video surveillance cameras be shut down during the election. However, it is not clear that Mendoza had the right to exit the election area and enter the facility to verify that the cameras were disabled. In analyzing this objection, we assume he was not so authorized.

¹² We do not rely on the judge's finding that “nine votes to five is not a close vote.”

¹³ Zabell's apparent misconduct included the following unjustified and repeated behavior: bullying and intimidating the General Counsel's witnesses, including by making threats to report them to immigration authorities; falsely accusing the Union's president of threatening Zabell's safety and referring to him as a “felon”; summoning federal marshals to the courtroom and insisting on a police presence throughout the hearing; accusing the General Counsel of misconduct; and questioning the trial judge's competence and authority after rulings had been made.

¹⁴ At one point during the hearing, the judge stated: “Mr. Zabell, I have never seen such misconduct engaged in by an attorney in these proceedings in my 43 years with the Board and 35 years as a judge. It's all on the record. I refer you to Sec. 102.177 of the Board's rules and regulations. You are put on notice that this is an admonishment and a reprimand. Your conduct before me, before we broke for lunch was improper, contemptuous, unprofessional, and constituted misconduct of an aggravated character. It will not be tolerated.”

¹⁵ Accordingly, we shall further modify the judge's recommended Order to include language referring the alleged misconduct to the Investigating Officer for the purpose of conducting an investigation of the alleged misconduct and performing other duties consistent with Sec. 102.177(e)(1) of the Board's Rules and Regulations.

tation Co., 341 NLRB 394, 398 fn. 7 (2004) (same), enfd. 156 Fed. Appx. 386 (2d Cir. 2005).

ORDER

The National Labor Relations Board orders that the Respondent, Deep Distributors of Greater NY d/b/a The Imperial Sales, Inc., Bethpage, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or otherwise discriminating against employees for engaging in union activity and/or protected concerted activity.

(b) Giving its employees the impression that their union activities were under surveillance by the Respondent.

(c) Threatening employees with unspecified reprisals if they selected the United Workers of America, Local 660 (the Union) as their collective-bargaining representative.

(d) Telling its employees that it would be futile to select the Union as their collective-bargaining representative.

(e) Threatening employees with discharge if they selected the Union as their collective-bargaining representative.

(f) Interrogating its employees about their involvement in a Fair Labor Standards Act lawsuit.

(g) Threatening employees with unspecified reprisals because of their involvement in the filing of a Fair Labor Standards Act lawsuit.

(h) Implementing new work rules because employees engage in union and/or protected concerted activity.

(i) Discharging employees for refusing to sign unlawfully promulgated work rules and disciplinary rules regarding cell phone use and lateness.

(j) Threatening employees with legal action in retaliation for participating in a Board hearing or because of their union activity.

(k) Threatening to report employees to government authorities in order to intimidate witnesses or to discourage them from participating in Board processes.

(l) In any other 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 from the date of this Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the judge's remedy as modified herein, plus reasonable search-for-work and interim employment expenses.

(c) Compensate Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amounts of backpay are fixed, either by agreement or Board order, reports allocating the backpay awards to the appropriate calendar year(s) for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon, and within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(e) Rescind the "Employee Code of Conduct" that was implemented on July 21, 2015, and notify the employees that it has done so.

(f) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which shall be scheduled to ensure the widest possible attendance of employees, at which the attached "Notice to Employees" shall be read to employees by a responsible management official in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or at the Respondent's option by a Board agent in the presence of a responsible management official and, if the Union so desires, an agent of the Union.

(g) Within 14 days from the date of this Order, publish in three publications of general local interest and circulation copies of the attached Notice to Employees, signed by the Respondent's general manager Tony Bindra or his successor, and do so at its expense. Such Notice shall be published twice weekly for a period of 8 weeks. The publications shall be determined by the Regional Director for Region 29 and need not be limited to newspapers so long as they will achieve broad coverage of the area.

(h) Upon request of the Union, immediately furnish it with lists of the names, addresses, and classifications of all the Respondent's employees as of the latest available payroll date, and furnish a corrected, current list to the

Union at the end of each 6 months thereafter during a period of 2 years following the entry of this Order.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Bethpage, New York, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 29, 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, the 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 the facility 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 any time since February 17, 2015.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 29 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.

IT IS FURTHER ORDERED that the alleged misconduct by the Respondent's counsel, Saul D. Zabell, as set forth above, is referred to the Investigating Officer, the Associate General Counsel, Division of Operations-Management, pursuant to Section 102.117(e) of the Board's Rules.

IT IS FURTHER ORDERED:

1. The Objections to the election are overruled.
2. The proceedings in Case No. 29-RC-146077 are remanded to the Regional Director for Region 29. She is

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."

directed to open and count the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh, issue a revised tally of ballots, and issue the appropriate certification.

Dated, Washington, D.C. June 20, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend, or otherwise discriminate against employees for engaging in union activity and/or protected concerted activity.

WE WILL NOT give employees the impression that their union activities are under surveillance.

WE WILL NOT threaten employees with unspecified reprisals if they select the United Workers of America, Local 660 (the Union) as their collective-bargaining representative.

WE WILL NOT tell our employees that it would be futile to select the Union as their collective-bargaining representative.

WE WILL NOT threaten employees with discharge if they select the Union as their collective-bargaining representative.

WE WILL NOT interrogate employees about their involvement in a Fair Labor Standards Act lawsuit.

WE WILL NOT threaten employees with unspecified reprisals because of their involvement in the filing of a Fair Labor Standards Act lawsuit.

WE WILL NOT implement new work rules because employees engage in union and/or protected concerted activity.

WE WILL NOT discharge employees for refusing to sign unlawfully promulgated work rules and disciplinary rules regarding cell phone use and lateness.

WE WILL NOT threaten employees with legal action in retaliation for participating in a Board hearing or because of their union activity.

WE WILL NOT threaten to report employees to government authorities in order to intimidate witnesses or to discourage them from participating in Board processes.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL rescind the "Employee Code of Conduct" that was implemented on July 21, 2015, and notify the employees that we have done so.

WE WILL, upon request of the Union, immediately furnish it with lists of the names, addresses, and classifications of all our employees as of the latest available payroll date, and WE WILL furnish a corrected, current list to the Union at the end of each 6 months thereafter during a period of 2 years following the entry of the Board's Order.

DEEP DISTRIBUTORS OF GREATER NY, D/B/A
THE IMPERIAL SALES, INC.

The Board's decision can be found at www.nlr.gov/case/29-CA-147909 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Henry J. Powell and Emily A. Cabrera, Esqs., for the General Counsel.

Saul D. Zabell, Esq. (Zabell & Associates, P.C.), of Bohemia, New York, for the Respondent.

Sheri Preece, Esq. (Bryan C. McCarthy, Esq. & Associates, P.C.) of Brewster, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on charges and amended charges filed by United Workers of America, Local 660 (Union) in Case No. 29-CA-147909, and based on charges and amended charges filed by Henry Hernandez in No. 29-CA-157108, an amended consolidated complaint was issued against Deep Distributors of Greater NY d/b/a The Impe-

rial Sales (Respondent or Employer) on October 30, 2015.¹

The complaint, as amended at the hearing, alleges that the Respondent (a) by its agent Amjad Malik, gave employees the impression that their union activities were under surveillance and (b) by its Manager Miller, threatened employees with unspecified reprisals if they selected the Union as their representative; told employees that it would be futile to select the Union as their collective-bargaining representative, and threatened employees with discharge if they selected the Union as their representative.

It is also alleged that on March 6, 2015, the Respondent discharged Jose Wilfredo Argueta, Jose Martin Torres, and Jose Michel Torres because they joined and assisted the Union and engaged in concerted activities.

It is further alleged that in about July, 2015, the Respondent's employees including Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon, engaged in concerted activities with other employees by filing a lawsuit which alleged that the Respondent was violating the Fair Labor Standards Act (FLSA).

It is alleged that on about July 14, 2015, by Tony Bindra, interrogated employees about their involvement in the FLSA lawsuit and threatened them with unspecified reprisals because of their involvement in the filing of that lawsuit.

It is additionally alleged that on about July 21, 2015, the Respondent unlawfully implemented new work rules and discipline regarding cell phone use and lateness, and that on that day, the Respondent discharged Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon because they filed the FLSA lawsuit.

Finally, it is alleged that on about December 9, Respondent, by its Attorney Saul D. Zabell, while in a Board hearing room (a) threatened employees with legal action in retaliation for participating in a Board hearing and because of their union activity and (b) threatened to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

On October 20, 2015, the Regional Director issued a Report on Objections and Challenges, consolidating for hearing the alleged unfair labor practice cases with objections to the election filed by the Employer. At an election conducted on March 24, 2015, of the 20 eligible voters, 9 votes were cast for the Union and 5 votes were cast against the Union. Five ballots were challenged. The ballots cast by Jose Wilfredo Argueta, Jose Martin Torres, and Jose Michael Torres, the alleged discriminatees in the unfair labor practice case, were challenged by the Employer. The ballots cast by Amjad Malik and Manjit Singh were challenged by the Union.

The Respondent's answer, as amended at the hearing, denied the material allegations of the complaint, and a hearing was

¹ The charge, first amended charge and second amended charge in Case No. 29-CA-149709 were filed by the Union on March 10, 12, and August 31, 2015, respectively. The charge, first amended charge, and second amended charge in Case No. 29-CA-157108 were filed by Henry Hernandez on July 31, September 24 and November 3, 2015, respectively.

held before me in Brooklyn, New York, on December 9, 11, 21-23, 2015, and January 20, 22, 26-27, 2016.²

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent admitted that from January 1, 2013, to the present, it has been a domestic corporation having an office and place of business at 999 South Oyster Bay Road, Bethpage, New York, and with a former place of business at 60 Gordon Drive, Syosset, New York. It further admits that it has been engaged in the nonretail sale of beauty and appliance and housewares products. The Respondent admits that during the past year, it purchased and received at its combined Bethpage and Syosset, New York facility, goods valued in excess of \$50,000 directly from points outside New York State. The Respondent admits, and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.³

The Respondent also admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE RESPONDENT'S HIERARCHY

Chandeep (Danny) Bindra is the owner of the Respondent. His brother, Tony Bindra, is its general manager. Herbert Miller is the warehouse manager and an admitted statutory supervisor. Miller is in charge of the daily operations of the warehouse. The complaint alleges and the Respondent denies that Amjad Malik is a statutory supervisor or agent.

The Respondent purchases beauty products and electronics and appliances which it stores in its warehouse. Retail stores purchase those products from the Respondent which then ships them to retailers and to on-line purchasers.

The Respondent's approximately 20 warehouse employees pick the orders requested by its customers by locating them on the warehouse shelves and bringing them to the shipping department where they are checked by Miller and then prepared for delivery and sent out. The employees operate fork lift trucks to store and to pick the items.

A. *The Alleged Supervisory and Agency Status of Amjad Malik*

Miller is in charge of the electronic and appliances section of the warehouse. Malik is in charge of the beauty and personal

² On February 1, 2016, I granted the General Counsel's motion to quash subpoenas served by the Respondent on certain employees. The Respondent sought to examine them on certain amendments to the complaint made by the General Counsel. My Order granting the motion to quash the subpoenas was received in evidence as GC Exh. 26.

³ The Respondent argued at the hearing that Deep Distributors of Greater New York and The Imperial Sales, Inc., are separate entities. This claim has no merit. The Respondent amended its answer to admit that Deep Distributors of Greater New York and The Imperial Sales having its facility in Bethpage is a statutory employer.

items products. Six or seven employees worked in each department.

Employee Jose Torres stated that when he began work in 2011 or 2012, Tony Bindra told him that Malik was his supervisor. Jose Torres and Argueta testified similarly that Malik told them what job they would be performing, and during their employment, gave them daily job assignments. If they were late to work or wanted a day off they called Malik. On those occasions, Malik approved the requests.

Jose Torres testified that about 2 or 3 years before the hearing, he saw Malik speak to employee Ramon Muncho but did not know what they said because he was too far away. Immediately thereafter, Muncho told Torres that he was fired. Muncho left the premises and did not return. Similarly, Argueta testified that, about 3 or 4 years ago, he saw Malik argue with Jose Ramone Argueta who then left the premises. Argueta asked Ramone what happened and Ramone said that Malik had fired him. The Respondent had no written disciplinary records of any employees and, accordingly, these alleged discharges could not be confirmed with documentary evidence. Employee Javier Reyes stated that he considered Malik as a supervisor because he followed and observed the workers, gave them orders, and worked at the computer in his office.

Employee Marvin Hernandez and Roberto Reyes stated that when Miller was not at the premises Malik was in charge, and, according to Reyes, at those times Malik directed the workers as to their job tasks. Miller testified that when he is not present he does not know who assigns the work.

Argueta testified that in about September, 2014, he was filling an order when Malik told him to do another job. Argueta testified that he did not hear Malik and, apparently, ignored him. Malik warned him that that he would not get any more chances if he made any more mistakes.

The Respondent had no responsive documents to General Counsel's subpoena regarding the supervisory status of Malik. Malik did not testify.

Tony Bindra testified that Malik uses a computer to print the order pick sheets. He is the only employee who has that task because he is the only worker who knows how to use the computer, and read English. Similarly, because of his fluency in English, Malik is the only employee who receives merchandise from delivery trucks. According to Bindra, apart from these duties, Malik is a warehouse worker with the same responsibilities as the other warehouse employees.

Bindra gave contradictory testimony. He first testified that Malik signed orders to purchase products but then, following an objection by Attorney Zabell, testified that he did not. Tony Bindra denied that Malik possessed any supervisory responsibilities. He stated that he has no authority to hire, discharge, or recommended discharge. Bindra conceded that he shares an office with him but later stated that he has no office within the warehouse.

Malik occupies a position of trust. Miller testified that Malik is his "main helper." He is the only employee who has a key to a room, called the blade room, where expensive merchandise is kept. Bindra trusts him with those costly goods, stating that he did not want others to possess a key because items may be missing.

III. THE UNION'S ORGANIZATIONAL CAMPAIGN

Employee Henry Hernandez and his coworkers became interested in joining a union, and Hernandez contacted Union Agent Wester Fabres. Beginning in early January, 2015, Hernandez and his fellow workers met each week with Fabres, and attended meetings with the Union.

In early January, 2015 Fabres parked his vehicle across the street from the Respondent's shop in direct view of the Respondent's business. The vehicle bore a large flag with the legend "Local 660" prominently displayed on the car.

Employees Javier Reyes, Roberto Reyes, Argueta, and Sabilon spoke occasionally with Fabres at his car for a few minutes. Javier Reyes stated that in late February, after speaking with Fabres and entering the building, he heard Miller ask Roberto Reyes "what happened outside."

Marvin Hernandez stated that as he and other employees entered the warehouse through the office, the door was open and he saw Tony Bindra and Miller standing at the window looking outside during the time that Fabres' car was located across the street from the facility.

Manager Miller testified that he saw a car parked across the street from the facility and noticed a banner hanging on the vehicle. He stated that he was not concerned about the car because he did not know if the car was there with respect to the Respondent or the business next door to it.

On February 10, 2015, the Union filed a petition seeking to represent the Respondent's warehouse employees. Thereafter, on February 26, the Respondent and the Union signed a stipulated election agreement setting March 24 as the date for the election.

A. Malik's Alleged Surveillance

Jose Michel Torres and Argueta testified that on February 17, as he and Argueta were working, Malik approached and said that they "were part of a union" or "with the Union." The two workers did not reply, and Malik left the area.

Argueta testified on cross examination that he was not given the impression that his union activities were under surveillance. I discount this testimony. The "impression of surveillance" is a legal term. Argueta testified credibly as to the facts which occurred.

Employee Roberto Reyes stated that, following his meetings with Fabres, Miller asked him if he "knew something about the Union." Reyes said that he knew nothing. Miller replied "I think that the one that is hanging out with the Union is Alex [Argueta]."⁴

B. The Discharges of Argueta, Jose Michel Torres and Jose Martin Torres

Manager Miller stated that in late January or early February, Tony Bindra told him that there were too many employees because the winter was harsh and "limited how much we could do." Bindra asked him to recommend who to "terminate." They

⁴ Reyes' testimony that this conversation occurred in December is an obvious error inasmuch as the Union's campaign did not begin until January. Further, Reyes rehabilitated his testimony by stating that the remark by Miller was made after the Union appeared on the scene.

decided that Jose Martin Torres would be discharged because he was a temporary employee who replaced Juan Flores who was caring for his injured son. They also agreed to “terminate” Argueta because of his “safety problems” and to “terminate” Jose Michel Torres because he was the least productive worker.

Tony Bindra stated that he saw Jose Michel Torres asleep at work on at least three occasions, the last time being 15 to 20 days before his discharge. However, he did not wake him up because he did not speak to the workers as that was Miller’s job. However, Bindra complained to Miller about Torres’ sleeping on the job. No written warnings were given to Torres who denied that he received any discipline, and denied sleeping on the job.

On March 6, 1 week after the Respondent signed the election agreement, Miller told Argueta, Michel Torres, and Martin Torres that there was “not a lot of work,” that work was slow, and they were being sent home but would be called back to work. However, they were not recalled.

Argueta testified that work was not light because at that time he unloaded four to five trucks and the Respondent was presenting at a trade show where customers typically place many orders for products. Sabillon testified that he did not know anyone who was laid off because work was slow. In fact, when the three employees were fired, business and work were not slow because he noticed that there was much work, citing the fact that trailers of products were received and were delivered. Jose Michel Torres also denied that work was slow at that time. He noticed that when he left work that orders were being received. Further, Henry Hernandez who continued to work after the three employees were laid off, observed that the Respondent hired one or two new workers following the layoff and after the move to Bethpage. One was a nephew of Roberto Flores.

Miller’s testimony that the three employees were laid off before the Respondent learned that the Union had filed the election petition is clearly wrong. They were discharged on March 6, 2015. The petition was filed on February 10, 2015, and Tony Bindra admitted receiving it on about that date. Miller’s further testimony that perhaps they were laid off before he began seeing the Union’s car parked across the street from the facility is equally erroneous. The Union’s car was at the Respondent’s facility beginning in January, and in his speech to the workers on March 10, Miller told them that the only thing the Union can do is “stand outside.” It is reasonable to find that Miller was aware of the Union’s presence outside the facility at least 4 days earlier especially since the Union’s car had been periodically parked across the street from the facility periodically for 2 months.

C. Reasons for the Selection of Argueta, Jose Martin Torres and Jose Michel Torres

1. Argueta

Bindra stated that Argueta crashed the forklift into a FedEx truck in the old facility in Syosset, breaking its light. According to Bindra he “always was a dangerous guy.”

Argueta testified that he and other employees often climbed the warehouse shelves in order to retrieve picked orders. They were seen doing so by Tony Bindra, and did not receive any discipline for that activity. In fact, Manager Miller testified that

Argueta was “kind of reckless,” on two occasions climbing the shelves instead of using a ladder. Miller warned him orally but not in writing. Tony Bindra stated that he often saw Argueta “trying to do gymnastics on the ladder.”

Nevertheless, Argueta was not suspended or discharged and received no written warnings in the 4 years he worked for the Respondent.

2. The Torres brothers

Miller stated that Jose Michel Torres was extremely lazy - the least productive worker who tried to do as little work as possible. He was often absent from work. Nevertheless, he did not issue any written warnings to Michel and did not discipline him in the approximately 4 years he worked at the Respondent. Further, Miller accepted his recommendation to hire his brother Martin because he needed a worker at that time.

Miller testified that when Michel asked him for a job for his brother, he told Michel that there were no openings. Later, when Flores was absent to care for his son, he looked for a temporary replacement until Flores returned. However, he did not testify that he told Michel or his brother that he would be retained only until Flores returned. In fact, the Respondent’s records reflect that Flores left work on December 12, 2014, to care for his son and returned on February 17, 2015.

Flores performed many tasks. He pulled orders and worked as a handyman, changing light bulbs and fixing the factory doors. In contrast, Jose Martin Torres was employed solely as an order picker.

Miller testified that he told Jose Martin Torres when he was hired that he was being hired as a “temporary employee.” Miller said that he told Torres that Juan Flores was away from work caring for his child and that when he returned “we’ll see how business was, and we would take it from there.”

Miller’s statement concerning Torres’ continued work was thus equivocal. He did not definitely say, according to his own testimony, that Martin would be released when Flores returned. Miller held out the possibility that if business was good he would be retained.

Miller’s testimony is flawed. The Respondent’s records establish that Martin Torres was employed by the Respondent on February 17, 2015, when Flores returned to work, and that Martin was not discharged until 3 weeks later, on March 6.

3. The alleged lack of work defense

The Respondent asserts that the three men were laid off for lack of work. Tony Bindra stated that the weather that season was harsh, and sales were down from the previous year. He also testified that following Christmas work is slow.

First, it should be noted that the three men were discharged on March 6, more than 2 months after Christmas. Their discharge was 2 weeks after the election petition was filed and 1 week after the election agreement was signed.

I must note Tony Bindra’s contradictory testimony. He first definitively testified on examination by General Counsel that the three men were “terminated . . . and were not laid off.” On examination by Attorney Zabell, the following day, he stated that they were “laid off.”

The Respondent produced a list of employees all of whom were marked as being “laid off” in the period 2010 to 2015.

However, Tony Bindra could not testify definitively as to who was terminated and who was laid off. He stated that when the document was prepared it was “just easier to drag this thing [the term “laid off”] from an Excel program and put it in there.” Finally, when asked about the accuracy of the term “laid off” when applied to all the employees on the list, he said “I don’t know if it’s accurate or not. I’m just saying I don’t remember this.” Nevertheless, he identified two employees who were laid off in February 2015, for lack of work: Chris Chiarappa, a buyer and Michael O’Hara, a salesperson. It must be noted that no warehouse workers were laid off or discharged at that time other than the three discharges, Argueta, and the Torres brothers.

Tony Bindra stated that in response to the subpoena’s demand for documents which would show the reasons for its determination that there was insufficient work to justify the employment of Argueta, Jose Martin Torres, and Jose Michel Torres, the Respondent provided just two documents, identified as General Counsel Exhibit 15 and 16. Bindra stated that the Respondent’s purchase of goods were \$17,780,000 in 2015, and \$25,302,520 in 2014. He guessed that one reason was the very cold weather in 2015 and with too many warehouses in Syosset the amount of snow made it impossible to travel between its three warehouses in Syosset. In answer to a leading question from Zabell, Bindra replied that the Respondent could not make deliveries to facilities because of the snow.

Bindra stated that the numbers in General Counsel Exhibit 15 and 16 were based on data that was input in the computer which was derived from purchase orders and slips and other sources. He conceded not having produced purchase orders or purchase documents, saying that there are “thousands of documents and he did not know where they were, adding that if he printed them there would be a “million pieces of paper.”

The General Counsel stated that she asked for original books and records—back-up documents and not just the summaries set forth in General Counsel Exhibit 15 and 16. Zabell replied that if back-up documents exist in the form of data in a computer he was under no obligation to compile a report that satisfied the General Counsel. General Counsel noted that the subpoena also demanded electronically maintained documents. Zabell stated that the records no longer exist, but that the “raw data . . . exists in an accounting program; “the data from purchase orders exist in a database Information does exist in the form of random data in a database that supports the financial information provided That data is not decipherable absent the created report. A summary of report existed and it was provided. Counsel now seeks to have Respondent create reports for purposes of this litigation without providing any legal basis to support imposition of such a duty. The creation of documents that do not exist from information that absent such a report is indecipherable exceeds the obligations imposed by the subpoena.”

During the hearing, the General Counsel filed a Motion to Impose Sanctions under *Bannon Mills, Inc.*, 146 NLRB 611, 633–634 (1964).⁵

⁵ The Motion, the Respondent’s Opposition and certain other documents were received in evidence as G.C. Exhibit 25.

I granted the General Counsel’s motion and the requested sanctions. I noted that Federal Rules of Evidence 1006 states that the contents of voluminous writings which cannot conveniently be examined in court may be presented in the form of a summary, but that the originals shall be made available for examination. I ruled that it was the Respondent’s obligation to produce the documents. I noted that Zabell stated that the data was available, and if reports had to be created to produce the data they should have been created.

The sanctions which I granted precluded the Respondent from presenting any documentary or testimonial evidence on the subject matter relating to its defense that the three employees were laid off due to a slowdown in business, and that the Respondent was similarly precluded from producing such evidence relating to the financial status of the Respondent’s business. I also granted the General Counsel’s requested sanction that I draw an adverse inference that the Respondent’s financial records, had they been produced, would not support its claim that a downturn in business necessitated the layoff of the three employees.

D. Miller’s Meeting with Employees

Henry Hernandez testified that in March, following the visits of Fabres across the street from the shop, he was speaking to his coworkers when Miller approached and said “let’s talk face to face about the Union. Don’t be like a girl!” or “if you want to talk about the Union, come in front. Don’t act like a girl.”

Miller testified that he did not hear the employees speaking with each other concerning the Union and did not assume that their conversation related to the Union. However, his pretrial affidavit stated that he held a meeting, discussed below, with employees because he saw about four employees sitting in the corner hiding behind pallets, talking about “things.” He did not know what they were speaking about but told them if they wanted to speak they should “bring it out in the open and we can talk about it.”

The next day, on March 10, 4 days after the three employees were discharged and 2 weeks before the election, Miller called a meeting of all the employees, in which he said that he would speak about the Union.⁶ Employee Sabillon recorded the meeting which was later transcribed and received in evidence. Miller, who is fluent in Spanish, told the employees, as relevant to the complaint allegations, as follows.

You are going to vote for union. This is what will happen. If [it] passes. If you vote and you want. And the union gets in. What is going to happen is. You will have to strike because we are not going to accept that. So, those who vote Yes. I am telling now that you will lose your jobs because you are going to go out there, stand outside with the union. Those who don’t vote are going to be here, working and, and we will be bringing new people. So, people who don’t, who vote, and go out there, I am telling you now, if you want you can go now, because you will not have a job. We will not bring the other.

⁶ Hernandez testified that the meeting took place in the morning at 9 or 10 a.m., but his affidavit stated that it occurred after lunch, at about 11 a.m. This minor inconsistency is immaterial. There is no dispute that the meeting occurred, as supported by the recording of it.

The others are going to. You know what. The only thing the union can do is to stand outside for. I don't know how to say it in Spanish. But we will bring new people because I know that not all of you will vote. I have 100 percent that not all are going to vote. So, those who do vote, I am telling you as of now, if you want. You are not coming back in here because you will lose your job. Because we will fight this.... I feel betrayed because I always treated everyone right. Because prior to my getting here you did not take coffee break or take anything. When I got here I changed everything.... I give you a lot. How do you say that? Ah. Freedom. The phones I don't say anything. You come wearing shorts, wearing tennis, I don't say anything. Okay. If you want change, careful what you ask for. Okay. Because a lot will change. But I am telling you right now, those who vote for the union, you will lose your job. Because we will fight it until the end. And all the union can do, like I said, is to stand outside. You left for months. Even Alex when his sister died left for months. And we always took him back.... I don't understand what happened with this union thing, but now I see Alex and Victor out there with them. But I don't know what is going on. You know more than I do. Because I know you were hanging with Michel and they told you. I was not there but I am 100 percent that he....

But if you're going to start work for us or trouble for us, I don't want you here. You. I have treated you right the whole time. If you want me to treat you poorly, you shall see. Okay. But I am telling you one, one thing, those who. The union is never getting in because we will fight. You shall see if you can go some two, three weeks without pay. We will bring other people and it will hurt them for one week, two weeks, but they will learn. Just like you learned, like you learned everything. The new people will come and learn the job.... If you are not happy, leave. But stop, don't bring problems for me because I am not going to be happy and if I am not happy you will not be happy....

[At this point an unidentified employee told Miller that he [Miller], as a manager must speak for the workers. Miller replied]

Exactly. Right. I am always doing that. That is why I can get everything I have gotten for you. So you can take the break. There was no coffee break here before.... If you are not happy, leave, leave.... When you were leaving you asked me, when you called me to come back I brought you back. You wanted to bring your brother and your two brothers were brought in. When you need something you go to Tony and helps you.... I gave your brother work because of you. So, everyone it's like a family. This started from nothing. I don't know where this started. That is the problem. We were fine here. Someone is putting things in your head but if you want it, if you don't believe me, do what you got to do and do what you gotta do. You'll see what happens.

It should be noted that the transcript of the recorded meeting contradicts Miller's trial testimony that he did not tell the workers that (a) a vote for the Union will cause a strike (b) the Respondent would not accept the Union (c) those who voted for the Union will lose their jobs or will have to stand outside

while those who voted against it will be working (d) those who vote for the union could leave now because they would not have a job (e) the Respondent will bring in new workers for those who vote for the union and (f) those who vote for the Union will not be returning.

Rather, Miller testified flatly that the only question he recalled asking is if the workers knew how much they would have to pay in union dues.

During the meeting, Miller asked, whether in "your country" employees were paid for their work. One worker said they were paid for their work. Miller replied that they were paid because they were in that country. He added that "you have all the rights here. I know what the union is telling you. But, no they don't have good social. What are they going to do for you in the union? They cannot do." An employee answered that his wife "has no papers" and she was paid for the holiday.

Henry Hernandez testified that Miller said at the meeting that the Union could do nothing for the workers because they did not have a "good social security." Employee Roberto Reyes stated that at a meeting, Miller told the workers that if they did not have "papers, social security," the Union would do nothing for them.

Following the playing of the recording of the meeting, the Respondent amended its answer to admit that on about March 9, Miller (a) threatened employees with unspecified reprisals if they selected the Union as their collective-bargaining representative (b) told employees that it would be futile to select the Union as their collective-bargaining representative and (c) threatened employees with discharge if they selected the Union as their collective-bargaining representative.

I reaffirm my ruling that the Respondent's later claim that the tape was inaccurate has no merit. Zabell was invited to produce any evidence to support that claim. He did not do so.⁷

E. The FLSA Lawsuit and the Events following the Election

The election was held on March 24. Henry Hernandez and other employees stated that following the election they continued to meet with Union Agent Fabres. Their conversations included their concern that they had not been paid for the overtime hours they worked. Fabres said that he would obtain an attorney to speak with them about that issue, and later brought them to meet an attorney who filed the lawsuit.

A federal lawsuit was filed on about July 6, 2015. Tony Bindra admitted receiving the lawsuit on about July 8. The plaintiffs were listed as Jose Reyes, Jairo Bonilla, Augustin Sabillon, Javier Reyes, Selvin Vasquez, Marvin Hernandez, Henry Hernandez, Jose Olan Amador, Armando Lazo, Valerio Baquedano, Jose Michel Torres, Jose Argueta, and Noel Efrain Cas-

⁷ Zabell first claimed that the recordings were not full and complete. He was given a copy of the recordings and transcripts thereof, which were also received in evidence. The Respondent had already amended its answer following Zabell's statement that "based upon the testimony that just came out, it appears that I'm going to have to amend my answer somewhat, to amend the pleading to comport to the testimony It will involve me reviewing my notes, reviewing the tape but I do believe it will streamline the process today." After a 1-hour break, Zabell amended the Respondent's answer to admit the allegations set forth above.

tro. The complaint stated the residence of each plaintiff and alleged that each employee worked on weekends and was not paid at the overtime rate for such work pursuant to the FLSA and the New York Labor Law.

Tony Bindra admitted that, upon receiving the lawsuit, he was “surprised and disappointed” and for that reason wanted to meet with the workers. He was surprised because most of the information contained therein was incorrect, including the employees’ addresses and their claim that they worked on the weekends. He wanted to make certain that the suit was their own product. Bindra denied discriminating against employees because they filed the lawsuit.

Employee Roberto Reyes testified that on July 15 he was called into Miller’s office where Miller and Tony Bindra spoke to him alone. Bindra showed him the court papers and asked if he knew anything about the attorney who filed the FLSA suit. Reyes denied any knowledge of the matter. Bindra challenged him, saying that his name was the first one listed. Reyes repeated that he knew nothing. Bindra told him to return to work and said that he would meet one-by-one with the workers.

Shortly thereafter, a meeting was held at which Tony Bindra spoke to the workers. His words in English were translated into Spanish by Miller. Sabillon recorded the meeting.

Bindra began the meeting by telling the workers that he was served with the lawsuit and read all the employees’ names listed, asking them where they lived and comparing their responses with the information in the lawsuit. He said that “all these guys’ names are here. They are all suing me.” He noted that the suit alleges that he has not paid them for work performed on weekends. Bindra told the men that they never worked on weekends. He told them that “now I have to defend myself,” adding “so now the question is this. We are fighting or we are not fighting? I didn’t pay you or did I not pay you? That’s the question.”

Bindra asked the employees if they were still intent on pursuing the lawsuit. At hearing, Bindra explained that the men agreed that their statements in the suit were false, that they did not work on the weekends and that they no longer wished to pursue the suit. However, the transcript of the meeting does not support a finding that the employees admitted that their allegations in the suit were untrue.

F. The Implementation of New Work Rules and Discipline Imposed

One week after Bindra’s meeting, on July 21, 2015, the Respondent implemented an employee Code of Conduct. This was the first time that the Respondent implemented written work rules of any type. It provided as follows:

Employee Code of Conduct Time and Attendance Policy

Employee lateness interferes with the company’s business operations. All employees are required to report to work on time. The scheduled start time for employees is 8:00 am. Any employee who signs in later than 8:05 will be subject to discipline. Consistent with this policy, employees who report to work late will receive a disciplinary warning. If an employee persists in being late, and they accumulate 3 unexcused inci-

dents of lateness during a twelve month rolling time period, they will be subject to termination. There are no exceptions to this rule.

Warehouse Personnel

The company adheres to all laws and regulations regarding worker and workplace safety. Consistent with this practice, no employee working in the company warehouse will be permitted to utilize their personal cell and/or smart phone, or any other non-company issued electronic device. This includes the operation of such devices with headphones and/or other hands-free components. Any violation of this policy will result in the immediate imposition of discipline, up to and including termination.

Cell phone bins will be provided as a convenience for employees to store their cell phones though employees are requested to leave their cell phones at home.

Employees who utilize their cell phone during work hours will be disciplined up to and including termination.

The form had a place for the employee to sign that he acknowledged and agreed with the policies. Employees testified that they made and received cell phone calls during working hours, they used their headphones while working, and that the Respondent’s supervisors saw them doing so. None of them was disciplined for such conduct. Indeed, Tony Bindra testified that the warehouse workers “always” wore headsets. He stated that he “always told them not to use the headphones but they never listen.”

Tony Bindra testified that he implemented the cell phone policy because of the dangerous nature of the warehouse environment: forklift trucks moving back and forth creating noise while employees wore headphones limiting their ability to hear the trucks. His concern in implementing the time and attendance policy was that the Respondent was losing money at that time and he wanted employees to come to work on time. It must be noted that subpoenaed time records of all the employees were not produced.

It is undisputed that prior to the issuance of these rules the Respondent had not issued any written workplace rules and procedures.

Bindra stated that he began work on the new policy at about the time the Respondent moved to its new Bethpage facility in mid-June, 2015 when the first draft of the policy was created. He stated that he was served with the FLSA suit 1 month later on July 13. His intent in instituting the new rules was that he wanted the work to be performed more efficiently and safely in the new location. Further, forklift trucks were used more often in Bethpage than in Syosset because it was a bigger location with more room to maneuver the machines. In Syosset, dollies were used in the smaller warehouse aisles. Nevertheless, notwithstanding the use of forklifts in Syosset, no written rules were implemented there concerning the use of cellphones or headphones.

Respondent’s witness Aldo Hernandez, a paralegal at Attorney Zabell’s law firm, testified and produced documentary evidence that the new cellphone policy and the new time and attendance policy was last edited on were last edited in Zabell’s office on June 18, and July 10, 2015, respectively.

On July 21, a payday, Mena, a payroll employee, told the employees that they had to sign the Employee Code of Conduct which was written in English and Spanish.

Five employees, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon refused to sign it. Mena called Miller over and he said that the employees must sign it. They refused. Tony Bindra told them that that was their last day of work. They then were given their last paycheck and they left the premises.

Thus, the Respondent terminated five long term employees solely because they refused to sign the new attendance and cell phone policy. It must be observed that the five dischargees had been employed for years by the Respondent without their being disciplined for any reason. Sabillon began work in October, 2010, Roberto Reyes started work in about April, 2011, Marvin Hernandez became employed in about 2011, and Henry Hernandez and Javier Reyes began work in about March, 2014.

Tony Bindra testified that all of the Respondent's employees signed the new policy except the five dischargees. Roberto Reyes and Sabillon also stated that those employees who signed the work rules retained their jobs. However, in response to the General Counsel's subpoena which demanded all the signed policies, only nine were produced notwithstanding that, according to the July 2015 payroll, at least 26 warehouse workers were employed at that time. There was no evidence that other employees who may have not signed the policy were discharged at that time. Thus, although Bindra and two employees testified that others who signed the forms retained their jobs, there was no documentary evidence, the best evidence, to support that claim.

The complaint alleges that the Respondent implemented the "new work rules and discipline regarding cell phone use and lateness and discharged the five employees because they filed the FLSA lawsuit in early July. Tony Bindra admitted receiving the lawsuit on July 13.

Miller testified that the Respondent always had a rule that cell phone use was prohibited, but it was enforced, for safety reasons, only when the facility moved from Bethpage to Syosset in late May 2015. Miller stated that from late May through July 21, when the new policy was introduced, a period of about 7 weeks, the employees worked "with these pieces of equipment running around in the warehouse . . . when they were wearing their headphones, and [I] said nothing." Miller stated that when he saw an employee using a cell phone he would "yell"—a form of warning that they should not be using their phone.

Miller testified that in March 2015, if an employee was late there was no written rule regarding any consequence for his lateness. The Respondent instituted the attendance policy because many employees were absent from work frequently. It decided to "tighten" the policy, which, according to Miller, was always in effect but not enforced. He conceded that no one was discharged for being late.

Miller testified further that prior to the move to Bethpage in late May, he told the workers that, once the facility moves, no one would be permitted to use their cell phones since the new facility would be bigger and have more machines. He explained that the rule was not implemented until July because, at first, all

the workers were "on board" with the new rule, but then "just got lax and began falling back in the old pattern again."

Tony Bindra stated that the employees were told that if they did not sign the new policy they would be fired, but if they signed they could retain their jobs. In contrast, the employees stated that they were not told that they would be discharged if they did not sign the policy.

Bindra also stated that he told all the workers to put their cell phones in a cubby which he provided and not use their headphones. They told him that they would not sign the policy because they wanted to continue to use their cell phones and headphones. They were discharged for their refusal to sign the policy.

As set forth above, Miller told the employees on March 10, 4 months before the implementation of the new rules, that he felt betrayed "because I always treated everyone right . . . I give you a lot . . . freedom. The phones I don't say anything. If you want change, careful what you ask for. Okay. Because a lot will change . . . If you are not happy, leave. But stop, don't bring problems for me because I am not going to be happy and if I am not happy you will not be happy . . . Someone is putting things in your head but if you want it, if you don't believe me, do what you got to do . . . You'll see what happens."

The employees testified that they understood that they were supposed to report to work on time and certain employees stated that they knew that they could be disciplined or discharged if they were late often. The Respondent argues that these were work rules that were in place, were understood by the workers and, accordingly, the written implementation of these rules was just a continuation of rules the workers understood and were nothing new.

G. The Alleged Threats Made in the Hearing Room on December 9

Union President Gilberto Mendoza stated that as he stood at the doorway to the hearing room he saw Zabell enter the hearing room and say "immigration is here" and then walked inside the room. At that time, the employees were seated in the back row of the room near the door which was open. Mendoza added that Zabell was not speaking to anyone when he made that comment. A few minutes later he then heard Zabell point to the workers and say "they are not going to get a penny from my client. This is a waste of time. They are a bunch of immigrants . . . if they get up to the stand and give a statement they will be committing perjury so I'm going to take it to the grand jury so they can be deported." He also said that he would call the Immigration Service.⁸ Mendoza said that the witnesses were Spanish speakers but that some understood English.

General Counsel Powell told Zabell to cease making such accusations.

The employees testified as to what they heard Zabell say. Their knowledge of English is admittedly limited. However,

⁸ Mendoza's affidavit stated that the administrative law judge was present when Zabell made these comments. I stated on the record that I was not present during this incident. Mendoza admitted that he was confused by another incident in which Zabell was yelling regarding Mendoza's presence at which I was present.

they credibly testified as to what they heard and that they understood the words Zabell uttered.

Argueta testified that he does not fully understand English but that he understands a little English. While testifying in cross-examination through an interpreter he understandably stated that he did not understand Zabell's words as they "exit [his] mouth."

Argueta first testified that he was at the elevator with employee Michel Torres when they observed Zabell arriving for the hearing. He heard Zabell speaking to his clients concerning "immigration," and remarking that he was going to "report us to Immigration." Argueta then testified that later, when he was in the hearing room with his coworkers, he heard Zabell say that he would report them to Immigration and that he was not going to pay the workers "not even a penny." He heard Powell tell Zabell three times to "stop."

It must be noted that Argueta made two errors in his testimony. He testified that he heard Zabell's comments in hearing room number 2 during which time the administrative law judge was present. In fact, the alleged comments were made in a different hearing room where I was not present when Zabell allegedly made the comments testified to. These errors do not undermine his testimony, the most important aspect of which was the comments made by Zabell. Those comments were corroborated by other employee witnesses and I credit them.

Javier Reyes testified that Zabell pointed to the workers. Although Reyes gave his testimony through a Spanish interpreter, he stated, in English, that "he report with immigration," and the workers would not get a penny. He stated that he is able to read and understand 35 percent of what is written and spoken in English.

Roberto Reyes stated that he did not understand what Zabell said but understood that Powell told him three times to stop. He testified that no one translated what Zabell said, but he believed, at that time, based on Zabell's pointing to him that he "was calling me a criminal."

Henry Hernandez, despite that he testified through a Spanish interpreter, testified in English as to what he heard. He stated, in English, that "report to immigration and like penny or something." He credibly and honestly stated that he does not understand much but he understands a little English. He testified that on December 9, Zabell pointed to all the employees sitting in the rear of the hearing room, and screamed at them, saying that he would report them to "immigration" and that the Respondent was not going to pay a penny. General Counsel Powell told him several times to stop. Prior to that time, Zabell was speaking to Powell.

Fabres testified that on December 9, he and the employees were sitting on a bench in the rear of hearing room number 3. Before the hearing began, he saw Zabell speaking to General Counsel Cabrera in the hallway outside the hearing room. The door to the hearing room was open and is nearby the bench they sat on. Fabres testified that he heard Zabell raise his voice, yelling, commenting that "they are all illegal undocumented." He said that he was going to call the Immigration Service and have them deported. Cabrera asked Zabell if he wanted to make those comments on the record. The employees looked at Fabres and asked what was happening. Fabres told them to be calm,

telling them that Zabell made a comment about the Immigration Service.

Fabres testified that later, as he sat in the rear of courtroom 3 with the employees, he observed General Counsel Powell approach Zabell who was seated at counsel's table in the front of the room. Fabres could not hear their conversation since they spoke quietly, but then Zabell raised his voice, shouting that if the employees testified they would be committing perjury, and he would report them to the Immigration Service. Zabell also mentioned a Supreme Court case and pointed at the workers, saying that they would "not receive a penny." Fabres heard Powell telling Zabell in a loud voice to "stop, stop, stop."⁹

Danny Bindra testified that as he and Zabell exited the elevator at the hearing-room floor and walking down the hallway toward the hearing room he asked Zabell whether the immigration status of the warehouse employees had an effect on this case. Zabell replied that if they were "illegal" they can be deported but it is very unlikely that that would occur because the "government doesn't do it." Bindra denied hearing Zabell say that "immigration is here."

Bindra also testified that, prior to the opening of the hearing, he overheard General Counsel Powell and Zabell speak about the case. Zabell, speaking in a conversational voice, but not yelling or speaking loudly, mentioned the name of a case to Powell, adding that pursuant to that decision if the employees were undocumented they "can't get a penny out of it." He did not observe that Powell was upset at Zabell's mention of their allegedly illegal status. Bindra conceded that some of the employees were at the benches in the rear of the hearing room.

Bindra noted that at that time, Zabell said that if the witnesses give false testimony under the penalty of perjury, such perjured testimony could affect their legal status if they apply for citizenship. Zabell said that they would be giving false testimony because he had a sworn statement from them. Bindra denied hearing Zabell say that he would have the employees arrested or that he would go to a grand jury and report them, and denied mentioning immigration.

Analysis and Discussion

Credibility Findings

I credit the testimony of the General Counsel's employee witnesses. Their testimony about conversations with the Respondent's representatives were mutually corroborative. They testified in a forthright, believable manner. Although their primary language was Spanish and they testified through an interpreter, they did understand, to some degree, spoken English. Indeed, they testified in English concerning certain statements they heard in English.

I discount their testimony concerning legal terms asked by Zabell such as whether the Respondent told them that it would be futile to seek union representation. Such improper questions, particularly since the Respondent had already admitted such an allegation, was beyond their limited comprehension of

⁹ Fabres' pretrial affidavit stated that those conversations occurred on December 16. At hearing, Fabres testified that that date was inaccurate due to a mistake. The mistake is immaterial and does not undermine his testimony which is supported by employee witnesses, that the conversations occurred on December 9.

those terms. Further, minor errors in their testimony or in their pretrial affidavits or recollection in which of two hearing rooms Zabell threatened them do not impair their testimony in any way.

I cannot find that the Respondent's witnesses gave truthful testimony in important areas of their recitations. Thus, Miller denied material parts of his March 10 meeting with the workers when the recording of that meeting clearly showed that he made those statements. That recording, and the Respondent's implicit acknowledgement that Miller was untruthful in denying the statements he made, led the Respondent to change its answer to admit that his threats and statements, preserved in the recording, were made.

Further, Miller first stated that he could not hear what occurred during the election confrontation but then, upon recall by Zabell, his memory improved to the extent that he heard the precise words uttered.

Tony Bindra's testimony was extremely evasive and not believable. He first stated that he did not own Deep Distributors but then admitted that he owned that corporation. He first stated that he did not work for Deep Distributors but later stated that he did. Incredibly, Tony Bindra could not admit that his brother Danny owned Deep Distributors. When asked whether he had any independent knowledge concerning whether Danny owns Deep Distributors, he incredulously answered "I don't know what you mean knowledge, you know. How would I get the knowledge? I don't know."

When asked whether the Respondent has contracts, Tony Bindra, the owner, general manager and "overseer of everything in the company" incredibly testified "what is a contract. I don't know what you mean by a contract . . . I don't understand what contract means. Contract for me is buying a house." Nevertheless, he admitted signing contracts for the purchase of forklift machines, and with UPS for the shipping and delivery of its products, and further conceded that he and Danny are responsible for signing all the Respondent's contracts.

He first testified that Malik signed purchase orders but then said that he did not. He first testified that the five employees were discharged but later stated, in questioning by Zabell following a day's break, that they were laid off and not discharged.

Danny Bindra testified that although he was present in the hearing room during Zabell's threats to employees, he did not hear General Counsel Powell's entreaties to Zabell to cease his comments. Employees gave credited testimony that they were present in the hearing room at the same time and heard Powell warn Zabell to stop.

Malik's Supervisory Status and the Impression of Surveillance

The complaint alleges that employees' were given the impression that their union activities were under surveillance by the Respondent's supervisor Malik.

The complaint alleges that Malik is the Respondent's supervisor and agent. Section 2(11) of the Act defines a statutory supervisor as any individual having the authority, as relevant here, to discharge, or discipline employees, or responsibly to direct them.

The exercise of any of the above responsibilities is sufficient to vest any person with the status of a statutory supervisor. As set forth above, Malik is Miller's "main helper." Jose Torres credibly testified that when he began work, Tony Bindra told him that Malik was his supervisor, and that he and Argueta testified that Malik gave them daily assignments. He also approved their requests for leave. There was also testimony that when Warehouse Manager Miller was absent, Malik was in charge of the facility.

Although Miller testified that no employee reports to Malik, the evidence is clear that the Respondent's large facility and large number of products are divided into two areas: beauty supplies and housewares and appliances. There was credible evidence that Miller and Malik are each in charge of the approximately six employees in those separate areas.

Inasmuch as there is much work to perform in each area, it is entirely reasonable that Miller and Malik each exercise the power to assign employees to work in his own area. Thus, employees credibly testified that Malik assigns them work to do, picking orders and receiving items in the beauty supplies area. It appears that Miller exercises his own duties in the housewares and appliance area. Accordingly, I find that Malik has the authority, which he has exercised, of responsibly directing employees in their work. *Marquette Transportation/Bluegrass Marine*, 346 NLRB 543, 552 (2006).

In addition, two employees, Jose Torres and Argueta, credibly testified that they were told by two other employees that they had just been discharged by Malik. The two discharges did not return to work thereafter. Further, Argueta stated that he received an oral warning from Malik who warned him that he would not receive any more chances if he made another mistake.

Moreover, Malik occupies a position of trust. He is the only employee who has access to the blade room where the most expensive merchandise is stored. He also prints the work orders.

Inasmuch as Malik did not testify no evidence was received from the person at issue. Nevertheless, it is the burden of the party claiming that the person is a statutory supervisor, the General Counsel, to prove that he possesses such status.

I find that General Counsels have met their burden. The evidence is clear that Malik is a statutory supervisor. If it is ultimately decided that Malik is not a statutory supervisor, I find that he is an agent of the Respondent. Malik was placed in a position of trust having access to a room containing expensive merchandise in which no other employee was permitted to enter. Inasmuch as he worked with employees who he assigned work to, it is clear that they would have reason to believe that he spoke and acted for management.

"The Board's test for determining whether an employer has created an impression of surveillance is whether the employee[s] would reasonably assume from the statement in question that [their] union activities had been placed under surveillance." *Grouse Mountain Lodge*, 333 NLRB 1322, 1322 (2001). The Board further stated that "employees should be free to participate in union organizing campaigns without the fear that members of management are "peering over their shoulders, taking

note of who is involved in union activities, and in what particular ways.” 333 NLRB at 1323.

I credit the testimony of Jose Michel Torres and Argueta who stated that on February 17, Malik told them that they were “part of a union” or “with the Union.” Torres and Argueta had not made their union support known to the Respondent. Their activities consisted of meeting with union agents. Malik’s comments made them reasonably assume that their union activities were kept under surveillance and therefore violated Section 8(a)(1) of the Act.

The Discharges of Argueta, Jose Martin Torres and
Jose Michel Torres

The complaint alleges that on March 6, 2015, the Respondent discharged Jose Wilfredo Argueta, Jose Martin Torres, and Jose Michel Torres because they joined and assisted the Union and engaged in concerted activities. The Respondent argues that they were laid off for lack of work, and were selected because of their misconduct.

The General Counsel’s Prima Facie Case

Pursuant to the Board’s decision in *Wright Line*, 251 NLRB 1083 (1980) in cases alleging a violation of Section 8(a)(3) and (1), where motivation is at issue, the General Counsel bears the initial burden of showing that the Respondent’s decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. The General Counsel may meet this burden by showing that (a) the employee engaged in union or other protected activity (b) the employer knew of such activity, and (c) the employer harbored animosity towards the union or other protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184–1185 (2011); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. *Brink’s, Inc.*, 360 NLRB 1206, 1206 at fn. 3 (2014). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorrain*, above.

Jose Michel Torres and Argueta gave credible testimony that they attended union meetings and that they greeted Union Agent Fabres at his car in front of the facility. There could be no doubt as to Fabres’ purpose since his car bore a large sign with the name of the Union. In fact, Miller said that he did not know whether the car was there for the Respondent or the business next door. Clearly, Miller possessed knowledge, or at least a suspicion, that the Union was present on behalf of the Respondent’s employees.

I also find that the Respondent possessed knowledge of the union activities of the three men. As set forth above, I have found that Malik told Jose Michel Torres and Argueta that they were “part of a union” or “with the Union.” Malik did not testify and therefore their testimony is un rebutted.

I credit the testimony of Roberto Reyes who stated that Miller asked him if he “knew something about the union.” Reyes denied knowing anything about the Union. Miller replied “I think that the one that is hanging out with the Union is Alex [Argueta].” Miller did not deny this remark attributed to him, and therefore it stands un rebutted.

There was no direct evidence that the Respondent knew that Jose Martin Torres engaged in union activities or that the Respondent was aware of them. However, the General Counsel argues that he was discharged because he was the brother of Jose Michel Torres who had recommended him for hire.

The Board has held that the discharge of a person in order to retaliate against his relative who was a union activist is unlawful. *Thorgren Tool & Molding*, 312 NLRB 628, 631 (1993); *Carrizo Mfg. Co.*, 214 NLRB 171, 181 (1974). Here, I find that the General Counsels have met their burden of proving that the union activities of Jose Michel Torres was a motivating factor in the Respondent’s decision to discharge his brother Jose Martin Torres. *T.M.I.*, 306 NLRB 499, 503 (1992).

Thus, I find that, as in *T.M.I.*, the timing of the discharges of the three men, coming only 4 days before Miller’s strongly antiunion message to the remaining workers, including admitted threats of discharge, and only 2 weeks after Argueta and Jose Michel Torres were identified by Malik as being “part of the Union,” supports a finding, which I make, that the three men were discharged because of their union activity.

I further find that the Respondent harbored animosity toward the Union and the union activities of the discharges. Miller’s strongly antiunion comments to all the employees only 4 days after their discharges forcefully conveyed the message that union supporters would lose their jobs. It also confirmed to the workers that he had been “betrayed” by their interest in the Union.

Miller specifically referred to Argueta as being “out there with them” and mentioned that “because I know that you were hanging with Michel.”

In addition, the Respondent’s creation of the impression of surveillance, found above, which occurred before the three employees were discharged, establishes that it had animus toward their union activities. *DPI New England*, 354 NLRB 849, 868 (2009); *Diversified Chemicals Corp.*, 231 NLRB 982, 993 (1977).

Further, I cannot find, as set forth below, that the Respondent has met its burden of proving that it possessed a reasonable basis for discharging the three men for their misconduct or that it has established its economic defense of lack of work. *T.M.I.*, 306 NLRB at 504–505.

I accordingly find that the General Counsel has proven that the union activities of Argueta and Jose Michel Torres were motivating factors in their discharge. I also find that Jose Martin Torres was discharged because he was the relative of Jose Michel Torres in retaliation for the union activities of Jose Michel Torres. *Wright Line, Inc.*, above.

The burden now shifts to the Respondent to prove that it would have discharged the three men even in the absence of their union activity. *Wright Line*, above.

The Respondent’s Defense

Lack of Work

The Respondent argues that the three men were discharged for lack of work. It further asserts that it chose them because of their poor work or misconduct. Neither defense has merit.

The General Counsel subpoenaed detailed financial records from the Respondent which would prove or disprove its eco-

conomic defense. As set forth above, only two limited documents which summarized certain sales or purchase orders was produced.

As set forth above, Tony Bindra gave inconsistent and contradictory testimony as to whether the three employees were laid off or discharged. The Respondent failed to provide original books and records to support the figures in the two summaries it produced. Those “back-up” documents were available in the form of data located in the Respondent’s computer which Zabell maintained he was under no obligation to produce because it must be organized into a report. However, the General Counsel’s subpoena called for the production of electronically maintained documents. As noted above I granted the General Counsel’s motion for sanctions under *Bannon Mills*, precluding the Respondent from producing evidence in support of its lack of work defense.

Even aside from the documents, Bindra’s testimony that the Respondent’s work slows after Christmas is undermined by the fact that the discharges occurred more than 2 months after Christmas, and by the fact that employees testified that at the time of the discharges they were busy at work.

The Selection of the Three Employees Argueta and Jose Michel Torres

The Respondent selected Argueta for discharge because he was “dangerous”—climbing shelves and not using a ladder. Michel Torres was chosen because he allegedly slept while at work and was lazy.

Argueta admitted crashing his forklift truck into a FedEx truck breaking its light and also conceded that he climbed the shelves, being seen by Tony Bindra and Miller. No discipline was issued for these infractions but Argueta admitted being warned by Malik for ignoring an order.

Incredibly, Tony Bindra testified that he saw Michel Torres asleep at work at least 3 times, the last being 2 to 3 weeks before he was discharged. However, Bindra did not wake him up and no discipline was given to him for this gross misconduct.

I find that the Respondent condoned the alleged misconduct of Argueta and Jose Michel Torres until an opportunity arose to discharge them for their union activities. The evidence is clear that the Respondent would have continued them in its employ, as it had for the 4 years each had been working for it, had it not been for the Union’s appearance on the scene.

Jose Martin Torres

Miller’s testimony that Jose Martin Torres was hired only as a replacement for Juan Flores lacks merit. The Respondent’s records establish that Martin continued to work for 3 weeks, from February 17, 2015, when Flores returned, until his discharge on March 6. This completely undermines Miller’s testimony that Martin was scheduled to be discharged upon Flores’ return to work.

Moreover, Miller did not testify that he told Michel or his brother that he would be retained only until Flores returned. Significantly Miller’s testimony that he told Torres that Juan Flores was away from work caring for his child and that when he returned “we’ll see how business was, and we would take it from there” held out the possibility that if business was good he

would be retained. This was not an unequivocal declaration to Martin that he would be replaced upon Flores’ return to work.

Further, the evidence also establishes that Flores worked as a handyman in addition to picking orders. Accordingly, Martin Torres may have replaced Flores regarding his order picking work but did not substitute for his repair work. Accordingly, they did different types of work and it appears that Martin Torres could have been retained to perform the type of work he did even upon Flores’ return to work.

The reason given for Martin’s discharge, that he was hired only as a replacement for Flores until his return to work was false. The evidence establishes that Martin continued to be employed for 3 weeks after Flores’ return. He was discharged only when the opportunity arose to discharge him for the union activities of his brother.

CONCLUSION

I accordingly find and conclude that the Respondent has not proven that it would have discharged Jose Wilfredo Argueta, Jose Martin Torres, or Jose Michael Torres even in the absence of their union activities. *Wright Line, Inc.*, above.

Employees were Threatened with Unspecified Reprisals and Discharge; Futility of Selecting the Union

The complaint alleges that the Respondent, by Miller, threatened employees with unspecified reprisals if they selected the Union as their representative; told employees that it would be futile to select the Union as their collective-bargaining representative, and threatened employees with discharge if they selected the Union as their representative.

Miller denied making these statements. As set forth above, following the playing of the recorded meeting at which he spoke on March 10, set forth above, Miller admitted that it was his voice making these statements. The Respondent then amended its answer to admit the complaint allegations that on March 10, the Respondent, by Miller threatened employees with unspecified reprisals, told employees that it would be futile to select the Union, and threatened employees with discharge if they selected the Union as their collective-bargaining representative.

I accordingly find that these admitted threats violated Section 8(a)(1) of the Act.

Interrogation of Employees and Threats of Unspecified Reprisals Concerning Employees’ Involvement with the FLSA Suit

On July 8, 2015, Tony Bindra received a federal lawsuit filed by the Respondent’s employees including Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes and Augustin Sabillon. The suit alleged that the Respondent violated the FLSA by not paying, inter alia, overtime wages and other payments required by law.

The complaint alleges that in July 2015, by Tony Bindra, interrogated employees about their involvement in a FLSA lawsuit and threatened them with unspecified reprisals because of their involvement in the filing of a FLSA lawsuit.

The Board has long held that the filing of a lawsuit by a group of employees is protected activity. See *D. R. Horton*, 357

NLRB 2277, 2278 at fn. 4 (2012), and cases cited therein; 200 E. 81st Rest. Corp., 362 NLRB No. 152 (2015)

The Interrogation of Reyes

As set forth above, on July 15, Miller and Tony Bindra called Reyes into an office where they spoke to him alone. Bindra showed him the FLSA lawsuit and asked him if he knew anything about the attorney who filed the FLSA suit. Bindra pressed him, saying that his name is the first one listed. Reyes repeated that he knew nothing. He was told to return to work.

Following that private meeting, Bindra spoke at a meeting with employees regarding the suit, as set forth above. In that conversation, Bindra challenged them, asking them if the information concerning their residences listed in the suit was correct. He accused the men of suing him. He contradicted the suit's allegations that the men worked on weekends, asking detailed questions about when they worked. He then asked the workers if they still intended to pursue the suit, ending the conversation with the remark that "now the question is this. We are fighting or we are not fighting? I didn't pay you or did I not pay you? That's the question."

The Respondent defends the General Counsel's allegations by asserting that the employees agreed that the suit was without merit and that they wanted to abandon it. The recorded transcription contains no such statements.

In this respect I reject the Respondent's argument that a letter dated January 3, 2016, from the attorney who filed the lawsuit proves that the allegations made therein are false. The letter requested Zabell's consent to file an amended complaint, stating that the factual allegations concerning the employees' hours worked and lunchbreaks in the complaint were not accurate. He sought to delete the allegations concerning the lunchbreaks and to present a more accurate representation of the hours worked by each employee. Thus, at most, the letter represents that certain allegations contained in the lawsuit were inaccurate, not the entire lawsuit. Further, the letter states that the attorney simply wished to change the employees' hours worked, not to delete that part of the lawsuit.

Accordingly, the Respondent's argument that the FLSA lawsuit was filed in "bad faith" and therefore permitted Zabell to question the employees as to their basis for filing the suit has no merit. The fact that the Respondent unlawfully questioned the employees about their lawsuit constitutes unlawful interrogation. *Samsung Electronics, LLC*, 363 NLRB No. 105, slip op. at 1 (2016).

The Respondent also correctly asserts that Bindra said that he had to "defend myself" and that he would have to "fight." I find nothing improper with Bindra's remark that he had to defend himself." However his question whether he and the workers are fighting or not fighting constitutes coercive interrogation. He sought an immediate answer from the workers, without the aid of their attorney, as to whether the Respondent paid them properly or did not. And with that answer he posed a further question of whether they would fight each other or not.

Thus, Bindra sought to coercively convince the workers that they had been paid and therefore should not fight him in their lawsuit for proper compensation.

The remarks by Bindra constitute interrogation of the em-

ployees he addressed. The Board has held that an interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. Relevant factors include whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. The Board has viewed the fact that the questioner is a high level supervisor as one factor supporting a conclusion that the questioning was coercive. *Brighton Retail, Inc.*, 354 NLRB 441, 448 (2009). *Samsung*, above.

Here, Bindra, the manager of the Respondent and the brother of its owner, questioned its employees immediately after receiving the lawsuit. He stated that he was surprised and "disappointed" that the suit was filed. The fact that he was disappointed clearly establishes that he blamed the employees for suing him and bore animus toward them for engaging in the protected activity of filing the action. He further sought to encourage, if not coerce them, into dropping the lawsuit, asking if they still intended to pursue it.

Thus, no assurances were given concerning the questioning, the interrogation took place in an atmosphere of interference with the union activities of the workers—the Respondent admitted that it had, on March 10, threatened employees with reprisals and discharge if they selected the Union, and told them that it would be futile to do so. Further, it had discharged three employees for their union activities, and only 1 week later it unlawfully discharged five more employees for their union activities.

It is clear that Bindra and Miller sought to obtain information about the lawsuit from Reyes, asking him if he knew anything about the lawyer who filed the suit. Reyes denied such knowledge and Bindra coercively continued the questioning by noting that Reyes' name was the first in the list of plaintiffs. The Respondent's effort to obtain information about the lawsuit is unquestionably interrogation. *Samsung*, above. In the meeting with the other employees, Bindra attempted to coercively persuade the workers to abandon their lawsuit, and tried to have them discontinue their protected activity of joining together to seek to remedy their allegedly unlawful working conditions. He threatened that he would "fight" them if they continued to engage in the protected activity of pursuing their lawsuit.

I accordingly find and conclude, as alleged, that the Respondent interrogated employees about their involvement in the FLSA lawsuit and threatened them with unspecified reprisals because of their involvement in the filing of that lawsuit.

The Implementation of New Work Rules and Discipline

The complaint alleges that the Respondent unlawfully implemented new work rules and discipline regarding cell phone use and lateness.

As set forth above, on July 21, the Respondent implemented new work rules prohibiting cell phone use during work hours and providing discipline for employee lateness.

It is undisputed that this was the first time that written work rules have been imposed on employees. Employee testimony that they understood that they were required to report to work

on time or they would be subject to discipline misses the point. First, employees testified that they called their manager to report their lateness and no discipline was issued. Secondly, Argueta's testimony that he was asked to wear a protective belt while using the forklift was not a written rule.

The evidence strongly suggests, and I find, that the rules were implemented in response to the employees' union and protected, concerted activity. Thus, the rules were placed in force on July 21, 2015, only 2 weeks after Bindra received the FLSA lawsuit and coercively interrogated employees about its contents. Moreover, they were implemented in the context of Miller's strongly antiunion speech to employees, and the Respondent's admitted threats to the workers. Further, the Respondent discharged five of the plaintiffs named in that lawsuit for refusing to sign the new policy.

Moreover, the rules were implemented within the context of the Respondent's commission of violations of the Act in Miller's admitted threats that employees would be discharged if they selected the Union, and that it would be futile to so designate the Union.

The Respondent's Defense

The Respondent argues first, that it began work on the new policy before it received notice that the FLSA suit had been brought. Its witness Aldo Hernandez testified that he edited the policy in mid-June. That may be the case, but the allegation and the violation is that the new policy was *implemented* on July 21. There is no allegation as to the policy's promulgation.

The Respondent asserts that the new rules were implemented in anticipation of its move to a new facility in Bethpage, a larger facility with more forklift machines in an effort to promote safety. However, the evidence establishes that the forklift machines were also used in the former, Syosset facility. It is clear that the new safety rules would apply equally to both facilities. Nevertheless, the new rules were not implemented at the Syosset warehouse.

The Respondent argues that the new rules were an effort to improve safety. Nevertheless, the move took place in late May and the new policy was not implemented for another 7 weeks. Miller's testimony that he told the workers that new rules prohibiting cell phones would be in effect when the facility moved cannot be believed. He noted that during those 7 weeks employees worked with dangerous equipment wearing their headphones and he "said nothing."

Miller's further testimony that employees immediately after the move were "on board" with the new policy but then "got lax" is similarly unbelievable. Clearly, no effort to enforce any policy, oral or written, was made until the employees began their activities in behalf of the Union and filed the FLSA lawsuit. It is clear that if safety was so important to the Respondent it would have implemented its new work rules when it said it would—when it moved to Bethpage.

Further, there was substantial evidence that the conduct of employees in using cell phones and wearing headphones during work hours was condoned at both locations. Tony Bindra stated that the employees "always" wore headphones and that he always told them not to do so but they did not heed his warning.

Miller precisely explained the Respondent's true motive for

implementing the new rules. In his speech to the employees on March 10, he told them he felt betrayed "because I always treated everyone right . . . I give you a lot . . . freedom. The phones I don't say anything. If you want change, careful what you ask for. Okay. Because a lot will change . . . If you are not happy, leave. But stop, don't bring problems for me because I am not going to be happy and if I am not happy you will not be happy . . . Someone is putting things in your head but if you want it, if you don't believe me, do what you got to do . . . You'll see what happens." Miller's promise to change was realized in the unlawful implementation of the new rules.

At the time of Miller's meeting with the workers, the Respondent was located in its former facility in Syosset. It is clear that Miller acknowledged that the employees' cell phone use was not appropriate but he said nothing about it, thereby condoning their use. He clearly related a change in that policy to the advent of the Union. The evidence also establishes that the new rules were put in place in reaction to the recent filing of the FLSA suit.

I accordingly find and conclude that the new work rules were implemented in retaliation for the employees' union activities and because they filed the FLSA lawsuit. *CDR Mfg.*, 324 NLRB 786. 790 (1997). I further find that the Respondent has not met its burden of proving that it would have implemented the new rules even in the absence of the employees' union and concerted activities. *Wright Line*, above.

The Discharges of Henry Hernandez, Marvin Hernandez Roberto Reyes, Javier Reyes, and Augustin Sabillon

I have found, above, that the implementation of the new work rules was unlawful. It is well settled that discharge of employees because they violated an unlawful rule is itself violative of the Act. *Tuscaloosa Quality Foods*, 318 NLRB 405, 411 (1995), and cases cited therein.

In addition, under a *Wright Line* analysis, I find that the five employees who were discharged were all engaged in union activities, and all were named plaintiffs in the FLSA lawsuit which was well known to the Respondent at the time they were discharged. The Respondent's animus toward the employees for filing the lawsuit is established in the coercive interrogation and threats made at the July 15 meeting and in the context of the Respondent's admitted unlawful threats made at Miller's meeting. I therefore find that the General Counsel has established a prima facie showing that their activities were a motivating factor in their discharge.

The Respondent argues that it discharged the five workers because they refused to sign the new work rule policy. It claims that all its employees signed the policy but, as set forth above, it could produce only nine signed forms from the approximately 26 workers employed at the time. There was no evidence that employees who had not signed the form were also discharged.

In addition, the employees testified that they understood that they were supposed to report to work on time and certain employees stated that they knew that they could be disciplined or discharged if they were late often. The Respondent argues that these were work rules that were in place, were understood by the workers and, accordingly, the written implementation of these rules was just a continuation of rules the workers under-

stood and therefore were nothing new. It must be emphasized that there were no written rules of any kind in existence until the implementation of this work rule policy, and that the Respondent tolerated for years the type of conduct prohibited by the new rules.

The Respondent also claims that these rules promoting safety in the workplace were themselves, proper rules. That may be true but, as found above, they were unlawfully implemented for unlawful reasons to retaliate against workers.

Nor did the Respondent establish why it had to discharge long-term employees with no record of discipline. It did not consider giving them a written warning or some lesser form of discipline. The fact that it had tolerated the identical conduct suddenly prohibited pursuant to the new rules undermines the Respondent's argument that it was vital that the rules be adhered to immediately.

I accordingly find and conclude that the Respondent has not met its burden of proving that the five employees would have been discharged even in the absence of their activities in behalf of the Union and in participating in the FLSA lawsuit against the Respondent. *Wright Line*, above.

Threats of Legal Action in a Board Hearing Room

The complaint alleges that on about December 9, Respondent, by its attorney Saul D. Zabell, while in a Board hearing room (a) threatened employees with legal action in retaliation for engaging participating in a Board hearing and because of their union activity and (b) threatened to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

As set forth above, the Union's witnesses credibly testified, in a mutually corroborative matter to essentially the same facts. Attorney Zabell told the employees that he would report them to the immigration authorities and that they would "not get a penny." He made these statements while the employees were in the hearing room.

Danny Bindra conceded that he heard Zabell tell Powell that if the employees were "illegal," they could not receive a penny due to a case whose name he could not recall. Thus, Bindra admitted that employees were in the room when Zabell made those comments—essentially corroborating the General Counsel's witnesses on that point. It must be noted that Zabell did not testify to refute these allegations.

I thus reject the Respondent's argument that Zabell was simply speaking to his client at the elevator concerning the effect of the employees' immigration status on this case. The evidence is clear, as admitted by Bindra, that he heard a conversation concerning immigration between Zabell and Powell in the hearing room.

[T]hreats to employees that election of the union might result in their being reported to Immigration officials and, presumably, possibly deported, may similarly elicit strong fears in the employees. While the record contains no evidence that any of respondent's employees are illegal aliens, should any of them fall within that category, then Allard's threats would undoubtedly evoke the most intense fear, not only of employment loss, but of removal from their very homes as well. Like the fears of job loss discussed above, fears of possible trouble

with the Immigration Service or even of deportation must remain indelibly etched in the minds of any who would be affected by such actions on Respondent's part. *Viracon, Inc.*, 256 NLRB 245, 247 (1981).

Here, although there was no effective threat of job loss since the employees had already unlawfully been discharged, nevertheless there were threats by the Respondent through Zabell that he would report them to the Immigration Service and that they would not receive a penny through this proceeding.

I accordingly find and conclude that the Respondent, by Zabell, threatened employees with legal action in retaliation for engaging participating in a Board hearing and because of their union activity and threatened to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

There is no question that employees have an unfettered right to participate in Board proceedings free of threats and intimidating comments by a respondent. The threats were of such a nature that they had a tendency to interfere with the employees' uninhibited right to freely appear at the Board hearing and give testimony.

Threats in a hearing room made to employees therein that an immigration investigation would be requested have been found to be unlawful threats in violation of Section 8(a)(1) of the Act. *AM Property Holding Corp.*, 350 NLRB 998, 1042–1043 (2007), and cases cited therein.

The Election

The election was held on March 24, 2015. Nine valid ballots were cast for the Union and five ballots were cast against the Union. Five ballots were challenged. The ballots cast by Jose Wilfredo Argueta, Jose Martin Torres, and Jose Michael Torres, the alleged discriminatees in the unfair labor practice case, were challenged by the Employer. The ballots cast by Amjad Malik and Manjit Singh were challenged by the Union. The Regional Director directed that the hearing concerning all five challenged ballots be consolidated with the unfair labor practice proceeding. The Employer filed Objections to the election which was also consolidated with this proceeding.

The Challenged Ballots

Inasmuch as I have found, above, that Jose Wilfredo Argueta, Jose Martin Torres, and Jose Michael Torres were unlawfully discharged, they remained statutory employees at the time of the election. I therefore direct that their ballots be opened and counted.

Inasmuch as I have found that Amjad Malik was a statutory supervisor and agent, I therefore find that his ballot should not be opened and counted.

Manjit Singh did not testify. The burden is on the challenging party, the Union, to prove that the voter who was challenged is ineligible to vote. Tony Bindra testified that Singh was a warehouse employee and driver who performed the same work as Argueta, Jose Martin Torres, and Jose Michel Torres. There was no evidence presented to rebut that testimony. I therefore find that Singh was a member of the unit and eligible to vote. I accordingly direct that the ballot of Manjit Singh should be opened and counted.

The Objections

The Respondent filed the following objections to the election:

Prior to the election, and during the course of voting, the Union pressured Imperial's employees to vote in favor of the union. The Union leveraged threats concerning employee's immigration status, along with promises regarding legalizing their immigration situation, to secure favorable votes. Moreover, during the course of the election, the Union, in an apparent effort to bully their way to a desired election outcome, resorted to acts of physical violence against Imperial's agents.

The aforementioned acts have a corrosive effect on the sanctity of a fair election. As such, the NLRB should decline to certify the March 24, 2015 election and should commence an investigation into the improper and unlawful conduct that transpired.

The Regional Director directed that a hearing be held on the allegations "that the Union would call immigration authorities and have employees deported, the promise that a vote for the Union meant employees could stay in the country lawfully, and the intertwined threat by employees that various members would kill an employee if s/he voted against the union because it would mean that they would be deported (which grew from the initial threat by the Union)."

The Director also directed that a hearing be held on the "allegation that a Union representative verbally and physically accosted the Employer's representative in front of employees at the beginning of the election."

The Director did not direct that a hearing be held on the allegation that a union agent engaged in unspecified threats, intimidation and electioneering immediately prior to and at the election.

The Alleged Threats Regarding Employees' Immigration Status

Tony Bindra stated that sometime prior to the election, one employee told him that he was told by the Union that if he did not vote for it, his immigration status would be affected, and he would be deported. Bindra did not identify the union agent and did not know the alleged victim's name. Bindra also stated that the same employee told him that he was told that a vote for the Union meant that he could remain in the United States legally, and that he would be given a green card.

Manager Miller testified that no employee told him that he was threatened by the Union or that the Union had mentioned anything to the workers about their immigration status.

Union President Mendoza and Union Agent Fabres denied speaking to the employees regarding their immigration status. No threats or promises were made regarding their immigration status, and no union agents told the employees that they would be deported if they did not vote for the Union.

Henry Hernandez denied having any conversations with union agents or employees concerning their immigration status in relation to their vote in the election. Nor did he recall discussions in which an employee's life was threatened concerning their vote. Jose Michel Torres denied that anyone made any promises to him regarding his immigration status if he voted for the Union.

Employee Marvin Hernandez stated that no union agents made any statements to him concerning his immigration status if he voted for the Union. Similarly, Sabillon testified that no union agent promised him anything regarding his immigration status at the time of the election.

Javier Reyes denied that any union agent made any promises to him concerning his immigration status regarding his vote at the election. No one threatened him with deportation for exercising his rights to join a union.

Roberto Reyes stated that no union agent told him that how he voted may affect his ability to stay in the United States. Argueta denied being spoken to by anyone concerning his immigration status and its effect on his vote.

Inasmuch as no evidence was presented in support of this Objection it is overruled.

The Alleged Acts of Verbal and Physical Violence Toward the Respondent's Agents

As set forth above, the election agreement provided that the election would take place in the warehouse area adjacent to Miller's office by the large west facing loading door at the Employer's facility, and that stated that the Employer agreed to turn off all surveillance cameras for the period of the election, which record the warehouse area adjacent to Herb Miller's office in addition to all exits in and out of the area. The controls for the video surveillance system are located in the "blade room" which is near the election polling location.

Tony Bindra testified that there was no agreement to shut the cameras during the election, but nevertheless he was told by Zabell to turn them off and he did so.

An altercation occurred during the pre-election period before the voting began. During that time, the Employer, Union and Board agent met in the location designated as the polling area.

Danny Bindra testified that as he was standing in the polling area before the voting occurred, he observed Union President Mendoza walking toward the warehouse. Bindra stood in front of him putting his hands at chest level and told him that he could not enter the warehouse. Mendoza advanced, aggressively pushing his chest into Bindra's chest with Mendoza's hands on Bindra's shoulders, pushing him back. Mendoza then placed his hand under Bindra's chin, and made a gun gesture with his hand, saying "I'll put you down." Bindra repeated that he could not enter the warehouse.

Bindra further stated that Mendoza raised his voice, insisting that he was "going to go inside." Bindra told him that he could not do so. At that point, according to Bindra, Zabell stepped between them, repeating that Mendoza could not enter the warehouse. Mendoza raised his hand, used profanities and told Zabell "what do you think - you're a big guy? I'll put you down too." Zabell repeated that he could not enter the warehouse.

Danny Bindra recounted that Mendoza's chest bumped Zabell's, and then Mendoza "buted" Zabell's chest with his head. Bindra denied that Zabell put his hands on Mendoza. Bindra estimated that each confrontation, that between him and Mendoza and between Zabell and Mendoza last 2 to 3 minutes.

Danny Bindra recalled that twelve to fifteen employees who were 20 to 25 feet away and were present to vote, saw the alter-

cation. The incidents ended when the Board agent separated Mendoza and Zabell, telling Mendoza to move back. Mendoza then walked to the area where the employees were standing and spoke to them. Danny and Tony Bindra stated that they saw Mendoza look at them and, once, put his finger across his throat, which Danny Bindra interpreted as a threatening gesture.

Although Danny Bindra testified that he was in fear of his life, he did not call the police. Instead, he gestured at the Board agents who replied that they had an election to conduct, but later amended this testimony to state that the Board agent stepped between Zabell and Mendoza. Bindra further stated that he asked Zabell if he should call the police and Zabell replied that the Board agents were present. Bindra conceded that he did not file assault or battery charges against Mendoza.

Tony Bindra testified that Mendoza “came to me” and said he wanted to “enter my warehouse and go all the way in.” In further testimony, Tony Bindra stated that indeed, Mendoza, without saying anything, began walking 20 feet inside the warehouse when Danny told him he could not do so. Bindra specifically stated that Mendoza said nothing about the video system when he walked into the warehouse. He simply sought to walk into the warehouse for no stated reason.

In this respect, Bindra’s testimony is refuted by Manager Miller who testified that the confrontation concerned “an issue about turning the cameras off and the union guy wanted to walk around the warehouse . . . it was an issue of the camera before they voted.” He stated that Mendoza “tried to follow Tony to shut the cameras off and Zabell asked him to stay where we were” and not enter the warehouse.

Tony Bindra then saw Mendoza walk up to Danny who told him that he could not enter the warehouse. Then Mendoza pushed Danny and made a gun sign with his hand, telling Danny that he would take him down. Tony Bindra then saw Zabell get between the two men at which point he observed Mendoza head-butting Zabell’s chest, and pushing and shoving Zabell, saying that he would “take care of you, too. He saw Mendoza put his hands on Danny’s shoulders, attempting to push him back. He recalled that Mendoza was yelling, screaming and cursing at the time. He first stated that the confrontation lasted a “few minutes” and then stated that it consumed 5 to 9 minutes.

Tony Bindra noted that 12 to 14 employees were present during this incident and stood about 10 to 20 feet away. However, he also testified that “some of the [workers] were present.” When asked how many, he stated that “this was a very heated situation. I didn’t know what was going on so I didn’t pay attention to it if there were other people there.”

Tony Bindra then said that following the confrontation with Danny, Mendoza went “all the way inside” the warehouse and was stopped by Danny, and then both were engaged in a physical confrontation.

Miller stated that Mendoza came up to Zabell and when “neck and neck . . . actually bumped him.” Miller added that Mendoza and Zabell were touching each other, with Mendoza threatening him. Miller said all the employees were watching this scene while they were waiting for the polls to open.

It must be noted that Miller stated that he was 15 to 20 feet

away from the confrontation and he could not hear what words were used – “the people were yelling, and you can’t make out nothing.” He did not hear any “specific words. “Later, when he was recalled by the Respondent, Miller’s memory improved. He stated that he heard Mendoza tell Danny Bindra and Zabell that he would “take [them] down.”

Tony Bindra first testified that the altercation lasted a “few minutes” and then said it took place between 5 and 9 minutes. Danny Bindra testified, alternately that it lasted 1 to 3 minutes, then 2 to 3 minutes, and then 5 to 9 minutes. Miller stated that the dispute continued for 3 to 5 minutes. There is no dispute that when the Board agent came between the men the confrontation ended.

Union President Mendoza stated that when he arrived at the polling location an employee told the Board agent there were many surveillance cameras at the warehouse and he pointed at some of them. Mendoza told the Board agent that the cameras should either be shut off or the cameras covered. The Board agent mentioned this to Zabell.

Mendoza stated that he asked for proof that the cameras were shut. Zabell said that he would have a manager or owner shut the system. Mendoza protested that either the union or the Board agent must also be certain that the cameras are shut.

At that point, according to Mendoza, Zabell began yelling, saying that he would not permit the Union to “go and make sure the cameras were off.” Both he and Zabell raised their voices at each other. Mendoza stated that after he asked to see the cameras, Zabell stepped in front of him, yelling that he could not do so. Mendoza stated that Zabell came toward him and they were inches apart but did not have physical contact.

Mendoza testified that the Union was not assured of a fair election if it was not able to ensure that the cameras were shut. He did not take the owner’s word that the cameras were rendered inoperable. Mendoza stated that after he was refused permission to check the cameras they continued to argue, but he did not attempt to walk into the Respondent’s facility.

However he stated that after his request was denied, he attempted to walk out of the election area to observe the camera system. He stated that since he did not attempt to walk through the facility, the owners did not try to get in his way. He also denied saying “I got you” or that he made a gun gesture with his empty hand.

Mendoza stated that he believed that he had a right to “walk around” the shop as he had, in the past, been permitted to enter an employer’s premises prior to an election. Mendoza stated that he did not attempt to walk inside the facility. Rather he walked only in the area where the polling area was located. Mendoza denied speaking to or making a throat slashing gesture at the Respondent’s agents.

According to Mendoza the Board agent told him to bring up the matter after the election if he so chose.

Union Agent Fabres testified that he did not witness the altercation between Mendoza and Zabell but was told about it later by Mendoza. Fabres further stated that the employees were inside the shop at work at the time of the confrontation

Argueta, the Union’s election observer, testified that he saw an argument between Zabell and Mendoza. He stated that they got close to each other “like pushing and shoving” but he saw

no contact between them. The argument lasted 4 to 5 seconds. He denied seeing Mendoza make hand gestures at that time. Argueta stated that none of the employees were present during the argument as they were told to leave the area – to “hide themselves.”

Employees Roberto Reyes, Jose Michel Torres, Marvin Hernandez, Javier Reyes, and Sabillon denied seeing any argument at the election. In addition, Jose Michel Torres, Marvin Hernandez, and Sabillon denied seeing any physical confrontation. As set forth above, Argueta stated that he was the only employee present at the preelection confrontation.

Henry Hernandez did not recall Zabell being at the election, but heard from other workers after the election that Zabell and a union agent “wanted to like fight.”

The Respondent subpoenaed Board Agent Stephanie LaTour to testify as to the events at the election. The Board granted the General Counsel’s petition to revoke the subpoena pursuant to Section 102.118(a)(1) of the Board’s Rules and Regulations on the ground that other witnesses were available to testify about the election incident.

Analysis

Objection 1

“It is the Employer’s burden, as the objecting party, to prove that there has been misconduct that warrants setting aside the election.” *Consumers Energy Co.*, 337 NLRB 752, 752 (2002).

I conclude, based on the above, that no credible evidence has been presented as to the first Objection, that the Union would call immigration authorities and have employees deported, or promised that a vote for the Union meant employees could stay in the country lawfully, or a threat by employees that various members would kill an employee if s/he voted against the union because it would mean that they would be deported.

Here, Tony Bindra’s testimony that an unnamed employee told him that an unnamed union agent threatened him with deportation and said that he could remain in the United States if he voted for the Union is simply incredible. No supporting evidence has been presented and each of the employees denied that any such comments had been made.

Objection 2

The second Objection alleges that the Union assaulted the Respondent’s agents and attorney at the election.

The test for evaluating conduct of a party is an objective one—whether it has the “tendency to interfere with the employees’ freedom of choice.” *Taylor Wharton Division*, 336 NLRB 157, 158 (2001). In determining whether a party’s misconduct has the tendency to interfere with employees’ freedom of choice, the Board considers: (1) the number of incidents, (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit, (3) the number of employees in the bargaining unit subjected to the misconduct, (4) the proximity of the misconduct to the election, (5) the degree to which the misconduct persists in the minds of the bargaining unit employees, (6) the extent of dissemination of the misconduct among the bargaining unit employees, (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct, (8) the closeness of the

final vote, and (9) the degree to which the misconduct can be attributed to the party.

I note first that the stipulated election agreement provided that the Employer would turn off its surveillance video cameras so that they would not be operating during the election.

Mendoza attempted to ensure that the cameras was turned off, and stated that he did not want to take the Employer’s word that it had done so. The Employer attempted to diminish this important aspect of Mendoza’s actions by its testimony of Tony Bindra that there was no agreement that it would shut the cameras, and by Danny Bindra’s testimony that Mendoza said nothing about the video system and simply wanted to enter the warehouse for no stated reason. It is significant that the Employer’s manager Miller stated, in contradiction, that the confrontation arose concerning “an issue of the camera.”

Accordingly, the Bindra brothers sought to make it appear that Mendoza’s actions were a brazen attempt to walk through the warehouse for no reason whereas Mendoza, apparently relying on the election agreement’s stipulation that the cameras were to be shut, simply wanted to confirm that fact, and made it known that that was his purpose.

Thus, it appears that Mendoza, by his own testimony, was not satisfied with the Employer’s assertion that it had shut the cameras, and he attempted to exit the election area to observe the video system, claiming, at hearing, that he had a “right” to “walk around” the shop. Miller gave believable testimony that Mendoza attempted to follow Tony Bindra when he shut the cameras off and that Zabell asked him to “stay where we were” and not enter the warehouse.

Although I credit Mendoza’s testimony that he did not try to walk through the warehouse, the evidence is clear that he did proceed at least to some point at or near the entrance of the warehouse which resulted in the Employer’s attempt to stop him. Thus, the alleged misconduct may be attributed to the Union, a party.

I further find that an argument and confrontation ensued between Danny Bindra, Zabell and Mendoza. The argument included raised voices and profanities. As set forth above, Employer representatives claimed that Mendoza, being the aggressor, made contact with Danny and Zabell, attempting to push them back. In contrast, Mendoza stated that, although he was “inches apart” from Zabell they made no contact.

I also find, as testified by Argueta, that there was “pushing and shoving.” However, he denied that there was contact between the men.

The evidence is clear that there was contact between Mendoza, Zabell and Danny Bindra. It is doubtful that angry words between men who were only “inches” away according to Argueta would not result in contact between them especially since he testified that there was “pushing and shoving.” However, I find that the contact was nothing more than the men pushing each other in the opposite direction. I do not credit the Employer’s agents that Mendoza head butted Danny and Zabell in their chests. It is not likely that such an act would have gone without the police being called by Zabell or the Employer or criminal charges being filed by them.

In making findings as to what occurred, I similarly cannot credit the Bindras or Zabell’s testimony that Mendoza made

threatening statements or threatening gestures toward them. Miller did not confirm that testimony and Mendoza and Argueta denied it. It is further noted that Miller at first denied hearing anything that Mendoza said, but later, upon recall by Zabell heard Mendoza's alleged threatening statement.

Considering the factors the Board looks at in determining whether Mendoza's conduct had a tendency to interfere with the employees' freedom of choice, only one incident took place—the confrontation between Mendoza, the Bindra brothers and Zabell. The incident occurred in the immediate vicinity of the election.

I cannot credit the Employer's evidence that the argument took as long as they said it did. It is unlikely that it lasted even a few minutes. The Board agent intervened and came between the disputants breaking it up and thereafter proceeded with the election. I accordingly find that the confrontation was quite short in duration. In this respect, I credit Argueta's testimony that the dispute lasted a few seconds.

In considering whether Mendoza's conduct was likely to cause fear among the employees it must first be determined whether any of the employees were present at the confrontation, and if not, whether that incident was disseminated among employees not present.

As set forth above, Danny Bindra and Miller testified that all the voting employees were present at the confrontation. However, Tony Bindra first stated that some employees were present. When asked how many, he said "this was a very heated situation. I didn't know what was going on so I didn't pay attention to if there were other people there." He later testified that all the employees were present. However, all the employees other than Argueta, the Union's election observer, denied that they were present or saw any arguments or confrontations.

In view of my credibility findings, above, in which I discredited the Bindra others as to material parts of their testimony, I cannot credit the Employer's agents that all the employees were present and observed the confrontation. Thus, I find that only Argueta was present. He described the dispute as "pushing and shoving," lasting only a few seconds.

Further, regarding the dissemination of the incident, Henry Hernandez stated that he heard from other workers after the election that Zabell and a union agent "wanted to like fight." Hernandez did not testify as to how many other employees spoke about this matter and he gave no further details as to what he heard. In any event, the dissemination took place after the election and thus could not have affected the employees before they voted.

There was no evidence as to whether the incident persisted in the minds of the unit employees, particularly since I find that employees, other than Argueta, were not present at the incident. There is no evidence that dissemination of the incident to the employees occurred before the election.

As to the effect, if any, of misconduct by the Employer, I credit Mendoza's testimony that Zabell stood in his way, stopping him from proceeding further. Thus, it appears that Zabell placed his body in front of Mendoza's, with both equally contributing to the physical contact which I find occurred. Accordingly, if Mendoza was originally at fault for attempting to proceed toward the warehouse, Zabell was equally at fault for

blocking his way, causing the physical contact between them.

It is not possible to determine the closeness of the final vote since five ballots were challenged and I direct, below, that four of them be opened. However, nine valid votes were cast for the Union and five were cast against it. Nine votes against five is not a close vote.

I find that the incident which occurred did not reasonably tend to interfere with the employees' free and uncoerced choice in the election. The incident was not directed at the employees, there is no credible evidence that any more than one employee, Argueta, the Union's election observer, witnessed the incident, and there is no evidence that the incident was disseminated to the other employees or that it persisted in their minds.

In addition, I cannot find that, in observing the incident, Argueta was given the impression that the Employer was "powerless against the force of the union." Rather, as in *Chrill Care, Inc.*, 340 NLRB 1016, 1016–1017 (2003), where the union's agent disrupted an employer meeting with employees and initially resisted the employer's efforts to eject her. I find that the Employer here, as was the employer in *Chrill Care*, "fully able to maintain control" by resisting Mendoza's attempt to proceed toward the warehouse. As was the case in *Chrill Care*, the union agent left the area when the police were called. Here, Mendoza backed away when the Board agent intervened.

The cases cited by the Employer, *Service Employees District 1199 (Staten Island University Hospital)*, 339 NLRB 1059, 1061 (2003), and *Central Massachusetts Joint Board*, 123 NLRB 590, 609 (1959), are inapposite. In *Staten Island University Hospital*, the union's agent engaged in a "series of open confrontations with managers" which consisted of "deliberate, repeated and unprovoked verbal abuse, including profanity, racial and sexual slurs and threats of physical harm." The Board found that the union's actions violated Section 8(b)(1)(A) of the Act. It also found that the hospital's employees, who were fully aware of the agent's actions, would reasonably tend to fear that they would be subject to the same abusive tactics if they failed fully to support the union in its bargaining position and the impending strike. The Board further found that the agent's intent in engaging in this "prolonged . . . repeated harassment was to "send this intimidating message to the hospital employee audience."

In *Central Massachusetts*, the Board found that the union agent's threatening with bodily harm and kicking an employer official as he crossed the union's picket line violated Section 8(b)(1)(A) of the Act. The Board held that the striking employees could have reasonably regarded the assault "as a reliable warning of what might befall them if they abandoned the strike" and restrained and coerced them in their exercise of their right to continue or discontinue striking as they wished.

The question here is whether the employees would reasonably fear that they would be subject to similar misconduct if they chose to fail to support the Union. I find that they would not harbor such a fear. Rather, I find that, Argueta, the sole witness to the incident, would reasonably believe that Mendoza was demonstrating his reasonable belief that the Union was entitled to ensure that the surveillance cameras were shut as agreed in the election stipulation, and that Mendoza was correct in asserting that he had a right to confirm that the cameras were turned

off. Argueta could therefore reasonably believe that the resulting confrontation took place because of the Employer's challenge to Mendoza's attempt to verify that the cameras were deactivated.

In sum, I view the election as reflecting the employees' free choice and I overrule this Objection.

CONCLUSIONS AND RECOMMENDATIONS

Based on the above discussion, the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh should be opened and counted. The ballot of Amjad Malik should not be opened and counted.

I shall remand the proceedings in Case No. 29-RC-146077 to the Regional Director and direct him to open and count the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh, and issue a revised tally of ballots.

If the revised tally of ballots shows that a majority of the valid votes cast at the election were cast for the Petitioner, I recommend that the Petitioner be certified. If the revised tally of ballots shows that the Petitioner has lost the election, I recommend that the election be set aside, and that all proceedings in Case No. 29-RC-146077 be vacated.

CONCLUSIONS OF LAW

1. The Respondent, Deep Distributors of Greater NY, Inc. d/b/a The Imperial Sales, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon.

3. The Respondent violated Section 8(a)(1) of the Act by giving its employees the impression that their union activities were under surveillance by the Respondent.

4. The Respondent violated Section 8(a)(1) of the Act by threatening its employees with unspecified reprisals if they selected the Union as their collective-bargaining representative.

5. The Respondent violated Section 8(a)(1) of the Act by telling its employees that it would be futile to select the Union as their collective-bargaining representative.

6. The Respondent violated Section 8(a)(1) of the Act by threatening its employees with discharge if they selected the Union as their collective-bargaining representative.

7. The Respondent violated Section 8(a)(1) of the Act by interrogating its employees about their involvement in a Fair Labor Standards Act lawsuit.

8. The Respondent violated Section 8(a)(1) of the Act by threatening its employees with unspecified reprisals because of their involvement in the filing of a Fair Labor Standards Act lawsuit.

9. The Respondent violated Section 8(a)(1) of the Act by implementing new work rules and discipline regarding cell phone use and lateness.

10. The Respondent violated Section 8(a)(1) of the Act, while in a Board hearing room, it threatened employees with legal action in retaliation for participating in a Board hearing and because of their union activity.

11. The Respondent violated Section 8(a)(1) of the Act, while in a Board hearing room, it threatened to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

12. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully implemented new work rules on July 21, 2015, regarding cell phone use and lateness, I shall order that it rescind those new work rules.

The Respondent having discriminatorily discharged and refused to reinstate Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon, it must offer them reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed, absent the discrimination against them. Further, I shall recommend that the Respondent make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In accord with *Tortillas Dan Chavas*, 361 NLRB No. 10 (2014), my recommended Order also requires the Respondent to (1) submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the employees, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse them for any additional Federal and State income taxes they may be assessed as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year.

The General Counsel requests an Order that Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon be reimbursed for their search for work and work-related expenses, without regard to whether interim earnings are in excess of these expenses. Normally, such expenses are considered an offset to interim earnings. However, the General Counsel seeks a change in existing rules regarding such expenses.

This would require a change in Board law, which is solely within the province of the Board and not an administrative law judge. Therefore, I shall not include this remedial proposal in my recommended order. The Board has recently stated that it will not order such relief at this time. *Goodman Logistics, LLC*, 363 NLRB No. 177, fn. 2 (2016).

In accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB 11, 15–16 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. *J. Piccini Flooring*, above, slip op. at 3. See *Teamsters Local 25*, 358 NLRB 54 (2012).

The General Counsel has requested certain enhanced remedies. In *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003), the Board, citing *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), stated that it “may order enhanced or extraordinary remedies when the Respondent’s unfair labor practices are ‘so numerous, pervasive, and outrageous’ that such remedies are necessary to ‘dissipate fully the coercive effects of the unfair labor practices found.’” Especially since a small bargaining unit is involved, “the probable impact of [the] unfair labor practice is increased.” *Excel Case Ready*, 334 NLRB 4, 5 (2001).

In addition, the Board has found that a broad order requiring a respondent from engaging in misconduct “in any other manner,” instead of a narrow order to refrain from misconduct “in any like or related manner” is necessary when a respondent has engaged in “such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” *Hickmott Foods*, 242 NLRB 1357 (1979).

In addition, in such cases, the Board has ordered a respondent to furnish periodic, updated lists of employee names and addresses to the union, so that the union can help to counteract the effects of these violations in its communications with employees, and to enable the union to “present its message in an atmosphere relatively free of restraint and coercion.” *Federated Logistics*, above, at 258; *Excel Case Ready*, above, at 5.

Further, the Board has required the public reading, by an official of the respondent, of a notice to its employees, so that “they will fully perceive that the Respondent and its managers are bound by the requirements of the Act.” *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007).

The publication of the Notice to Employees has been found an appropriate remedy in cases such as this one. *Pacific Beach Hotel*, 361 NLRB No. 65 (2014).

I find that all of the above enhanced remedies are necessary to dissipate the serious unfair labor practices which the Respondent engaged in. As set forth above, shortly after the Union began organizing the employees, the Respondent immediately embarked on a campaign to identify the Union’s supporters. The Respondent learned that Jose Michel Torres and Alex Argueta were union adherents and discharged them, along with Jose Michel Torres’ brother, Jose Martin Torres. Later, after five other employees filed a FLSA lawsuit, the Respondent discharged them for not signing its unlawfully implemented rules concerning lateness and cell phone use.

The Respondent’s admitted violations of the Act by threatening employees with unspecified reprisals, telling employees that it would be futile to select the Union, and threatening them

with discharge if they voted for the Union, all constitute serious violations of the Act.

Finally, and most egregiously, the Respondent attorney’s threat to employees in the hearing room that he would report them to immigration authorities and that if they testified they would be committing fraud constituted extraordinary intimidation of the employee witnesses. Not only did it instill fear in them that they may be reported to governmental authorities, but it conveyed the message that if they gave testimony they would be in legal jeopardy.

Accordingly, I find that the General Counsel has established good cause for the imposition of the above enhanced remedies, and I shall order that the Respondent be required to undertake them.

However, I will not order two additional special remedies requested by the General Counsel. The General Counsel requests an Order that the Respondent be required to “schedule training for all employees on their rights under the Act conducted by a Board agent during paid worktime; and an Order requiring the Respondent to schedule training for all supervisors and managers on compliance with the Act conducted by a Board agent during paid worktime. No Board precedent has been cited for the imposition of such Orders, and no detail has been given concerning the nature or length of the training

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Deep Distributors d/b/a The Imperial Sales, Inc., Bethpage, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engaged in union activities, concerted activities, and because they filed a lawsuit pursuant to the Fair Labor Standards Act.

(b) Giving its employees the impression that their union activities were under surveillance.

(c) Threatening its employees with unspecified reprisals if they selected the Union as their collective-bargaining representative.

(d) Telling its employees that it would be futile to select the Union as their collective-bargaining representative.

(e) Threatening its employees with discharge if they selected the Union as their collective-bargaining representative.

(f) Interrogating its employees about their involvement in a Fair Labor Standards Act lawsuit.

(g) Threatening its employees with unspecified reprisals because of their involvement in the filing of a Fair Labor Standards Act lawsuit.

(h) Implementing new work rules and discipline regarding cell phone use and lateness.

¹⁰ 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.

(i) Threatening employees with legal action in retaliation for participating in a Board hearing and because of their union activity.

(j) Threatening to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

(k) In any other 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 from the date of the Board's Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon in writing that this has been done and that their discharges will not be used against them in any way.

(d) Rescind the work rules entitled "Employee Code of Conduct" which was implemented on July 21, 2015, and notify the employees that it has done so.

(e) Within 14 days after service by the Region, hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance, at which the attached Notice to Employees" to the employees shall be read to employees by Danny Bindra, Tony Bindra, Herb Miller or Amjad Malik in English and in Spanish during worktime, or at the Respondent's option, by a Board agent in the presence of the Respondent's officials, supervisors and agents named above.

(f) Within 14 days from the date of this Order, publish in three publications of general local interest and circulation copies of the attached Notice to Employees, signed by the Respondents' general manager Tony Bindra, or his successor, and to do so at its expense. Such Notice shall be published twice weekly for a period of 8 weeks. The publications shall be determined by the Regional Director for Region 29, and need not be limited to newspapers so long as they will achieve broad coverage of the area.

(g) Upon the request of the Union, immediately furnish it with lists of the names, addresses, and classifications of all the Respondent's employees as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during a period of 2 years following the entry of this Order.

(h) Within 14 days after service by the Region, post at its fa-

cility in Bethpage, New York, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, in English and in Spanish, on forms provided by the Regional Director for Region 29, 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, the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility 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 any time since February 17, 2015.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 21 days after service by the Region, file with the Regional Director 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.

IT IS FURTHER ORDERED as follows:

1. The Objections to the election are hereby overruled.

2. The proceedings in Case No. 29-RC-146077 are hereby remanded to the Regional Director for Region 29. He is directed to open and count the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh, and issue a revised tally of ballots.

3. If the revised tally of ballots shows that a majority of the valid votes cast at the election were cast for the Petitioner, I recommend that the Petitioner be certified. If the revised tally of ballots shows that the Petitioner has lost the election, I recommend that the election be set aside, and that all proceedings in Case No. 29-RC-146077 be vacated.

Dated, Washington, D.C. May 6, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

¹¹ 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."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge you because of your activity on behalf of United Workers of America, Local 660, or your concerted activities or because you filed a lawsuit pursuant to the Fair Labor Standards Act.

WE WILL NOT give you the impression that your union activities were under surveillance.

WE WILL NOT threaten you with unspecified reprisals if you select United Workers of America, Local 660 as your collective-bargaining representative.

WE WILL NOT tell you that it would be futile to select the Union as your collective-bargaining representative.

WE WILL NOT threaten you with discharge if you select the Union as your collective-bargaining representative.

WE WILL NOT interrogate you about your involvement in a Fair Labor Standards Act lawsuit.

WE WILL NOT threaten you with unspecified reprisals because of your involvement in the filing of a Fair Labor Standards Act lawsuit.

WE WILL NOT unlawfully implement new work rules and discipline regarding cell phone use and lateness.

WE WILL NOT threaten you with legal action in retaliation for participating in a Board hearing and because of your union activity.

WE WILL NOT threaten to report you to Government authorities in order to intimidate you as a witness and to discourage you from participating in Board processes.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify Jose Wilfredo Argueta, Jose

Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon in writing that this has been done and that their discharges will not be used against them in any way.

WE WILL immediately rescind the unlawfully implemented new work rules entitled "Employee Code of Conduct" which were implemented on July 21, 2015, regarding cell phone use and lateness, and notify the employees that we have done so.

WE WILL within 14 days after service by the Region, hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance, at which the attached Notice to Employees to the employees shall be read to employees by Danny Bindra, Tony Bindra, Herb Miller, or Amjad Malik in English and in Spanish during worktime, or at the Respondent's option, by a Board agent in the presence of the Respondent's officials, supervisors and agents named above.

WE WILL within 14 days from the date of this Order, publish in three publications of general local interest and circulation copies of the attached Notice to Employees, signed by the Respondent's general manager Tony Bindra, or his successor, and to do so at its expense.

Such Notice shall be published twice weekly for a period of 8 weeks. The publications shall be determined by the Regional Director for Region 29, and need not be limited to newspapers so long as they will achieve broad coverage of the area.

WE WILL upon the request of the union, immediately furnish it with lists of the names, addresses, and classifications of all the Respondent's employees as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during a period of 2 years following the entry of this Order.

DEEP DISTRIBUTORS D/B/A/ THE IMPERIAL SALES, INC.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/29-CA-147909 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



EXHIBIT B

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

DEEP DISTRIBUTORS OF GREATER
NY D/B/A THE IMPERIAL SALES, INC.

and

LOCAL 660, UNITED WORKERS OF AMERICA

Case 29-CA-147909 and
29-CA-157108

and

HENRY HERNANDEZ, An Individual

ANSWER TO COMPLIANCE SPECIFICATION

Respondent, **DEEP DISTRIBUTORS OF GREATER NEW YORK, INC. d/b/a THE IMPERIAL SALES, INC.** “Deep Distributors” or “Employer”, by and through its attorneys, Certilman Balin Adler & Hyman, LLP, and pursuant to Section 102.56 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, for its Answer to the Compliance Specification and Notice of Hearing (“Compliance Specification”) filed herein, alleges and answers as follows:

JURISDICTION AND VENUE

1. Respondent denies each and every allegation in Section I of the Compliance Specification, “The Discriminatees,” except admits that the eight named individuals were former employees of Respondent.
2. Respondent denies each and every allegation set forth in Section II of the Compliance Specification, “Backpay Period,” except admits that the dates of discharge of the former employees listed on the chart on page three is accurate, and notes that by July 29, 2016,

Respondent had made valid reinstatement offers to each of same.

3. Respondent denies each and every allegation set forth in Section III of the Compliance Specification, "Computation of Gross Backpay," except admits that the named individuals each worked forty hours per week and admits the accuracy of the alleged hourly rate of pay for the 2015 time period only, for the same named individuals.
4. Respondent denies knowledge or information sufficient to form a belief as to the allegations within Section IV of the Compliance Specification, "Interim Earnings," regarding the interim earnings of the named former employees of Respondent.
5. Respondent denies each and every allegation set forth in Section V of the Compliance Specification, "Net Backpay," except denies knowledge or information sufficient to form a belief regarding the interim earnings of the named former employees of Respondent.
6. Respondent denies each and every allegation set forth in Section VI of the Compliance Specification, "Excess Tax Liability on Backpay."
7. Respondent denies each and every allegation set forth in Section VII, "Summary."

AFFIRMATIVE DEFENSES

As and For the First Affirmative Defense

Respondent has already offered unconditional reinstatement to all alleged "discriminatees."

As and For A Second Affirmative Defense

Respondent does not owe backpay to alleged "discriminatees" Jose Reyes, Augustin Sabillon, Henry Hernandez, Jose Amador, and Jose Arguenta inasmuch as those alleged "discriminatees" have signed releases in this matter in relation to Eastern District of New York case no.: 15-cv-03980, releasing Respondent of all further liability or backpay obligations.

As and For A Third Affirmative Defense

Respondent does not owe backpay to alleged “discriminatees” Jose Reyes, Augustin Sabillon, Henry Hernandez, Jose Amador, and Jose Arguenta inasmuch as the United States District Court in the Eastern District of New York so ordered the stipulation and order of final dismissal of case no.: 15-cv-03980(JMA)(ARL) brought by those alleged “discriminatees.”

As and For A Fourth Affirmative Defense

Respondent does not owe backpay to any of the alleged “discriminatees” inasmuch as the award of backpay is entirely foreclosed by the illegal immigration status of the alleged “discriminatees” and their violation of federal immigration laws.

As and For A Fifth Affirmative Defense

Respondent does not owe backpay to any of the alleged “discriminatees” because of their failure to mitigate their alleged damages.

As and For A Sixth Affirmative Defense

Respondent has not been apprised in detail by the Regional Director of the amounts and sources of interim earning of the alleged “discriminatees.”

WHEREFORE, having answered, Respondent respectfully requests that the claims for backpay be dismissed in their entirety with prejudice, and for such other and further relief as this Court may deem just and proper.

Respondent expressly reserves the right to amend their Answer and assert additional defenses and/or supplement, alter or change this Answer upon completion of appropriate investigation and discovery.

Dated: East Meadow, New York
August 1, 2019

**CERTILMAN BALIN ADLER &
HYMAN, LLP**

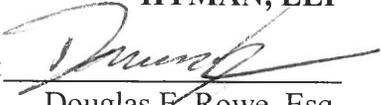
By: 
Douglas E. Rowe, Esq.
Attorneys for Employer
90 Merrick Avenue, 9th Floor
East Meadow, NY 11554
(516) 296-7000
drowe@certilmanbalin.com

EXHIBIT C

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK REGION**

**DEEP DISTRIBUTORS OF GREATER NY
D/B/A THE IMPERIAL SALES, INC.**

and

**Cases 29-CA-147909
29-CA-157108**

**LOCAL 660, UNITED WORKERS OF
AMERICA**

and

HENRY HERNANDEZ, an Individual

MOTION FOR A BILL OF PARTICULARS

Respondent's Answer to the General Counsel's Compliance Specification fails to comply with the Board's Rules and Regulations Section 102.56 because it fails to "set forth in detail" the factual basis for its affirmative defense that the award of backpay is foreclosed by the "illegal immigration status" of the discriminatees. Respondent failed to plead any facts to support this affirmative defense. In *Flaum Appetizing, Corp.*, 357 NLRB 2006 (2011), the Board emphasized that it will not permit an affirmative defense based on immigration status to proceed where a respondent fails to plead articulable facts in support of the defense. Consequently, without any factual basis, Respondent's bare assertion regarding the discriminatee's work authorization status is insufficient under the Board's Rules and Regulations and requires that Respondent provide the General Counsel with further detail regarding this affirmative defense.

For this reason, the General Counsel seeks an order requiring that Respondent serve on the General Counsel a bill of particulars containing a clear and concise description of the

evidence in support its affirmative defense that no backpay is due to the discriminatees because of their “illegal immigration status.”

I. Background

On June 20, 2017, the Board issued its Decision and Order in Case Nos. 29-CA-147909 and 29-CA-157108,¹ finding that in March and July 2015, Respondent unlawfully discharged employees Jose Wilfredo Arguetta, Henry Hernandez, Marvin Hernandez, Javier Reyes, Jose Roberto Reyes, Augustin Sabillon, Jose Martin Torres, and Jose Michel Torres in violation of Sections 8(a)(1) and (3) of the Act. The Board also found that Respondent violated Section 8(a)(1) of the Act by unlawfully threatening employees with termination and unspecified reprisals, interrogating employees, promulgating new work rules in response to Section 7 activity, telling employees it would be futile to select the Union as their collective-bargaining representative, threatening employees with deportation for testifying at the Board hearing, and giving employees the impression their protected activities were under surveillance (through conduct of a supervisor). Thereafter, the Board petitioned for enforcement of the Board’s Decision and Order in the Second Circuit.

On October 24, 2018, the Second Circuit granted the Board’s petition for enforcement of the Board’s entire Decision and Order. The Second Circuit issued its Mandate on December 18, 2018. (Exhibits 1 and 2, respectively.)

On June 27, 2019, the Regional Director for Region 29 of the National Labor Relations Board issued Compliance Specification and Notice of Hearing. (Exhibit 3). On July 12, 2019, Respondent requested an extension of time within which to file its Answer to the Specifications. (Exhibit 4). In response, the Regional Director for Region 29 issued an Order on July 17, 2019

¹ 365 NRLB No. 95

granting Respondent an additional two weeks in which to file its Answer to the Specification. (Exhibits 5). On August 1, 2019, Respondent, by its attorney, filed an Answer to the Specifications. (Exhibit 6).

In its Answer, Respondent asserted the following affirmative defense:

“As and for a Fourth Affirmative Defense: Respondent does not owe backpay to any of the alleged “discriminatees” inasmuch as the award of backpay is entirely foreclosed by the illegal immigration status of the alleged “discriminatees” and their violation of federal immigration laws.”

Respondent failed to provide any facts to support this defense, including the identity of those discriminatees it believes were not authorized to work in the United States during the relevant time period.

II. Respondent Has Failed to Plead Articulate Facts to Support Its Affirmative Defense Based on Immigration Status.

In *Flaum Appetizing Corp.*, the Board recognized that “to permit the pleading of an affirmative defense based on immigration status in the complete absence of any articulable reason...would contravene the policies underlying *both* IRCA and the NLRA.” 357 NLRB 2006, 2011 (emphasis in original). In that case, the respondent claimed that eleven employees were disqualified from receiving backpay because they were undocumented aliens “who willfully violated the Immigration Reform and Control Act of 1986...[“IRCA”] by perpetrating a fraud upon the Respondent...” *Id.* at 2007. Counsel for the Acting General Counsel then filed a motion with the administrative law judge for a bill of particulars requesting that the respondent plead specific facts in support of its affirmative defense. The administrative law judge granted the motion and ordered the respondent to proffer a factual summary, including a statement of the facts constituting the offenses that the discriminatees engaged in and when. In reply, the respondent asserted that all eleven discriminatees were ineligible to receive backpay under

Hoffman Plastic Compounds, Inc. v NLRB, 535 U.S. 137 (2002), because each employee had provided it with fraudulent documentation and photo identification. The respondent asserted that it learned of this alleged fraud when four of the eleven employees testified at the underlying unfair labor practice hearing that they had presented false documents when initially hired. At the same time, the respondent sought to subpoena from each of the eleven employees documents relating to their immigration status in an effort to uncover evidence to support its assertions. The Acting General Counsel then moved to strike the respondent's affirmative defense because the bill of particulars failed to identify specific facts sufficient to support its claim. *Id.* at 2008.

The Board granted the Acting General Counsel's motion with respect to the seven employees who did not testify about their work status documents at the unfair labor practice hearing. The Board concluded that it was "readily apparent" that the respondent failed to satisfy the ALJ's order for a specific bill of particulars. Thus, the respondent "failed to provide dates on which the discriminatees allegedly committed the wrongdoings attributed to them and failed to describe the nature of the documentation and photo identification submitted by each of the discriminatees or explain why it was fraudulent." *Id.* at 2008, n.4. The Board noted that "it was the filing of the unfair labor practice charge, the discriminatees' participation in this case, and the Board's order of reinstatement and backpay to the discriminatees that motivated the pleading at issue..." *Id.* at 2011. Under these circumstances, allowing the respondent to attempt to use a Board compliance hearing to re-verify an employee's work status would violate IRCA's anti-discrimination provisions. *Ibid*, citing 8 USC sec. 1324b and 8 CFR sec. 8274a.2(b), (1), (vii), (A), (5). The Board warned that if respondents were allowed to plead immigration status as an affirmative defense without any articulable basis, employers would do so as a matter of course. The result would be that,

In every case in which the Board has found that employees' rights have been violated, in order to obtain any remedy for the injuries suffered, the employees would potentially be subject to what is often an embarrassing and frightening inquiry into their immigration status.

In our view, subjecting every employee whose rights have been violated to such an intrusive inquiry, even when the party that has already been adjudged to have violated the law can articulate no justification for the inquiry, contravenes the purposes of the NLRA.

Id. at slip op. 7.

As to the four remaining employees who testified that they had provided false documentation, the Board held that respondent's bill of particulars was also inadequate because the respondent failed to justify its assertion of immigration-related affirmative defenses as to those four employees. Accordingly, the Board ordered that respondent file an amended bill describing specific facts, without which the ALJ would strike the affirmative defense upon a renewed motion by the Acting General Counsel. *Id.* at 2012-13.

Here, Respondent's affirmative defense that backpay is not due to "any" of the alleged discriminatees because of their "illegal immigration status" fails to meet the basic pleading requirements of Section 102.56 of the Board's Rules and Regulations and the principles articulated in *Flaum Appetizing*. This defense is not supported by any articulable facts. Respondent offers no explanation for why it believes that all the discriminatees, whom it previously employed and whose immigration status was presumably verified at the time of such employment, were not eligible to work in the United States during the relevant time period. In accordance with *Flaum Appetizing*, if Respondent intends to litigate the work authorization of any of the discriminatees, its current Answer is plainly deficient and must be supplemented with specific facts set forth in a bill of particulars.

III. Conclusion

Accordingly, Counsel for the General Counsel requests an order requiring Respondent to serve on the General Counsel, within 14 days of the date of the order, a bill of particulars which will include (a) the identity of each discriminatee asserted to be unauthorized to work in the U.S. during the relevant time period and (b) for any such discriminatee, a particularized and specific description of the evidence, both documentary and testimonial, that establishes the individual's ineligibility.

Respectfully submitted this 4th day of September 2019.

/s/ Noor I. Alam

Noor I. Alam
Emily A. Cabrera
Counsel for the General Counsel
National Labor Relations Board, Region 29
2 Metrotech Center, 5th Floor
Brooklyn, NY 11201

Exhibit 1

17-2250

NLRB v. Deep Distributors of Greater N.Y., Inc.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of October, two thousand eighteen.

Present:

JOHN M. WALKER, JR.,
GUIDO CALABRESI,
DEBRA ANN LIVINGSTON
Circuit Judges.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

17-2250

DEEP DISTRIBUTORS OF GREATER N.Y., INC., D/B/A
THE IMPERIAL SALES INC.,

Respondent.

For Petitioner:

USHA DHEENAN, Supervisory Attorney, JOEL A. HELLER, Attorney, National Labor Relations Board, Washington, DC.

For Respondent:

SAUL D. ZABELL, ESQ., Bohemia, NY.

On application for enforcement of an order of the National Labor Relations Board ("NLRB" or "Board").

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the application for enforcement is **GRANTED**.

The National Labor Relations Board (“NLRB” or “Board”) applies for enforcement of its Order issued against Respondent Deep Distributors of Greater N.Y., Inc. (“Deep Distributors”) on June 20, 2017. *Deep Distributors of Greater NY d/b/a The Imperial Sales, Inc. and United Workers of America, Local 660 and Henry Hernandez.*, Cases 29–CA–147909, 29–CA–157108, and 29–RC–146077, 365 NLRB No. 95 (June 20, 2017). We assume the parties’ familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

“The Board’s findings of fact are conclusive if supported by substantial evidence on the record considered as a whole.” *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 473 (2d Cir. 2009) (quoting 29 U.S.C. § 160(e)) (internal quotation marks omitted). Thus, we will not overturn the Board just because there are two conflicting views of the evidence; we reverse a factual finding only if “no rational trier of fact could reach the conclusion drawn by the Board.” *Id.* at 473–74. As to questions of law, “[i]f the Board’s conclusion has a reasonable basis in law,” this Court will uphold it, and we defer to the Board on mixed questions of law and fact so long as there appears to be more than one reasonable solution, one of which the Board has adopted. *Sheridan Manor Nursing Home, Inc. v. NLRB*, 225 F.3d 248, 252 (2d Cir. 2000) (quoting *Beverly Enters., Inc. v. NLRB*, 139 F.3d 135, 140 (2d Cir. 1998)).

At the start, Deep Distributors has not challenged the substance of the NLRB’s Order on appeal. The company does not challenge the Board’s factual findings or its conclusions, but argues only that enforcement is unnecessary because it is complying with the Order and that, to the extent it is not, it is merely refusing to comply with parts of the Order where compliance would be illegal or has been waived. To the extent that Deep Distributors has failed to

challenge the substance of the Board’s order as issued, the Board is entitled to enforcement, as the order is uncontested. *See NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67–68 (2d Cir. 1992) (approving conclusions and enforcing provisions of order “since respondents have not challenged these conclusions in this Court”); *see also Consol. Bus Transit*, 577 F.3d at 474 n.2 (“The Board is entitled to summary affirmance of portions of its order identifying or remedying these and all other uncontested violations of the Act”); *NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1308 n.1 (2d Cir. 1990) (“Although some review of objections raised before the Board may be justified even in cases of complete default, in light of [Respondent’s] concession, the Board is entitled to summary affirmance of the numerous unchallenged unfair labor practice findings.”) (citation omitted).

As to the challenges that Deep Distributors does present, Deep Distributors’s argument that its compliance with portions of the Order renders enforcement improper is foreclosed by precedent.¹ *See NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567 (1950) (“We think it plain from the cases that the employer’s compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court. . . . A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree.”); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263, 273–74 (2d Cir. 1981) (“[T]he Board is still entitled to enforcement of its

¹ Deep Distributors has also moved to supplement the record on appeal with evidence supposedly demonstrating compliance with the NLRB Order. As the Supreme Court has noted, however, “[i]f compliance with an order of the Board is irrelevant to the reviewing court’s function after the new evidence has been adduced,” there is no point “in adducing evidence of that compliance.” *Mexia*, 339 U.S. at 569. Nor do we discern a basis for supplementing the record with the additional proffered materials supposedly demonstrating that compliance with portions of the Board’s Order is not required, as such material may be considered, if relevant, during compliance proceedings.

orders despite corrective actions taken by offending parties.”). Deep Distributors also argues that enforcement is inappropriate because: (1) backpay and reinstatement may be unavailable to some workers pursuant to *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); and (2) some workers may have waived their right to monetary relief by settling a suit brought under the Fair Labor Standards Act at the same time that NLRB proceedings were ongoing. We review the Board’s orders for “substantial evidence” *in the record*, however, and do not consider claims not brought before the Board. *Consol. Bus Transit, Inc.*, 577 F.3d at 473; *see also Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 115 (2d Cir. 2001) (noting that claims not brought before the Board will not be considered by the Courts of Appeals). To the extent that Deep Distributors believes employees are not entitled to offers of reinstatement or backpay due to their immigration status or previous settlement agreements, it may seek to adduce evidence of that in compliance proceedings. *See NLRB v. Dazzo Prods., Inc.*, 358 F.2d 136, 138 (2d Cir. 1966) (per curiam) (“[T]hese objections do not go to enforcement; the employer’s precise duties as to reinstatement . . . and back pay . . . are matters to be resolved under established [sic] principles in compliance proceedings.”).

Deep Distributors argues, finally, that this Court should not enforce the NLRB Order because the Board has allegedly not cooperated with it in its effort to comply with portions of the Order. But as to its contention of waiver by the NLRB, we review an order based on when it was made. *NLRB v. Pool Mfg. Co.*, 339 U.S. 577, 581–82 (1950) (“[A]n order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made.”). The Board is thus correct to point out that “Deep Distributors offers no authority for the proposition . . . that it can refuse to comply simply because not all of the details have been worked out.”

We have considered Deep Distributors's remaining arguments and find them to be without merit. Accordingly, the company's motion to supplement the record on appeal is **DENIED**. We **GRANT** the Board's application for enforcement.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk




Exhibit 2

MANDATE

17-2250
NLRB v. Deep Distributors of Greater N.Y., Inc.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of October, two thousand eighteen.

Present:

JOHN M. WALKER, JR.,
GUIDO CALABRESI,
DEBRA ANN LIVINGSTON
Circuit Judges.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

17-2250

DEEP DISTRIBUTORS OF GREATER N.Y., INC., D/B/A
THE IMPERIAL SALES INC.,

Respondent.

For Petitioner:

USHA DHEENAN, Supervisory Attorney, JOEL A. HELLER, Attorney, National Labor Relations Board, Washington, DC.

For Respondent:

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“The Board’s findings of fact are conclusive if supported by substantial evidence on the record considered as a whole.” *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 473 (2d Cir. 2009) (quoting 29 U.S.C. § 160(e)) (internal quotation marks omitted). Thus, we will not overturn the Board just because there are two conflicting views of the evidence; we reverse a factual finding only if “no rational trier of fact could reach the conclusion drawn by the Board.” *Id.* at 473–74. As to questions of law, “[i]f the Board’s conclusion has a reasonable basis in law,” this Court will uphold it, and we defer to the Board on mixed questions of law and fact so long as there appears to be more than one reasonable solution, one of which the Board has adopted. *Sheridan Manor Nursing Home, Inc. v. NLRB*, 225 F.3d 248, 252 (2d Cir. 2000) (quoting *Beverly Enters., Inc. v. NLRB*, 139 F.3d 135, 140 (2d Cir. 1998)).

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challenge the substance of the Board's order as issued, the Board is entitled to enforcement, as the order is uncontested. See *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67–68 (2d Cir. 1992) (approving conclusions and enforcing provisions of order “since respondents have not challenged these conclusions in this Court”); see also *Consol. Bus Transit*, 577 F.3d at 474 n.2 (“The Board is entitled to summary affirmance of portions of its order identifying or remedying these and all other uncontested violations of the Act”); *NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1308 n.1 (2d Cir. 1990) (“Although some review of objections raised before the Board may be justified even in cases of complete default, in light of [Respondent's] concession, the Board is entitled to summary affirmance of the numerous unchallenged unfair labor practice findings.”) (citation omitted).

As to the challenges that Deep Distributors does present, Deep Distributors's argument that its compliance with portions of the Order renders enforcement improper is foreclosed by precedent.¹ See *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567 (1950) (“We think it plain from the cases that the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court. . . . A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree.”); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263, 273–74 (2d Cir. 1981) (“[T]he Board is still entitled to enforcement of its

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orders despite corrective actions taken by offending parties.”). Deep Distributors also argues that enforcement is inappropriate because: (1) backpay and reinstatement may be unavailable to some workers pursuant to *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); and (2) some workers may have waived their right to monetary relief by settling a suit brought under the Fair Labor Standards Act at the same time that NLRB proceedings were ongoing. We review the Board’s orders for “substantial evidence” *in the record*, however, and do not consider claims not brought before the Board. *Consol. Bus Transit, Inc.*, 577 F.3d at 473; *see also Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 115 (2d Cir. 2001) (noting that claims not brought before the Board will not be considered by the Courts of Appeals). To the extent that Deep Distributors believes employees are not entitled to offers of reinstatement or backpay due to their immigration status or previous settlement agreements, it may seek to adduce evidence of that in compliance proceedings. *See NLRB v. Dazzo Prods., Inc.*, 358 F.2d 136, 138 (2d Cir. 1966) (per curiam) (“[T]hese objections do not go to enforcement; the employer’s precise duties as to reinstatement . . . and back pay . . . are matters to be resolved under established [sic] principles in compliance proceedings.”).

Deep Distributors argues, finally, that this Court should not enforce the NLRB Order because the Board has allegedly not cooperated with it in its effort to comply with portions of the Order. But as to its contention of waiver by the NLRB, we review an order based on when it was made. *NLRB v. Pool Mfg. Co.*, 339 U.S. 577, 581–82 (1950) (“[A]n order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made.”). The Board is thus correct to point out that “Deep Distributors offers no authority for the proposition . . . that it can refuse to comply simply because not all of the details have been worked out.”

We have considered Deep Distributors's remaining arguments and find them to be without merit. Accordingly, the company's motion to supplement the record on appeal is **DENIED**. We **GRANT** the Board's application for enforcement.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk




A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit




Exhibit 3

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

DEEP DISTRIBUTORS OF GREATER
NY D/B/A THE IMPERIAL SALES, INC.

and

Case No. 29-CA-147909
29-CA-157108

LOCAL 660, UNITED WORKERS OF AMERICA

and

HENRY HERNANDEZ, An Individual

**COMPLIANCE SPECIFICATION AND
NOTICE OF HEARING**

The National Labor Relations Board (the Board) having issued its Decision and Order in Case Nos. 29-CA-147909 and 29-CA-157108 on June 20, 2017 (365 NLRB No. 95), directing Deep Distributors of Greater NY d/b/a Imperial Sales, Inc. (Respondent), its agents, officers, successors and assigns to, *inter alia*, offer Jose Wilfredo Argueta, Henry Hernandez, Marvin Hernandez, Javier Reyes, Jose Roberto Reyes, Augustin Sabillon, Jose Martin Torres, and Jose Michel Torres (“the discriminatees”) full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits they suffered as a result of the their unlawful discharges in violation of Sections 8(a)(1) and (3) of the Act.

On October 24, 2018, the United States Court of Appeals for the Second Circuit enforced the Board’s Decision and Order.

Controversy having arisen over the amount of monies due under the Board Decision and Order and Court Judgment, the undersigned Regional Director for Region 29, pursuant to authority conferred upon her by the Board and Sections 102.54 and 102.55 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Compliance Specification and Notice of Hearing, and alleges that the backpay and other monies due under the Board's Decision and Order and Court Judgment are as follows:

I. THE DISCRIMINATEES

The discriminatees are the employees named below whom the Respondent unlawfully discharged in violation of Sections 8(a)(1) and (3) of the Act:

<u>First Name</u>	<u>Last Name</u>
a. Jose Wilfedo	Argueta
b. Henry	Hernandez
c. Marvin	Hernandez
d. Javier	Reyes
e. Jose Roberto	Reyes
f. Augustin	Sabillon
g. Jose Martin	Torres
h. Jose Michel	Torres

02/10/2020

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II. THE BACKPAY PERIODS

The backpay periods begin on the dates when each of the discriminatees was unlawfully discharged, as detailed below, and continue to April 29, 2019, the date by which

Respondent made valid offers of reinstatement to each of the discriminatees:

<u>Name</u>	<u>Backpay Period</u>
a. Jose Wilfredo Argueta	March 6, 2015 to April 29, 2019
b. Henry Hernandez	July 21, 2015 to April 29, 2019
c. Marvin Hernandez	July 21, 2015 to April 29, 2019
d. Javier Reyes	July 21, 2015 to April 29, 2019
e. José Roberto Reyes	July 21, 2015 to April 29, 2019
f. Augustin Sabillon	July 21, 2015 to April 29, 2019
g. Jose Martin Torres	March 6, 2015 to April 29, 2019
h. Jose Michel Torres	March 6, 2015 to April 29, 2019

III. COMPUTATION OF GROSS BACKPAY

An appropriate measure of gross backpay which the discriminatees would have earned during the backpay period are the employees' average weekly earnings, that is their hourly rates of pay times their hours worked per week, computed on a calendar quarterly basis.

A. Regular Hours of Work

The discriminatees each worked forty hours per week.

B. Hourly Rate of Pay

1. The hourly wage rates used for backpay accrued during calendar year 2015 were the wage rates earned by employees on their dates of discharge.
2. The hourly wage rate used for backpay accrued during calendar years 2016 through 2018 was \$11.25, the wage rate Respondent paid to its similarly situated employees classified as Warehouse Workers.
3. Effective December 31, 2018, Nassau County, New York, where Respondent's business operates, raised the hourly minimum wage to \$12.00 per hour. Thus, from January 1, 2019 through April 29, 2019, the end of the backpay periods, the average hourly wage rate used for backpay accrued was \$12.00.

Hourly Rates

	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>
a. Jose Wilfredo Argueta	\$10.00	\$11.25	\$11.25	\$11.25	\$12.00
b. Henry Hernandez	\$10.00	\$11.25	\$11.25	\$11.25	\$12.00
c. Marvin Hernandez	\$10.00	\$11.25	\$11.25	\$11.25	\$12.00
d. Javier Reyes	\$10.00	\$11.25	\$11.25	\$11.25	\$12.00
e. Jose Roberto Reyes	\$11.25	\$11.25	\$11.25	\$11.25	\$12.00
f. Augustin Sabillon	\$10.00	\$11.25	\$11.25	\$11.25	\$12.00
g. Jose Martin Torres	\$10.00	\$11.25	\$11.25	11.25	\$12.00
h. Jose Michel Torres	\$10.00	\$11.25	\$11.25	\$11.25	\$12.00

The computation of the gross backpay based on the above, is set forth in Appendices A1-A-8.

IV. INTERIM EARNINGS

Interim earnings, which are admitted were earned by discriminatees during the backpay period, are set forth in Appendices A1-A8.

V. NET BACKPAY

Net backpay, which is gross backpay less any interim earnings, is computed on a calendar quarterly basis, and is set forth in Appendices A1-A8.¹

Summarizing the facts and calculations specified above in paragraphs I through V, Respondent is liable for net backpay to each of the discriminatees, as follows:

NET BACKPAY SUMMARY TABLE

	Gross Backpay	Interim Earnings	Net Backpay
a. Jose Wilfredo Argueta	\$95,610.00	\$51,977.00	\$43,634.00
b. Henry Hernandez	\$88,010.00	\$61,816.00	\$29,184.00
c. Marvin Hernandez	\$88,010.00	\$60,310.00	\$27,700.00
d. Jose Roberto Reyes	\$89,160.00	\$77,400.00	\$16,080.00
e. Javier Reyes	\$88,010.00	\$51,900.00	\$38,500.00
f. Augustin Sabillon	\$88,010.00	\$78,260.00	\$13,890.00

¹ Should interim earnings exceed gross backpay in any calendar quarter, net backpay for that quarter is reduced to zero.

	Gross Backpay	Interim Earnings	Net Backpay
g. Jose Martin Torres	\$95,610.00	\$84,682.00	\$16,667.00
h. Jose Michel Torres	\$95,610.00	\$64,126.00	\$39,548.00
Total	\$728,030.00	\$530,471.00	\$225,203

VI. EXCESS TAX LIABILITY ON BACKPAY

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas* (361 NLRB No. 10 (2014)), the discriminatees in this matter are entitled to be compensated for the adverse tax consequences of receiving lump sum backpay for a period over one year. If not for the unfair labor practice committed by Respondent, the backpay award for the discriminatees would have been paid over more than one year rather than paid in the year Respondent makes final payment in this case. The backpay owed to the discriminatees should have been earned in 2015, 2016, 2017, 2018, and 2019 rather than exclusively in 2019.²

A. In order to determine what the appropriate excess tax award should be, the amount of federal and state taxes must be determined for the backpay as if the monies were paid when they were earned throughout the backpay period. Also, the amount of federal and state taxes must be calculated for the lump sum payment as if the payment were made this year, as described below in paragraph D. The excess tax liability was calculated as the difference between these two amounts.

B. The amount of Taxable Income for each year is based on the calculations for backpay provided in the Compliance Specification for each year of the backpay periods.

² All information, including the amounts owed, will need to be updated to reflect the actual year of payment.

These taxable income amounts are listed in individualized format for each year, as set forth in Appendices B1-B-8, and federal and state taxes were calculated using the federal and state tax rates for the appropriate year.³ The federal rates are based on each of the discriminatee's filing taxes as Single, Married Filing Joint-Widow, Married Filing Separately, or Head of Household status. The state taxes used were based on New York state tax rates. The amount of taxes owed during the years backpay would have been earned is set forth in Appendices B1-B8 and in Summary Appendix C in the column labeled "If Backpay was Paid When Earned." These amounts are separated into federal and state taxes.

C. The total amount of the lump sum award that is subject to this excess tax award is listed in Appendices B1-B8 and in Summary Appendix C, in the column labeled "Lump Sum." The lump sum is based on the backpay calculations described in this Compliance Specification. The amount of taxes owed in 2019 is based on the current federal and state tax rates and on the fact that each discriminatee will be filing his income taxes using the tax filing status listed in Appendices B1-B8. The amounts are also listed in Summary Appendix C as "Lump Sum Federal Tax" and "Lump Sum State Tax."

D. The adverse tax consequence for each discriminatee is the difference between the amount of taxes on the lump sum amount being paid in 2019 and the amount of taxes that would have been charged if these amounts were paid when the backpay was earned in 2015, 2016, 2017, and 2018. These amounts are set forth in Appendices B1-B8 and in Summary Appendix C as "Excess Tax Federal" and "Excess Tax State".⁴

E. The excess tax liability payment that is to be made to each discriminatee is also taxable income and causes additional tax liabilities. Appendices B1-B8 also includes a

³ The actual federal tax rates were used, while the state's average tax rate was used for these previous years.

⁴ The amount of excess tax liability would need to be updated to reflect the actual date of payment.

calculation for these supplemental taxes. This amount is called Incremental Tax Liability. The incremental tax includes all of the taxes that each discriminatee will owe on the excess tax payment. This incremental tax is calculated using the federal tax rate used for calculating taxes for the backpay award and the average state tax rate for 2019 and is set forth in Appendices B1-B8 and in Summary Appendix C as "Incremental tax".⁵

F. The Total Excess Tax is the total tax consequence for each discriminatee receiving a lump-sum award covering a backpay period longer than one year and is set forth in Appendices B1-B8 and in Summary Appendix C as "Total Excess Tax." The Total Excess Tax owed to each discriminatee is \$2,018.00 which is determined by adding the Excess Tax and Incremental Tax as shown in Summary Appendix C.

VII. SUMMARY

Summarizing the facts and calculations specified above and in the Appendices, Respondent is liable for the total amounts due to each discriminatee detailed below.

Name	Net Backpay	Excess Tax	Total
a. Jose Wilfredo Argueta	\$43,634.00	\$464.00	\$44,098.00
b. Henry Hernandez	\$29,184.00	\$269.00	\$29,453.00
c. Marvin Hernandez	\$27,700.00	\$282.00	\$27,982.00
d. Javier Reyes	\$38,500.00	\$416.00	\$38,916.00
e. Jose Roberto Reyes	\$16,080.00	\$156.00	\$16,236.00
f. Augustin Sabillon	\$13,890.00	\$102.00	\$13,992.00

⁵ The amount of incremental tax liability would need to be updated to reflect the actual date of payment.

g. Jose Martin Torres	\$16,667.00	\$170.00	\$16,837.00
h. Jose Michel Torres	\$39,548.00	\$159.00	\$39,707.00

Total Due: \$227,221.00

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.56 of the Board's Rules and Regulations, it must file an answer to the compliance specification. The answer must be **received by this office on or before July 18, 2019 or postmarked on or before July 17, 2019**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-Filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within

three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission.

As to all matters set forth in the compliance specification that are within the knowledge of Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial is not sufficient. See Section 102.56(b) of the Board's Rules and Regulations, a copy of which is attached. Rather, the answer must state the basis for any disagreement with any allegations that are within the Respondent's knowledge and set forth in detail Respondent's position as to the applicable premises and furnish the appropriate supporting figures.

If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the compliance specification are true. If the answer fails to deny allegations of the compliance specification in the manner required under Section 102.56(b) of the Board's Rules and Regulations, and the failure to do so is not adequately explained, the Board may find those allegations in the compliance specification are true and preclude Respondent from introducing any evidence controverting those allegations.

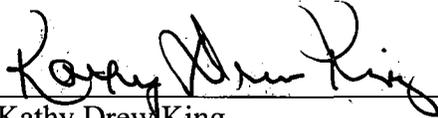
Any request for an extension of time to file an answer must, pursuant to Section 102.111(b) of the Board's Rules and Regulations, be received by close of business on July 18, 2019. The request should be in writing and addressed to the Regional Director of Region 29.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **Tuesday, September 24, 2019**, in a hearing room located at Two Metrotech Center, Suite 5100, Brooklyn, New York, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding

have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: June 27, 2019.)



Kathy Drew King
Regional Director, NLRB Region 29
Two MetroTech Center, Suite 5100
Brooklyn, New York 11201



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 29-CA-147909, 157108

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements will not be granted unless good and sufficient grounds are shown and the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in detail;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Douglass Rowe, Esq.
Certilman Balin Adler & Hyman, LLP
90 Merrick Avenue
9th Floor
East Meadow, New York 11554

Exhibit 4

DOUGLAS E. ROWE
PARTNER
DIRECT DIAL 516.296.7102
drowe@certilmanbalin.com

July 12, 2019

Via regular mail

Regional Director, NLRB Region 29
Two MetroTech Center, Suite 5100
Brooklyn, New York 11202

Re: Deep Distributors of Greater NY d/b/a Imperial Sales, Inc.
Case No.: 29-CA-147909; 29-CA-157108

Dear Regional Director:

This firm represents the respondent, Deep Distributors of Greater NY, in connection with this matter. I am writing to request an extension of time to file an answer to the compliance specification currently due on July 18, 2019.

The reason for the need for this adjournment is that our client, the respondent's owner, Tony Bindra, just had a death in the family and will be out of the country in India for the next several weeks. This firm wishes to review answer to the compliance specification upon his return. Accordingly, our firm is requesting a 30-day extension to answer.

There has not previously been a request for an extension.

Thank you for your courtesy and cooperation.

Respectfully yours,



Douglas E. Rowe, Esq.

Certilman Balin Adler & Hyman, LLP
90 Merrick Avenue, East Meadow NY 11554
Drowe@certilmanbalin.com
(516)-296-7000

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Exhibit 5

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

DEEP DISTRIBUTORS OF GREATER NY D/B/A
THE IMPERIAL SALES, INC.

and

Case 29-CA-147909 and
29-CA-157108

LOCAL 660, UNITED WORKERS OF AMERICA

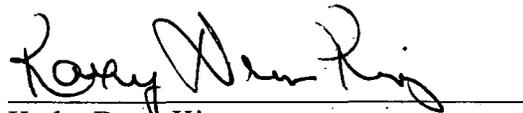
and

HENRY HERNANDEZ, An Individual

**ORDER EXTENDING THE TIME TO FILE AN ANSWER
TO THE COMPLIANCE SPECIFICATION AND NOTICE OF HEARING**

IT IS ORDERED that the time for filing an answer to the Complaint and Notice of Hearing is extended from July 18, 2019 to August 1, 2019. Absent extraordinary circumstances, no further extension of time will be granted.

Dated at Brooklyn, New York this 17th day of July, 2019.



Kathy Drew King
Regional Director
National Labor Relations Board
Region 29
Brooklyn, New York

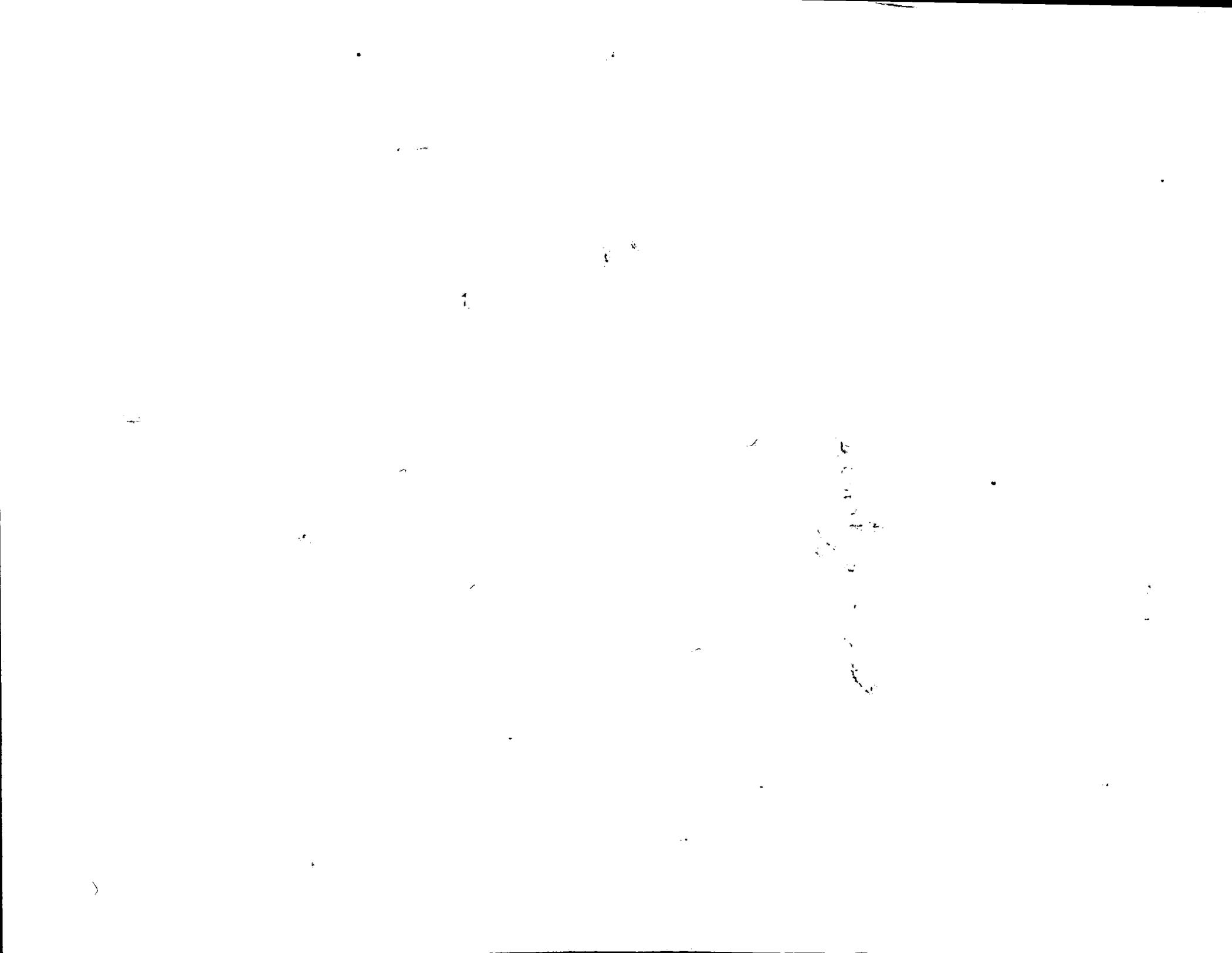


Exhibit 6

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

DEEP DISTRIBUTORS OF GREATER
NY D/B/A THE IMPERIAL SALES, INC.

and

LOCAL 660, UNITED WORKERS OF AMERICA

Case 29-CA-147909 and
29-CA-157108

and

HENRY HERNANDEZ, An Individual

ANSWER TO COMPLIANCE SPECIFICATION

Respondent, **DEEP DISTRIBUTORS OF GREATER NEW YORK, INC. d/b/a THE IMPERIAL SALES, INC.** “Deep Distributors” or “Employer”, by and through its attorneys, Certilman Balin Adler & Hyman, LLP, and pursuant to Section 102.56 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, for its Answer to the Compliance Specification and Notice of Hearing (“Compliance Specification”) filed herein, alleges and answers as follows:

JURISDICTION AND VENUE

1. Respondent denies each and every allegation in Section I of the Compliance Specification, “The Discriminatees,” except admits that the eight named individuals were former employees of Respondent.
2. Respondent denies each and every allegation set forth in Section II of the Compliance Specification, “Backpay Period,” except admits that the dates of discharge of the former employees listed on the chart on page three is accurate, and notes that by July 29, 2016,

Respondent had made valid reinstatement offers to each of same.

3. Respondent denies each and every allegation set forth in Section III of the Compliance Specification, "Computation of Gross Backpay," except admits that the named individuals each worked forty hours per week and admits the accuracy of the alleged hourly rate of pay for the 2015 time period only, for the same named individuals.
4. Respondent denies knowledge or information sufficient to form a belief as to the allegations within Section IV of the Compliance Specification, "Interim Earnings," regarding the interim earnings of the named former employees of Respondent.
5. Respondent denies each and every allegation set forth in Section V of the Compliance Specification, "Net Backpay," except denies knowledge or information sufficient to form a belief regarding the interim earnings of the named former employees of Respondent.
6. Respondent denies each and every allegation set forth in Section VI of the Compliance Specification, "Excess Tax Liability on Backpay."
7. Respondent denies each and every allegation set forth in Section VII, "Summary."

AFFIRMATIVE DEFENSES

As and For the First Affirmative Defense

Respondent has already offered unconditional reinstatement to all alleged "discriminatees."

As and For A Second Affirmative Defense

Respondent does not owe backpay to alleged "discriminatees" Jose Reyes, Augustin Sabillon, Henry Hernandez, Jose Amador, and Jose Arguenta inasmuch as those alleged "discriminatees" have signed releases in this matter in relation to Eastern District of New York case no.: 15-cv-03980, releasing Respondent of all further liability or backpay obligations.

As and For A Third Affirmative Defense

Respondent does not owe backpay to alleged “discriminatees” Jose Reyes, Augustin Sabillon, Henry Hernandez, Jose Amador, and Jose Arguenta inasmuch as the United States District Court in the Eastern District of New York so ordered the stipulation and order of final dismissal of case no.: 15-cv-03980(JMA)(ARL) brought by those alleged “discriminatees.”

As and For A Fourth Affirmative Defense

Respondent does not owe backpay to any of the alleged “discriminatees” inasmuch as the award of backpay is entirely foreclosed by the illegal immigration status of the alleged “discriminatees” and their violation of federal immigration laws.

As and For A Fifth Affirmative Defense

Respondent does not owe backpay to any of the alleged “discriminatees” because of their failure to mitigate their alleged damages.

As and For A Sixth Affirmative Defense

Respondent has not been apprised in detail by the Regional Director of the amounts and sources of interim earning of the alleged “discriminatees.”

WHEREFORE, having answered, Respondent respectfully requests that the claims for backpay be dismissed in their entirety with prejudice, and for such other and further relief as this Court may deem just and proper.

Respondent expressly reserves the right to amend their Answer and assert additional defenses and/or supplement, alter or change this Answer upon completion of appropriate investigation and discovery.

Dated: East Meadow, New York
August 1, 2019

**CERTILMAN BALIN ADLER &
HYMAN, LLP**

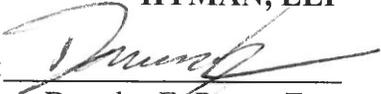
By: 
Douglas E. Rowe, Esq.
Attorneys for Employer
90 Merrick Avenue, 9th Floor
East Meadow, NY 11554
(516) 296-7000
drowe@certilmanbalin.com

EXHIBIT D

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**DEEP DISTRIBUTORS OF GREATER NY
D/B/A THE IMPERIAL SALES INC.**

and

**Cases 29-CA-147909
29-CA-157108**

LOCAL 660, UNITED WORKERS OF AMERICA

ORDER TO SHOW CAUSE

On September 4, 2019, the General Counsel filed and served on the parties a motion for a bill of particulars in the above-captioned case. As described more fully in the motion papers, the General Counsel seeks an order requiring the Respondent to provide a description of evidence in support of its affirmative defense that no backpay is due to the discriminatees because of their alleged illegal immigration status.

If the Respondent desires to file and serve an opposition to the General Counsel's motion for a bill of particulars, it is hereby ORDERED to do so by September 12, 2019.

Dated September 6, 2019
at New York, New York.

S/ Benjamin W. Green
Benjamin W. Green
Administrative Law Judge

Served by email on the following:

Douglas Rowe, Esq.	drowe@certilmanbalin.com
Emily Cabrera, Esq.	Emily.Cabrera@nlrb.gov
Noor I. Alam, Esq.	Noor.Alam@nlrb.gov
Sheri Preece, Esq.	sdp@bcmassociates.org
Giblerto Mendoza	gilbertotitomendoza@hotmail.com