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Trinity Services Group, Inc. and United Food and Commercial Workers Union, Local 99. Case 28–CA–212163

November 20, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

On November 7, 2018, Administrative Law Judge John T. Giannopoulos issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The 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,² and conclusions only to the extent consistent with this Decision and Order.³

The Respondent is a food service company that contracts to prepare and serve meals to prison inmates. One such contract is with the State of Arizona to provide food services to prisoners at the state prison in Douglas, Arizona. For approximately 20 years, the Union has represented the Respondent's employees employed at this prison, and the Respondent and the Union have been parties to successive collective-bargaining agreements, the most recent of which was effective from July 2013 to June 30, 2017.⁴ In June, the Respondent and the Union began negotiations for a successor agreement. Employee Marisol Victoria attended some of the bargaining sessions. The Respondent's proposals included changing the collectively-bargained personal time off or "PTO" plan applicable to employees at the Douglas facility to align it with the PTO plan in place at its unrepresented facilities. According to the Respondent, it was administratively challenging to administer different PTO plans.

1. *The Respondent did not coercively interrogate Marisol Victoria.*⁵ The judge found that the Respondent

¹ Member Emanuel took no part in the consideration of this case.

² 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.

No exceptions were filed to the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(1) of the Act by threatening that collective bargaining between the Respondent and the Union

coercively interrogated Victoria on August 14 when Food Service Director Jesus Puentes asked her if union members were paying fees to the Union. In context, we find that Puentes' comment was a rhetorical question that merely expressed his personal opinion of the Union's value to employees. Accordingly, we shall dismiss this complaint allegation.

Before her shift began on August 14, Victoria went to the Respondent's office to print her paystub. Food Service Director Puentes and Assistant Food Service Director Luna were smoking on a porch outside of the office, and Victoria joined them at Puentes' invitation. After a short discussion about Victoria's family, Luna brought up the subject of the Union and negotiations. He asked what the Union was doing for employees and stated that the Union was not really presenting anything on their behalf at the bargaining table. Victoria responded that the bargaining was what it was. Luna commented that the money employees were paying the Union was not being used to present anything at bargaining. Puentes then asked Victoria if the union members were paying fees to the Union and said that the money they were paying to the Union was being thrown away, and Luna said that employees were paying \$20 per week. Victoria did not respond. Puentes then said that if Victoria would like to throw her money away, she should give it to him. In response, Victoria made a gesture of giving away her paystub and said to Puentes, "You can have it for me." She then left the porch.

The Act does not make it illegal per se for employers to question employees about union activity. Rather, to establish a violation, the General Counsel must show that, under all the circumstances, the questioning reasonably tended to restrain, coerce, or interfere with employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *affd.* sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Circumstantial factors relevant to the analysis include the employer's background (i.e., whether there is a history of union hostility or discrimination), the nature of the information sought (i.e., whether the interrogator appeared to be seeking information on which to base taking action against individual employees), the identity of the

would be futile and by coercively interrogating employee Marisol Victoria through Assistant Food Service Director Gustavo Luna.

³ We shall amend the judge's Conclusions of Law and modify his recommended Order to conform to the violation found and in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified.

⁴ All dates hereafter are in 2017 unless otherwise indicated.

⁵ Chairman Ring and Member Kaplan join in this finding. For the reasons given in her partial dissent, Member McFerran would affirm the judge's finding that Puentes unlawfully interrogated Victoria.

questioner (i.e., whether he or she held a high position in the company hierarchy), the place and method of interrogation (i.e., whether the employee was called from work to the interrogator's office, and whether there was an atmosphere of unnatural formality), and the truthfulness of the employee's reply. *Id.*; *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); see also *Temp Masters, Inc.*, 344 NLRB 1188, 1188 (2005), *affd.* 160 F.3d 684 (6th Cir. 2006).

Consistent with these principles, we find that the single question Puentes asked Victoria—whether union members were paying fees to the Union—was not unlawful. To begin with, there is no history of antiunion hostility or discrimination. To the contrary, the Respondent and the Union have a 20-year bargaining relationship. The question was posed in the course of an informal conversation that took place on the porch outside the Respondent's office, and a reasonable employee would have understood it as part of Puentes' expression of his low opinion of the Union's value to employees. Although Victoria did not reply, Puentes apparently did not seek a response, either. Significantly, Puentes merely asked a general question about whether union members were paying fees to the Union, not about whether any specific union member was paying or not paying fees. Thus, Puentes' comment did not "appear[] to be seeking information upon which to take action against individual employees." *John W. Hancock Jr., Inc.*, 337 NLRB 1223, 1224 (2002) (citing *Bourne*, 332 F.2d at 48), *enfd.* 73 Fed.Appx. 617 (4th Cir. 2003). Instead, Puentes' remark, in context, was a

rhetorical question posed as part of a lawful expression of his opinion that paying money to the Union was not a good investment. The only fact that tends to favor a finding of coercion is that Puentes is a high-level manager. This is far from sufficient to make out a violation of the Act.

Our dissenting colleague contends that Puentes' off-hand exchange with Victoria was, in reality, a sinister effort to determine whether other employees were paying dues, which she views as "a key barometer of support" for the Union in a right-to-work state. In addition, she finds the comment coercive because it was accompanied by "negative comments about the Union." We disagree.

As the Board recognized in *Rossmore House*, above, 269 NLRB at 1177, "[t]o hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace" (quoting *Graham Architectural Products v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983)). This observation is apropos here. No reasonable employee in Victoria's place would have taken Puentes' isolated and casual question as an effort to enlist her as "an informer regarding the union activity" of fellow employees.⁶ As to the negative comments about the Union cited by the dissent, those were lawful expressions of opinion protected by Section 8(c) of the Act, as the judge found (and no party excepted).⁷ Such protected free speech does not support a finding that Puentes' question was coercive. See *John W. Hancock Jr., Inc.*, above, 337 NLRB at 1224 (finding employer's prior statements that it would do everything in its power to keep the union out and

⁶ *Abex Corp.*, 162 NLRB 328, 329 (1966), quoted by our colleague. Cases cited by the dissent in support of this proposition are readily distinguishable. In *Norton Audubon Hospital*, 338 NLRB 320, 321 (2002), for example, the employer asked an employee during a performance evaluation meeting if she knew about the level of union support among other employees and whether the union had enough votes to win an election, after also pointedly noting that the employee wore a union button, questioning whether she liked her job, and suggesting that the union could not help employees "if there's nobody to put in the job." Likewise, in *Cumberland Farms*, 307 NLRB 1479 (1992), *enfd.* 984 F.2d 556 (1st Cir. 1993), the Board found an 8(a)(1) violation where two supervisors, one of whom was highly placed, engaged in repeated, probing questioning of two employees over the course of several days, including asking how many employees in specific departments had signed authorization cards. In *Horton Automatics*, 289 NLRB 405, 412 (1988), *enfd.* mem. 884 F.2d 574 (5th Cir. 1989), *cert. denied* 494 U.S. 1079 (1990), the employer assembled its employees and asked who among them had been giving information to the union that formed the basis for the union's charges against the employer. In *Time Warner Cable New York City, LLC*, 366 NLRB No. 116, slip op. at 4–5 (2018), the employer asked employees how they learned about a planned union demonstration that violated a contractual no-strike provision and was therefore unprotected, for the purpose of determining whether the employees had participated and were therefore subject to discipline. Finally, in *Abex Corp.*, above, the employer's plant superintendent asked employees if they knew who was trying to start a union and who was the union leader. The wide gap between the coercive conduct in these cases and the facts presented here

further supports our finding that Puentes' isolated and casual question did not violate the Act.

⁷ Sec. 8(c) provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit" (emphasis added).

TKC, a Joint Venture, 340 NLRB 923 (2003), *enfd.* 123 Fed.Appx. 554 (4th Cir. 2005), and *Farmer Bros. Co.*, 303 NLRB 638 (1991), *enfd.* 998 F.2d 120 (9th Cir. 1993), cited by the dissent, are not to the contrary. In both cases, the Board found the disputed questioning unlawful on the basis of all the surrounding circumstances, as *Rossmore House* and its progeny require, including coercive factors not remotely present here. Specifically, in *TKC*, a manager, who appeared "agitated," approached an employee shortly after the employee had distributed union literature, asked the employee if he was in the union, and when the employee responded that he was not but was trying to join, responded, "Why would you want to do that? Why the fuck would you want to pay somebody to let you work?" 340 NLRB at 924. In *Farmer Bros.*, during an employment interview, the employer's vice president asked an applicant whether he had been an officer or a steward for the Teamsters and whether he was "a strong union man"; and during a subsequent interview, the company president asked the applicant how he felt about the union himself and, once again, whether he was "a strong union man." 303 NLRB at 641. The facts of these cases are a far cry from the lawful comments made by Puentes and Luna in this case.

referring to employees who solicit authorization cards as “the enemy within” to be protected free speech under Section 8(c) and therefore did not lend any significant support to allegation that isolated question about how many employees had attended union meeting was coercive).

Considering all the circumstances, we find that the General Counsel failed to establish that Puentes’ question reasonably tended to restrain, coerce, or interfere with employees’ exercise of their Section 7 rights.⁸ Accordingly, we shall dismiss this allegation.

2. *The Respondent unlawfully blamed the Union for creating problems with computation of time off credit.* We adopt the judge’s finding that the Respondent violated Section 8(a)(1) of the Act when Unit Manager Sergio Rivera blamed the Union for a PTO problem experienced by Victoria.⁹ Victoria requested 3 days’ PTO in December. Victoria’s timecard showed that she had enough accrued PTO to cover her request, but the Respondent’s office manager, Frank Romero, told Victoria that she had no PTO. Victoria questioned this, and Romero said there was a problem because the Respondent’s system showed that Victoria had no remaining PTO but her company-generated timecard showed that she had 3 days remaining. At this point, Rivera chimed in, saying, “[T]hat is a problem that the Union created regarding PTO. You need to fix that with the Union.” Victoria said that everything was okay but that the Respondent should ensure employees received the correct PTO. Rivera agreed but repeated, “[T]hat’s the problem with the Union.” Ultimately, Victoria was granted 1 day of leave.

At the time of this conversation, the Respondent and Union were still negotiating a successor bargaining

agreement and the Respondent’s proposal to eliminate the current contractual PTO credit system for unit employees in the next contract was only tentatively agreed upon in bargaining. Grievances had been filed by the Union about the Respondent’s determination of PTO credits under the current contract.¹⁰ It is undisputed that the Union had no responsibility for the Respondent’s PTO bookkeeping and that the discrepancy at issue was likely attributable to the failure of the Respondent’s current software program to accurately account for the computation of PTO credit under the contractual terms applicable for employees represented by the Union at the Douglas facility, as opposed to the different terms applicable to all unrepresented employees at the Respondent’s non-union facilities.

As the judge stated, it is well established that “[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1).” *Sears, Roebuck & Co.*, 305 NLRB 193, 193 (1991). Nevertheless, the judge correctly found that in the context of this conversation Rivera’s statement had a reasonable tendency to interfere with employees’ Section 7 rights by placing the blame for problems in computing Victoria’s PTO credits on the Union. See *Novelis Corp.*, 364 NLRB No. 101, slip op. at 2 fn. 9 (2016) (finding that Respondent’s false representations to employees disparaging the Union “violated Sec. 8(a)(1) as it constitutes interference, restraint, and coercion that unlawfully tended to undermine the Union”), *enfd.* in relevant part 885 F.3d 100 (2d Cir. 2018).¹¹

Relying on principles from *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), our dissenting colleague would find that the statement was an expression of opinion

⁸ In support of his finding that Puentes’ questioning violated Sec. 8(a)(1), the judge cited *Creutz Plating Corp.*, 172 NLRB 1 (1968). However, there were no exceptions to the judge’s 8(a)(1) interrogation finding in that case, and therefore *Creutz Plating* is not relevantly precedential. See *Watsonville Register-Pajaronian*, 327 NLRB 957, 959 fn. 4 (1999). The judge also cited *Ridgewood Management Corp.*, 171 NLRB 148 (1968), a case decided before *Rossmore House*, above. In *Ridgewood Management*, the Board adopted the trial examiner’s finding that the respondent coercively interrogated employees where, in the context of a recent union organizing campaign, the company president asked employees generally and individually whether they had signed union cards or paid initiation fees or whether they would join the union. *Id.* at 149–150. For the reasons discussed above, Puentes’ comment is distinguishable from the questions posed in *Ridgewood Management*.

Citing *RHCG Safety Corp.*, 365 NLRB No. 88, slip op. at 1–2 (2017), the judge also found that Puentes’ question was unlawful because he did not convey a legitimate purpose for asking the question or provide assurances against reprisals, and the dissent finds likewise. *RHCG* is easily distinguished. There, the employer responded by text message to an employee’s request to return to work with the question, “U working for [the employer] or u working in the union?” The employee was not an open union supporter, and the question not only sought to determine his union sympathies but also strongly suggested that working for the employer and “working in the union” were incompatible. No such facts are present

here: Puentes’ rhetorical question neither sought to uncover employees’ union sympathies nor implicitly threatened reprisal. In these circumstances, Chairman Ring and Member Kaplan find it unnecessary to decide whether an employer’s failure to convey a legitimate purpose for a question or give assurances against reprisals—factors not mentioned in *Rossmore House* or *Bourne*—are properly considered in determining whether questioning constitutes an unlawful interrogation. See *RHCG*, 365 NLRB No. 88, slip op. at 9 fn. 8 (Chairman Miscimarra, concurring); *Evenflow Transportation, Inc.*, 358 NLRB 695, 696 fn. 4 (2012) (Member Hayes, concurring), adopted by reference 361 NLRB 1482 (2014).

⁹ Members McFerran and Kaplan join in this finding. For the reasons given in his partial dissent, Chairman Ring would find Rivera’s comments lawful.

¹⁰ Like the judge, we find no need to determine whether Victoria herself filed a grievance after the December 15 discussion. The Respondent does not except to the judge’s statement that grievances previously filed by the Union about PTO were still “outstanding” on that date.

¹¹ See also *Westminster Community Hospital Inc.*, 221 NLRB 185, 193 (1975) (“[b]y placing responsibility for the absence of greater benefits . . . exclusively on the Union, which had had no role in the matter, [the Respondent] was attempting to disparage the Union ‘in the eyes of the employees so as to discourage membership in the Union.’”) (citation omitted), *enfd.* mem. in relevant part 566 F.2d 1186 (9th Cir. 1977).

protected by Section 8(c) of the Act because it did not convey a coercive threat. However, as recently explained by the United States Court of Appeals for the District of Columbia Circuit, the Supreme Court distinguished statements of opinion protected under Section 8(c) from “‘coercive . . . overstatements’ that an employer ‘has reason to believe will mislead his employees.’” *NLRB v. Ingedion, Inc.*, 930 F.3d 509, 516 (D.C. Cir. 2019), quoting from *Gissel Packing*, supra at 620. In affirming the Board’s finding of an 8(a)(1) violation in *Ingedion*,¹² the court noted with approval that “[t]he Board has held that an employer violates Section 8(a)(1) by ‘misrepresent[ing] the [u]nion’s bargaining positions’ in a way that ‘tends to undermine’ employee support for the union. *Id.* citing *RTP Co.*, 334 NLRB 466, 467–468, (2001), enfd. sub nom. *NLRB v. Miller Waste Mills*, 315 F.3d 951 (8th Cir. 2003), cert. denied 540 U.S. 811 (2003); *Faro Screen Process, Inc.*, 362 NLRB 718, 718–719 (2015). Further, the court explained, “Ingedion’s contention that the manager’s statements were non-threatening . . . misunderstands the nature of its violation. The Board did not find that the statements were threatening, but rather that they were misleading.” *Id.* Accordingly, the court concluded that the record supported “the Board’s finding that Ingedion violated Section 8(a)(1) by misrepresenting the Union’s position in a way that tended to cause employees to lose faith in the Union.” *Id.*

Contrary to our dissenting colleague, we find the facts here are not meaningfully distinguishable from those at issue in *Ingedion*. Rivera’s statements were patently false as to administration of the extant contract. There was no objective basis for blaming the Union, rather than the Respondent, for the claimed discrepancy between the company-generated timecards and its computer system.¹³ Moreover, whether or not intended,¹⁴ Rivera’s misrepresentation, made during ongoing contract negotiations and grievance proceedings about the PTO computation issue, would undermine the Union’s status as bargaining representative and reasonably tend to cause an employee to lose faith in the Union’s representation on the PTO issue. On this basis, we affirm the judge’s finding that the Respondent violated Section 8(a)(1).

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 3 and renumber the subsequent paragraphs accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Trinity Services Group, Inc., Douglas, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs accordingly.

2. Substitute the following for paragraph 2(a).

“(a) Within 14 days after service by the Region, post (in both English and Spanish) at its Douglas, Arizona facility copies of the attached notice marked “Appendix.”¹⁵ Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed 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 December 15, 2017.”

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. November 20, 2019

John F. Ring,

Chairman

¹² *Ingedion, Inc.*, 366 NLRB No. 74 (2018).

¹³ Contrary to our dissenting colleague, it is irrelevant to our 8(a)(1) interference analysis whether the timecard computation was correct or whether Victoria actually should have received credit for 3 PTO days.

¹⁴ The Respondent argues that Rivera may have intended only to urge Victoria to contact a Union representative for assistance regarding her PTO complaint. However, the standard for determining whether a statement violated Sec. 8(a)(1) is an objective one, and the speaker’s intent is

irrelevant. See *Flying Foods*, 345 NLRB 101, 105 (2005), enfd. 471 F.3d 178 (D.C. Cir. 2006).

¹⁵ 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.”

Lauren McFerran Member

Marvin E. Kaplan Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN RING, dissenting in part.

I agree that the Respondent did not violate Section 8(a)(1) of the National Labor Relations Act by interrogating employee Marisol Victoria, and I join that part of the Board's decision. However, I disagree that the Respondent violated the Act when it blamed the Union for an administrative mixup regarding paid leave for Victoria under its personal time off (PTO) policy.

The Respondent provides food services at prisons across the United States. Its employees at the state prison in Douglas, Arizona, are represented by the Union; all its other employees are unrepresented. Under the most recent collective-bargaining agreement between the Union and the Respondent, the Douglas employees received a fixed number of PTO days at the beginning of each year, the number of which varied depending on years of service. They also accrued additional PTO time monthly, at rates that also varied depending on years of service, in accordance with a 3-tier schedule (1-7 years, 8-14 years, 15 years or more). All other employees received PTO based solely on accrual, per pay period (not per month), at rates that differed from the accrual rates in effect at Douglas, also varying depending on years of service but in accordance with a 5-tier schedule (less than 2 years, 2-5 years, 5-10 years, 10-15 years, more than 15 years) instead of a 3-tier schedule. In other words, as between employees at Douglas and employees everywhere else, calculating PTO differed in just about every conceivable way. Unsurprisingly, these differences were an administrative headache, and one consequence was that sometimes discrepancies would show up in the Respondent's PTO recordkeeping for particular employees.¹ The Union filed grievances regarding these discrepancies, and when the parties began

¹ Worse still, in early 2017 the parties began to dispute the proper interpretation of the contract language concerning PTO days. The Union believed that the Douglas employees were entitled to 5-10 PTO days at the beginning of the year and continued to accrue additional hours of PTO each month (Tr. 34). The Respondent believed that the employees stopped accruing additional hours monthly once the start-of-the-year PTO days plus monthly accruals reached a certain maximum (GC Exh. 9). The Union grieved, and in June 2017 it requested arbitration, which, according to Puentes, involved the issue of PTO balances related to the

negotiating for a successor agreement in June 2017, the Respondent proposed that the Douglas facility switch to the same PTO policy in force at its other facilities.² In early December, the Union agreed to the Respondent's PTO proposal subject to certain conditions, including rolling over the current year's unused PTO to the next year. However, the parties did not reach overall agreement on a new contract.

On December 15, Victoria received a text message from Unit Manager Sergio Rivera, asking her to report to the office to make a change on her timecard regarding PTO. When she arrived at the office, Office Manager Frank Romero told her to sign for a change that was made on her timecard because she no longer had any PTO left. Victoria responded, "[O]kay, but I was under the understanding that I still had 3 days of PTO." Romero said, "[T]hat is the problem we are having. In my system it reflects that you no longer have PTO, even though [on] your time card it is reflected as you still have [PTO]." Rivera then said, "[T]hat is a problem that the Union created regarding PTO. You need to fix that with the Union." Victoria replied, "[E]verything is okay. I don't have any problems towards you. I know you are not the ones that take care of the system. [B]ut if you are working in the same company as we are, you should be taking care of giving us the correct PTO." Rivera said, "[Y]es, I know, but that's the problem with the Union." Victoria was ultimately granted 1 day of leave. The judge noted that she "claimed" to have filed a grievance concerning her PTO request.

Contrary to the judge and my colleagues, I find that Rivera's offhand remarks did not violate the Act. An employer's statements violate Section 8(a)(1) if they have a reasonable tendency to "interfere with, restrain, or coerce" employees in the exercise of their Section 7 rights. But criticism or disparagement of a union does not violate the Act. An employer "may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006).

In my view, Rivera's remarks were a lawful expression of his personal opinion, protected by Section 8(c), that the Union was responsible for the recordkeeping problems

lump-sum hours received at the beginning of each year. The record does not clearly show whether that grievance was resolved in any way, but it abundantly shows that PTO computation for the Douglas employees was fraught with uncertainty.

² The Respondent's October 20, 2017 Negotiation News distributed to employees specifically cited the administrative challenges with the existing PTO policy at the Douglas facility as a reason for the proposal (GC Exh. 14).

All dates hereafter are in 2017.

regarding Victoria's PTO. It was certainly true that such problems cropped up from time to time and that the PTO system provided for in the collective-bargaining agreement meant that the Respondent had to administer two entirely dissimilar PTO systems, one for its Douglas employees and another for everyone else. As noted above, the Respondent had previously communicated to employees its position that the different systems made the contractual PTO system difficult to administer. In this broad sense, it was not unreasonable of Rivera to express an opinion linking the recordkeeping problems with the Union. Of course, it was unfair to lay the blame entirely at the Union's feet. After all, the Respondent agreed to the separate PTO system at Douglas in collective bargaining. But criticism need not be fair to be lawful. See, e.g., *North Kingstown Nursing Care Center*, 244 NLRB 54, 65 (1979) (finding that the employer's statements about the union, "however false or unsubstantiated," were "privileged expressions of opinion" that "did not rise to the level of interference, restraint, or coercion prohibited by Section 8(a)(1) of the Act"); *Camvac International*, 288 NLRB 816, 820 (1988) (finding that employer did not unlawfully imply that union was preventing it from granting benefits by stating that every time it granted benefits, union filed charges; holding that statement "did not . . . contain any express or implied threat of loss of benefits but was merely an expression of views or arguments protected under Section 8(c)").³

I recognize that an employer violates the Act when it takes an adverse action against one or more employees and falsely blames the union for its action. See, e.g., *Faro Screen Process, Inc.*, 362 NLRB 718 (2015) (employer rescinded a just-implemented wage increase and blamed the union); *Webco Industries*, 327 NLRB 172 (1998) (employer unlawfully discharged four employees and blamed the union), enfd. 217 F.3d 1306 (10th Cir. 2000). But here, it has not been established that the Respondent took an adverse action against Victoria. That is, it has not been shown that Victoria was denied accrued PTO to which she was entitled. The record shows that Victoria *believed*, based on her timecard, that she had 3 days of accrued PTO, and that the Respondent, based on other records,

³ *Ingredion, Inc.*, 366 NLRB No. 74, slip op. at 1 fn. 1 (2018), enfd. 930 F.3d 509 (D.C. Cir. 2019), cited by the majority, is readily distinguishable. There, the employer falsely stated to employees that the employer was willing to offer employees a more generous contract but the union was unwilling to bargain. No facts of this character are present here: Rivera did not misrepresent the Union's bargaining position or accuse it of refusing to bargain, much less falsely blame the Union for employees not receiving more favorable benefits—a charge that plainly would cause them to lose faith in the Union. *Novelis Corp.*, 364 NLRB No. 101, slip op. at 2 fn. 9 (2016), enfd. in relevant part 885 F.3d 100 (2d Cir. 2018), also cited by the majority, is also readily distinguishable.

determined that she had only one. We do not know that Victoria's timecard was correct and the Respondent's other records were not. Indeed, the judge did not decide this issue, finding only that "[f]or whatever reason Victoria was denied two days of PTO in December" (emphasis added).⁴ Thus, the General Counsel has failed to establish an adverse action.

Finally, some remarks are "of such obviously limited impact and significance that we ought not to find that [they] rise[] to the level of constituting a violation of the Act." *Musicians, Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 621 (1973). Even if Rivera's remarks would otherwise constitute a de minimis, technical violation of the Act, I would place them in the *Jimmy Wakely Show* category and decline to find a violation.

I would dismiss the complaint in its entirety.

Dated, Washington, D.C. November 20, 2019

John F. Ring,

Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting in part.

Contrary to my colleagues, the judge properly found that the Respondent's highest-ranking manager interrogated an employee about her and her coworkers' support for the Union. In the midst of contract negotiations, the manager, accompanied by another high-ranking supervisor, questioned the employee whether employees were paying dues to the Union, a key barometer of support given that this case arises in a "right-to-work" state where employees cannot be compelled to pay even core dues. An employee in those circumstances would have reasonably felt coerced because a meaningful response would have required the employee to reveal not only her and her coworkers' union sympathies, but also that she had been discussing this subject with her coworkers.

There, the employer falsely represented to employees that the union had filed charges seeking the rescission of their Sunday premium pay and unscheduled overtime, and that the employer would have to rescind these benefits as a result. Rivera's statement to Victoria did not assert that employees would lose any existing benefits, much less blame the Union for such losses.

⁴ The judge found that "Victoria *claims* to have filed a grievance over the matter, but it is unclear from the record the outcome of the grievance" (emphasis added). Assuming the claim is true, the filing of a grievance does not establish that Victoria was denied 2 days' PTO to which she was entitled.

I.

The facts here are not in dispute. The Respondent's two highest-ranking officials at the facility are Food Service Director Jesus Puentes and Assistant Food Service Director Gustavo Luna. The United Food and Commercial Workers Union, Local 99 (Union) has represented the Respondent's employees at the facility for approximately 20 years. The present case arose shortly after the parties commenced negotiations in June 2017 for a successor collective-bargaining agreement.

On August 14, 2017, employee Marisol Victoria stopped by the Respondent's office to print her paycheck stub because she had been experiencing issues related to the accuracy of her personal time off (PTO) accrual.¹ Upon exiting the office, Victoria was invited by Puentes to join his conversation with Luna on the porch. The conversation initially focused on Victoria's family, but then the managers abruptly turned the discussion toward the Union.

Luna raised the topic of the Union and the parties' ongoing contract negotiations, criticizing the Union's representation of employees and its ability to present anything on behalf of employees at the negotiating table. Specifically, Luna questioned the Union's effectiveness and whether the Union was making good use of employees' dues in presenting their interests in bargaining. Puentes then directly asked Victoria "whether the members were paying fees to the Union." When Victoria did not answer, Luna did, telling Puentes "that what employees were paying was \$20 per week." Puentes then equated Victoria's monetary support for the Union to throwing money away and suggested that she should give it to him instead.

II.

On those facts, the judge properly found that Puentes unlawfully interrogated Victoria about whether employees were financially supporting the Union during successor bargaining negotiations. When considering whether the questioning of an employee constitutes an unlawful interrogation, the Board's "task is to determine whether

under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood Health Care Center*, 330 NLRB 935, 940 (2000).² In analyzing the totality of the circumstances, the Board considers the following factors: the position of the questioner in the company hierarchy; the nature of the information sought; the truthfulness of the reply; whether the employer had, or conveyed, a legitimate purpose for the question; whether assurances against reprisals were made; whether the employer has a history of antiunion hostility or discrimination; whether the employee is an open and active union supporter; and the place and method of interrogation. See *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *enfd. sub nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *RHCG Safety Corp.*, 365 NLRB No. 88, slip op. at 1–2 (2017); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).³

Applying those well-established principles, Puentes' question was unlawful because an employee in Victoria's position would have reasonably felt coerced by a high-level manager inquiring into her and her coworkers' financial support for the Union.⁴ See *SAIA Motor Freight, Inc.*, 334 NLRB 979, 980 (2001) (questions that constitute "a pointed attempt to ascertain the extent of the employees' union activities" are unlawful). Here, the conversation was initiated and dominated by the Respondent's two highest-ranking managers at the facility,⁵ and a reasonable employee would have understood Puentes' question as seeking information about the employees' financial support for the Union—an important indicator of the Union's strength at the bargaining table during successor contract negotiations.⁶ See *Norton Audubon Hospital*, 338 NLRB 320, 321 (2002) (questions that addressed other employees' support for the union added to the coercive nature of the interrogation) citing *Cumberland Farms*, 307 NLRB 1479 (1992) ("the fact that the interrogators sought information about other employees and the organizing effort in general" supports a finding that the interrogation was

¹ As the judge noted, the Respondent's proposed changes to and administration of PTO was one of the major issues during bargaining. The Union also filed grievances to ensure that employees could use their accrued PTO benefits.

² The Board's test is objective and "does not take into account either the motive of the employer or the actual impact on the employee." *Id.* at fn. 17.

³ The factors are "useful indicia that serve as a starting point for assessing the 'totality of the circumstances'" and are not meant to be applied mechanically. *Westwood Health Care Center*, above at 939, citing *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

⁴ Unlike my colleagues, whose analysis is dependent upon their conclusion that Puentes' question was meant to be rhetorical, I have not

ascribed any motive—"sinister" or otherwise—to Puentes because any motive that he may have possessed is not relevant. See fn. 2, above.

⁵ Although Puentes, the highest-ranking official at the facility, asked the question concerning whether members were paying fees to the Union, Luna, the day-to-day manager and second highest-ranking official, was an active participant in the conversation—criticizing the Union and its ability to bargain on behalf of employees twice before Puentes inquired about the status of members paying fees. See *Naomi Knitting Plant*, 328 NLRB 1279, 1280 (1999) (explaining that the "double-teaming" of the colloquy amplified the questioning's impact).

⁶ As noted above, because Arizona is a right-to-work state where employees cannot be compelled to pay dues, knowing whether employees actually were paying dues to the Union would have provided the Respondent with valuable insight into the Union's support.

unlawful), enfd. 984 F.2d 556 (1st Cir. 1993); *Horton Automatics*, 289 NLRB 405, 412 (1988) (finding unlawful interrogation where “[t]he question asked [by the highest-ranking official] was not rhetorical but rather was calculated to invoke a response from the employees that would reveal their union sympathies[.]”), enfd. mem. 884 F.2d 574 (5th Cir. 1989), cert. denied 494 U.S. 1079 (1990).

Moreover, in order to answer Puentes’ question, Victoria would also have had to reveal that she had engaged in conversations with her coworkers regarding their financial support for the Union—classic protected concerted activity. See *Time Warner Cable New York City, LLC*, 366 NLRB No. 116, slip op. at 5 (2018) (finding unlawfully coercive questions that “intruded into Section 7 communications between employees”); see also *Abex Corp.*, 162 NLRB 328, 329 (1966) (“The Board holds . . . that interrogation which seeks to place an employee in the position of acting as an informer regarding the union activity of his fellow-employees is coercive.”).⁷ Not surprisingly, Victoria did not respond to Puentes’ question, prompting Luna to answer instead.⁸ See *Chipotle Services, LLC*, 363 NLRB No. 37, slip op. at 11–12 (2015) (finding that an employee’s decision not to answer a high-ranking supervisor’s question was evidence of a coercive interrogation).

From Victoria’s perspective, the coercive nature of Puentes’ question is also supported by the fact that Puentes did not have or communicate any legitimate purpose for asking her about employees’ payment of dues to the Union; nor did he provide Victoria with any assurances against reprisals. See *RHCG Safety Corp.*, above, 365

NLRB No. 88, slip op. at 1–2 (no legitimate purpose for the question and no assurances against reprisals given were relevant factors, among others, considered by the Board in finding interrogation unlawful).⁹ To the contrary, most of Puentes and Luna’s conversation with Victoria—including Puentes’ comment immediately following his question that “money they [members] were paying to the Union was being thrown away”—was replete with negative comments about the Union and served as a platform for them to express their hostility toward the Union. See *TKC, A Joint Venture*, 340 NLRB 923, 924 (2003), enfd. 123 Fed.Appx. 554 (4th Cir. 2005) (finding rhetorical question about union support coercive in the context of other comments where only apparent reason for the question was to convey hostility and disapproval of the union); *Farmer Bros. Co.*, 303 NLRB 638, 653 (1991), enfd. mem. 998 F.2d 120 (9th Cir. 1993) (finding unlawful interrogation where questions were accompanied by statements indicating hostility to the union).¹⁰

Additionally, “[t]he Board has recognized that a subsequent unfair labor practice can increase the coerciveness of a preceding interrogation or threat, depending on the relationship between the two events and the totality of circumstances.” *Santa Fe Tortilla Co.*, 360 NLRB 1139, 1140 fn. 8 (2014).¹¹ In the present case, the judge found—and a Board majority affirms—that the Respondent subsequently violated Section 8(a)(1) by blaming the Union for Victoria’s problems regarding the accuracy of her PTO accrual, even though the Union was not involved in the administration of the Respondent’s PTO system. This

⁷ The majority’s attempt to distinguish these cases is unpersuasive. Although the specific facts of each case may differ, they all involve—like the present case—instances where employers sought information about other employees’ union sympathies and protected activities, which the Board found unlawful.

⁸ Contrary to my colleagues, then, Luna did not appear to think that Puentes’ question was “rhetorical.”

⁹ The majority attempts to distinguish *RHCG Safety Corp.* by claiming that Puentes’ question did not seek to uncover employees’ union sympathies. However, it is hard to ascertain how asking an employee “whether the members were paying fees to the Union” is anything other than an attempt to gain information about the employees’ level of financial support for the Union.

Further, the majority, mistakenly in my view, discounts the significance of Puentes’ failure to offer Victoria a legitimate purpose for the question and assurances against reprisals. But even absent those factors, the remaining probative factors still support affirming the judge’s finding of an unlawful interrogation.

¹⁰ Although the record does not contain any evidence of the Respondent having a history of antiunion hostility or discrimination, the majority errs in turning a blind eye toward the negativity expressed by Puentes’ and Luna’s comments. And where, as here, such comments are coupled with a direct question to an employee about her and her coworkers’ union support, those comments are relevant evidence supporting a finding of an unlawful interrogation under the Board’s totality of the circumstances

test. See *TKC, A Joint Venture*, above, 340 NLRB at 924; and *Farmer Bros.*, above, 303 NLRB at 653.

Relatedly, there is no merit to the majority’s attempt to dismiss Puentes’ and Luna’s negative comments about the Union as protected speech under Sec. 8(c) of the Act. On this point, *John W. Hancock Jr., Inc.*, 337 NLRB 1223 (2002), enfd. 73 Fed.Appx. 617 (4th Cir. 2003), cited by the majority, is unavailing. There, the Board refused to take into account the employer’s statements opposing unionization in considering the lawfulness of a low-level supervisor’s question to an employee about how many employees had attended a union meeting. But in that case, the statements predated the relevant questioning whereas here Puentes’ and Luna’s negative comments about the Union were made simultaneously with their questioning of Victoria. Moreover, the Board found that no other circumstances surrounding the questioning suggested an element of coercion that might color the prior statements. Thus, in addition to the questioner being a low-level supervisor, the Board noted, among other things, that the question posed would not have revealed any particular employee’s support for the union, that the supervisor did not express any hostility toward the union, and that although the employer later committed unfair labor practices, none was related to the questioning. Those mitigating factors are absent from the present case.

¹¹ See also *Westwood Health Care Center*, above, 330 NLRB at 940 fn. 17 (“An employee may reasonably come to realize only after the fact, in light of subsequent statements or events, that seemingly benign questions were actually efforts to ferret out his union sentiments by an employer hostile to union activity.”).

subsequent unfair labor practice involving Victoria would reasonably have further colored Puentes' questioning of her, as it also included disparaging comments that undermined the Union's status as bargaining representative.

Furthermore, the record evidence does not establish that Victoria was an open and active union supporter at the time of the interrogation. She was not a union steward or a member of the Union's bargaining committee,¹² and the judge explained that although Victoria did attend some bargaining sessions, "there is no evidence whatsoever that she did so as an 'observer for the Union' or that Puentes knew she attended sessions or 'that she supported the Union in any way whatsoever.'" See *Gardner Engineering, Inc.*, 313 NLRB. 755, 755 (1994), *enfd.* as modified on other grounds, 115 F.3d 636 (9th Cir. 1997) (finding employer questions coercive in part because there is "no evidence in the record that [the employee] was an open and active union supporter at the time of the interrogation, although he was a union member").

Considering all the circumstances, six of the relevant factors militate in favor of finding that Puentes' questioning of Victoria was coercive. The remaining two factors—the Respondent's background and history and the fact that the conversation took place outside the office on the porch—may support the Respondent's position that Puentes' question was lawful, but even so, those factors are clearly outweighed in all the circumstances.

III.

Although my colleagues refer to the particular *Rossmore House* factors, they fail to fully appreciate the broader, more relevant point that the Board must consider all the circumstances as a whole to determine whether an employer's "words themselves or the context in which they are used . . . suggest an element of coercion or interference." 269 NLRB at 1177.

Here, the record as a whole is clear that Puentes' and Luna's conversation with Victoria—and the context in which it took place—was objectively coercive and interfered with Victoria's Section 7 rights. My colleagues' characterization of the conversation as "casual" and

"isolated" betrays their failure to come to grips with that reality: again, the questioning took place during contract negotiations, two high-level supervisors affirmatively brought up the negotiations, and they criticized the Union before and after Puentes directly asked Victoria about her and her coworkers' financial support of the Union.

Moreover, the majority errs in emphasizing that Puentes only asked a single question and that the conversation took place in an informal location outside the office. The Board has previously found unlawful interrogations consisting of a single question¹³ and explained that even if an "interrogation is made in a casual manner during a friendly conversation[, that] does not lessen its unlawful effect." *Abex Corp.*, above, 162 NLRB at 329.¹⁴

Further, there is no merit to the majority's dismissal of Puentes' question as a "rhetorical" one that merely expressed his negative views of the Union. First, as noted, the supposed "rhetorical" nature of the question is belied by the fact that Luna responded when Victoria did not. Second, even assuming that Puentes did not intend for Victoria to answer, the Board's test is an objective one; thus, whether Puentes intended for the question to be rhetorical is irrelevant. See *Smithfield Packing Co.*, 344 NLRB 1, 1 (2004), *enfd.* sub nom. *Food & Commercial Workers Local 204 v. NLRB*, 447 F.3d 821 (D.C. Cir. 2006) ("the standard for determining whether a statement violates Section 8(a)(1) is an objective one that considers whether the statement has a reasonable tendency to coerce the employee or interfere with Section 7 rights, rather than the intent of the speaker."¹⁵ The Board has found that even "rhetorical" questions may be unlawful when they tend "to impede employees in the exercise of their Section 7 rights under conditions violative of Section 8(a)(1) of the Act." *Kidde, Inc.*, 284 NLRB 78, 84 (1987).¹⁶ Last, the Board has also explained that when an employer coercively questions an employee it "is not expressing views, argument, or opinion" that is protected by the Act. See *Struksnes Construction Co.*, 165 NLRB 1062, 1062 fn. 8 (1967).

¹² The judge noted that the Union may not even have had a bargaining committee.

¹³ See, e.g., *Naomi Knitting Plant*, 328 NLRB at 1280 (finding under the circumstances, labor consultant's question "whether anyone had heard anything about the Union" would reasonably tend to interfere with questioned employees' rights); *MDI Commercial Services*, 325 NLRB 53, 69–70 (1997), *enfd.* in relevant part 175 F.3d 621 (8th Cir. 1999) (unlawful interrogation found where low-level supervisor asked employee to "Tell me about this union."); *Medical Center of Ocean County*, 315 NLRB 1150, 1154 (1994) (finding coercive interrogation where supervisor asked an employee "[w]hat's going on . . . what's happening?" to inquire about not only the employee's union activities, but the union activities of other employees in the shop).

¹⁴ See also *Hanes Hosiery, Inc.*, 219 NLRB 338, 338 (1975) ("We long have recognized that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on Respondent's motive, courtesy, or gentleness, or on whether the coercion succeeded or failed.")

¹⁵ See also *Burns Electronic Security Services*, 245 NLRB 742, 742 fn. 2 (1979), *enf. denied* 624 F.2d 403 (2d Cir. 1980) (rejecting characterization of statement as "not intended to elicit any answer" as speculative and irrelevant to the issue of whether the statement tended to coerce employees).

¹⁶ See also *TKC, A Joint Venture*, above, 340 NLRB at 924; *Mauka, Inc.*, 327 NLRB 803, 809 (1999) (finding comments were coercive irrespective of whether they were an interrogation or rhetorical).

v.

For these reasons, I agree with the General Counsel and the judge that Puentes' question to Victoria was unlawful in all the circumstances. An employee in Victoria's position would have reasonably felt coerced—accordingly, the Board should adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act.

Dated, Washington, D.C. November 20, 2019

Lauren McFerran

Member

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 disparage the United Food and Commercial Workers Union, Local 99 (Union), by telling employees that the Union was responsible for creating problems with PTO and employees needed to fix that with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

TRINITY SERVICES GROUP, INC

The Board's decision can be found at <https://www.nlr.gov/case/28-CA-212163> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor

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

Relations Board, 1015 Half St. S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Judith Dávila, Esq., for the General Counsel.

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

DECISION

STATEMENT OF THE CASE

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

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

I. JURISDICTION AND LABOR ORGANIZATION

Trinity admits that it is a corporation with an office and place of business in Douglas, Arizona, where it provides institutional food services to correctional facilities. It further admits that, in conducting its business operations, the company purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Arizona. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Trinity also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Background

Trinity is a food service company that contracts with prisons across the country to prepare and serve meals to inmates. In Arizona, Trinity is contracted by the State of Arizona to provide food preparation and delivery services to the prisoners housed at

the state prison in Douglas, Arizona. Approximately 1,800 inmates are housed at the Douglas prison. Respondent employs about 18 people at the facility, including statutory supervisors; twelve of Respondent's Douglas employees are represented by the Union.² (Tr. 18–21, 114.)

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

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

Jesus Puentes (Puentes) serves as Trinity's food service director at Douglas. Puentes testified that, although he lives and has an office in Douglas, he only visits the Douglas prison every 4 or 6 months; he spends most of his time at the Company's office near Phoenix.³ Gustavo Luna (Luna) is the assistant food service director and is the day-to-day supervisor of Respondent's Douglas employees and managers. Sergio Rivera (Rivera) is the Unit Manager and supervises the Douglas kitchen employees, including the food supervisors. This case concerns statements that Puentes, Luna, and Rivera allegedly made to employee Marisol Victoria (Victoria), who works as a food supervisor, at a time when Respondent and the Union were in the middle of negotiations for a successor agreement. (Tr. 15–18, 25, 76, 113, 133–134.)

B. Negotiations for a successor agreement

Respondent and the Union began negotiations for a successor agreement in June 2017. The parties held a total of four negotiating sessions in 2017 (one in June, August, October, and December) before employees ratified a successor agreement in April 2018. Autumn Mitchell, who works for the Union, was its lead negotiator. It is unclear who served as the Company's lead negotiator. However, Luna attended both the August and December negotiating sessions and Puentes also attended the December meeting. Victoria, along with other employees, also attended some of the negotiations. (Tr. 21–22, 41–42, 49, 54, 74–75, 92, 113.)

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

The parties met again on August 9, 2017 where they discussed

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

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

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

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

C. Negotiation News

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

D. Personal Time Off

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

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

³ Douglas, Arizona is about 230 miles Southeast of Phoenix; the Douglas prison is about 10 miles from the border with Mexico. I take

judicial notice of this geographical information. Fed.R. Evid. 201; *United States v. Johnson*, 726 F.2d 1018, 1021 (4th Cir. 1984) ("geographical information is especially appropriate for judicial notice.")

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

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

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

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

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

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

The subject of PTO ultimately became one of the major issues during bargaining. There were problems with how PTO was being used and accrued, and how the existing contract language was being interpreted. The Union contended that Respondent had changed its interpretation of the contract regarding PTO and was no longer properly crediting employees for all the additional PTO time they earned. Trinity had implemented a new software system where accrued PTO would appear on employee paychecks/time cards, and it became increasingly more challenging for the company to administer a PTO benefits system that applied only to the Douglas employees. Starting in about December 2016 and continuing throughout 2017 the Union filed various grievances to ensure employees were being allowed to use their accrued PTO benefits. In June 2017 the Union requested arbitration over one of the PTO grievances. Puentes testified that he could not remember the specifics of the dispute, but that it involved the issue of employee PTO balances related to

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

the lump sum hours received at the beginning of each year. (Tr. 22, 32–36, 56–61, 67–68; GC Exhs. 6, 14.)

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

E. August 14 conversation

1. Marisol Victoria's testimony

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

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

Victoria testified that, as she entered the office, Puentes and Luna were coming out of the office onto the porch. They exchanged greetings, with a kiss on the cheek and a hug, which was a normal greeting in their community.⁵ Victoria printed her check stubs, and then exited the office walking out onto the porch. Luna and Puentes were sitting on a bench; Luna was smoking a cigarette. Puentes invited Victoria to join them and he asked how she and her kids were doing; the two discussed her family. A little bit into the conversation, Luna brought up the subject of the Union, asking what the Union was doing for workers and saying that it was not really presenting anything on their behalf at the negotiating table. Victoria replied saying "[w]hat was going on was what it was." (Tr. 78) Luna said that the money they were paying the Union was not being used to present anything at the bargaining table for negotiations and that the Union was not doing anything for employees. Then Puentes asked whether the members were paying fees to the Union and said the money they were paying to the Union was being thrown away. Luna said that what employees were paying was \$20 per week.⁶ Victoria did not respond, and then Puentes told Victoria that if she would like to throw her money away, to throw it away and

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

give it to him. Both Luna and Puentes started laughing. According to Victoria, she “also laughed in a way” but was actually mad about the circumstances as they were talking about her money. (Tr. 79.) Victoria said that “money comes and goes,” handed her paycheck stubs to Puentes and said, “you can have it for me.” (Tr. 80.) Then, Victoria saw Union steward Jose Pedrego (Pedrego) walking towards the office. She said goodbye and walked towards Pedrego. When she joined up with Pedrego, she told him that she was glad he was there “because these mother f**ers made me mad.” (Tr. 80–81.) Pedrego asked her what happened, and she said that Puentes and Luna were talking about the Union. Pedrego told her to wait for him, and that he would talk to her in a bit. (Tr. 77–81, 94–98.)

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

2. Jose Pedrego’s testimony

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

3. Jesus Puentes’s testimony

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

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

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

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

4. Gustavo Luna’s testimony

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

Luna recalled them discussing insurance, saying that Victoria had a lot of concern about the cost of insurance going up. Then, according to Luna, Victoria spoke with Puentes, exchanging pleasantries, and said she was leaving as it was getting close to the start of her shift. He gave her a hug and kiss and told her to have a good shift. (Tr. 123–24) According to Luna, the conversation was very pleasant and Victoria did not appear to be upset. He denied telling Victoria that the Union was not doing anything

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

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

for her, and denied the topic of union dues was ever discussed. He also denied that Puentes said anything about union dues, or that employees were throwing away their money by paying dues to the Union. (Tr. 124–26)

F. December 15 discussion

1. Marisol Victoria’s testimony

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

2. Francisco “Frank” Romero’s Testimony

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

3. Sergio Rivera’s testimony

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

According to Rivera, he spoke with Victoria in the office on December 15; however, it was nothing more than just saying hello and goodbye. He testified that he was working in the manager’s office that day, in the area that employees use to copy their paycheck stubs and view their PTO hours; Romero was working in his office finalizing the inventories. He remembered Victoria walking by and saying hello/good morning, but nothing more. Rivera denied telling Victoria that the Union was to blame for the problems with PTO. He also denied knowing that employees had issues with how their PTO was being tracked or that there were discrepancies between the employee PTO balance in the computer system and the balance listed on their paychecks. (Tr. 147–156.)

III. ANALYSIS

A. The August 14 conversation

1. Witness credibility

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

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

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

⁹ Also detracting from Puentes’s credibility is his testimony that he could not remember the specifics about the issues the company and the Union were having regarding PTO, despite previously agreeing that PTO

was one of the major issues between the Union and Respondent. (Tr. 22–23.) Also, Puentes was copied on several company emails regarding the PTO issues, and initiated at least one of those emails. (GC Exh. 9) .

other and make her decision. However, Puentes specifically testified that Luna did not have any paper with him, which contradicts Luna's testimony. Moreover, the August 4 Negotiation News simply states that the company was proposing the same medical coverage that it was offering to its non-unionized employees at other facilities. There is no discussion in the newsletter, or anywhere in the record, whether the company's proposed medical coverage would cost employees more, less, or the same as they were currently paying. There is no explanation why Victoria would somehow start discussing purported concerns about money based upon the evidence in the record as to what was occurring during negotiations at the time. I do not credit Luna's testimony.

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

2. Threat of futility

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

In support of this allegation, the General Counsel cites to *Wellstream Corp.*, 313 NLRB 698 (1994) and argues that the statements made to Victoria, coming during contract negotiations, would cause employees to believe that continuing to support the Union would be futile and their efforts would be purposeless. GC Br., at 13-14. In *Wellstream Corp.*, the Board

found a violation where the company president told employees that no "son of a bitch" would bring a union into the company and he would see to it that the company was never unionized, as the statements were intended to, and did, convey to employees the futility of supporting the union. 313 NLRB at 706.

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

Here, I find that the statements made by Luna and Puentes are more similar to those found lawful by the Board in *Trailmobile Trailer* and *W&F Maintenance Co.*, than the those found unlawful in *Wellstream Corp.* While the statements were disparaging and distasteful, they were not accompanied by any threats, nor did they otherwise suggest that employee union activity was futile. Moreover, as of August 14, 2017, it is unclear from the evidence what, if any, bargaining proposals the Union had actually presented to Respondent; the record contains only one written bargaining proposal from the Union dated almost three months later.¹⁰ (GC Exh. 8.) Compare *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985), *enfd. sub nom NLRB v. Pratt & Whitney*, 789 F.2d 121 (2d Cir. 1986) (finding employer's communications "criticizing the Union's demands and tactics" were protected by Section 8(c) because "employees ought to be fully informed as to all issues relevant to collective-bargaining negotiations and the parties' positions as to those issues") with *Miller Electric Pump and Plumbing*, 334 NLRB 824, 825 (2001) (owner's comment to employee that he was "wasting his time" because the company would shut its doors and would not go union was an unlawful expression of futility as the statement that the employee was "wasting his time" was made in conjunction with the owner's unlawful threat of plant closure and indicated to employees that seeking union representation would be futile because it would result in the business closing) and *Weis*

¹⁰ While Victoria testified on cross-examination that, by August the Union had presented proposals on PTO and wages, Victoria is not a

union official and, other than this brief testimony, there is no evidence of these proposals, what they entailed, or when/how they were presented.

Markets, Inc., 325 NLRB 871, 872 (1998), enfd. in pertinent part 265 F.3d 239 (7th Cir. 2001) (manager’s statements to employees that the union “could do nothing for them” unlawfully conveyed the futility of selecting the union as their bargaining representative as it was made contemporaneously with, and linked to, the manager’s unlawful threats to close the store and put employees out of work if they voted to unionize).

Here, the comments made by Luna and Puentes appear to be their personal assessment of the Union’s value at the bargaining table at the time. And, because the comments were not made contemporaneously with, or linked to, any explicit or implicit threats, while obnoxious, they do not constitute a threat of futility. Accordingly, I recommend this allegation be dismissed.

3. Interrogation

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

constituted an unlawful interrogation.¹¹

While there is no history of employer hostility and/or discrimination, the information sought by Puentes related directly to whether employees were continuing to support the Union financially by paying fees. Thus, Puentes was seeking to determine whether Victoria and her coworkers were still financial supporters of the Union, at a time when the Union was bargaining a successor agreement. While the setting was informal, Puentes is a high level management official, and Luna is Respondent’s highest day-to-day official at the jobsite. Puentes is the one who initiated the questioning as to whether members were paying Union fees and neither Puentes nor Luna conveyed a legitimate purpose for their questions. Nor did they provide Victoria with assurances against reprisals. *RHCG Safety Corp.*, 365 NLRB No. 88 slip op. at 1-2 (2017) (that employer did not have or communicate any legitimate purpose for the question and did not provide assurances against reprisals supports a finding of an unlawful interrogation). Accordingly, assessing all the factors, I find that Respondent violated Section 8(a)(1) of the Act by interrogating Victoria as to whether employees were paying fees/dues to the Union. *Creutz Plating Corp.*, 171 NLRB 1, 13 (1968) (general manager’s asking employee whether he was going to continue to pay dues to the Union was for no legitimate purpose and constituted an unlawful interrogation); *Ridgewood Management Co.*, 172 NLRB 148, 150 (1968) (employer had no legitimate reason for interrogating employees about various matters, including whether they paid a fee to the Union, and did not provide assurances against reprisals).

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

Also, there is no evidence that, before the August 14 discussion, Puentes knew Victoria had attended any of the bargaining sessions, or that she supported the Union in any way whatsoever. According to Puentes, at the time he was not involved in the negotiations in Douglas; the only bargaining session he attended was in December 2017. (Tr. 22, 137-38.) Moreover, Puentes’s inquiry was not limited to only Victoria, but he asked whether members in general were paying fees to support the Union. In these circumstances, while relevant, whether Victoria was or was

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

¹² Respondent also refers to Puentes’s statement that Victoria could throw her money away by giving it to him as a “joke” which Victoria

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

not an open Union supporter is not determinative. *Abramson, LLC*, 345 NLRB 171, 171 fn. 1 (2005) (fact employee was open union supporter and wearing union t-shirt at time of questioning was relevant, but not determinative and considering all the circumstances supervisor's questions to employee constituted an unlawful interrogation); Cf. *Premier Rubber Co.*, 272 NLRB 466, 466 (1984) (no violation where vice president asked if employee's husband "worked for a union" and "how much the dues were" as the inquiry was not intended to elicit information about employee union activities or sympathies, and the questions did not involve respondent's employee "nor necessarily a member of the union.")

Finally, Complaint paragraph 5(b) alleges that Luna also interrogated Victoria during this August 14 discussion. The credited evidence shows that, after Puentes said members were throwing their money away by paying it to the Union, Luna stated that employees were paying \$20 per week to the Union. It appears that this statement was more or less accurate.¹³ Thus, it does not appear that Luna was trying to elicit information from Victoria about the amount of Union dues, or who was or was not paying. Cf. *Belcher Towing Co.*, 238 NLRB 446, 459 (1978) (provocative statements to employees about union activity, while declarative in nature, were "designed to bring forth employee sentiments about union representation."); *Eddyleon Chocolate Co.*, 301 NLRB 887, 898 (1991) ("Although . . . statement was declarative in form rather than interrogative, it was clearly intended to elicit" information regarding employee's participation in union activities.) Instead, Luna was stating his understanding of the weekly dues that Union members were paying. In her brief, the General Counsel does not address this allegation. (GC Br., at 15–16.) Considering all the circumstances, I find that the General Counsel has failed to meet her burden of proof and I recommend that Complaint paragraph 5(b) be dismissed.

B. The December 15 discussion

1. Witness credibility

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

many requests. (Tr. 147–49.) In sum, I found his entire testimony regarding the PTO issue, PTO requests and their approval/denial, and the December 15 conversation with Victoria as not credible.

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

Accordingly, the credited evidence shows that, on December 15, when Victoria was in the office, Romero told her that she needed to sign for a change on her timecard because she no longer had any PTO. As he gave Victoria her time card, Rivera arrived. After agreeing to make the change, Victoria expressed her belief that she still had three days of PTO left. Romero replied saying there was a problem as the system reflected that she no longer had any PTO, even though her time card reflected she still had PTO days remaining. Rivera then said that is a problem that the Union created regarding PTO, and Victoria needed to fix that with the Union. After Victoria said everything was okay but they should ensure employees received the correct PTO, Rivera agreed but said that is the problem with the Union. Victoria, who had requested three days of PTO in December because she was sick, was only granted one day of leave.

2. Analysis

The General Counsel asserts that Rivera's comments, blaming the Union for the PTO issues, unlawfully disparaged the Union in violation of Section 8(a)(1). (GC Br., at 17.) Respondent argues there can be no violation as the comments were neither disparaging nor critical of the Union, and whatever Rivera said was simply an expression of personal opinion protected by Section 8(c). (R. Br., at 18.)

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

The balancing of the rights of employer expression guaranteed

¹³ It is unclear from Victoria's testimony exactly when employees went from paying \$20 every 2 weeks in Union fees to \$20 per week. (Tr. 79.)

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

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

Here, I find that Rivera’s statements have a tendency to interfere, restrain, and coerce employees in the exercise of their Section 7 rights, and constitute a violation. The record evidence shows that there was a dispute regarding how PTO was being earned and calculated, along with a problem relating to how PTO was displayed on employee paychecks/time cards versus Respondent’s computer system. Rivera admitted he had heard there were issues regarding employee PTO. For whatever reason Victoria was denied two days of PTO in December, one thing is certain—there is no evidence that the PTO problems were created by the Union or that her denial of PTO was because of the Union. Accordingly, considering Rivera’s statements in context, and from the standpoint of employees, I find his comments blaming the Union for creating the PTO problem and telling Victoria to fix the problem with the Union violated Section 8(a)(1) of the Act. Cf. *Webco Industries, Inc.*, 327 NLRB 172, 173 (1998), *enfd.* 217 F.3d 1306 (10th Cir. 2000) (employer “violates Section 8(a)(1) of the Act when it takes adverse action against employees and falsely blames its action on the union.”); *Faro Screen Process, Inc.*, 362 NLRB No. 84 slip. op. at 1–2 (2015) (citing *RTP Co.*, 334 NLRB 466, 468, 470–71 (2001) (blaming the union for preventing a wage increase was a violation)); *Westminster Community Hospital, Inc.*, 221 NLRB 185, 193 (1975), *enfd.* mem. in relevant part 566 F.2d 1186 (9th Cir. 1977) (“by placing responsibility for the absence of greater benefits, which Respondent assertedly desired to confer, exclusively on the Union, which had no role in the matter, [Respondent] was attempting to disparage the Union in the eyes of employees so as to discourage membership in the Union.”) Rivera’s statements occurred while the parties were still bargaining for a successor contract, and while the Union’s grievances about PTO were still outstanding. Thus, I believe Rivera’s statements to Victoria, who was denied two days of time off, coercively suggested to employees that support for the Union “results in damage to their terms of employment,” and constitute a violation. *Webco Industries, Inc.*, 327 NLRB at 173.

CONCLUSIONS OF LAW

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

The Union is a labor organization within the meaning of

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

Section 2(5) of the Act.

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

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

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

REMEDY

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

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

ORDER

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

1. Cease and desist from

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

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

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

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

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

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.”

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

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

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

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 a representative 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 interrogate our employees about their union membership, activities, or support.

WE WILL NOT disparage the United Food and Commercial Workers Union, Local 99, including by telling employees that the Union was responsible for creating problems with PTO and employees needed to fix that with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

TRINITY SERVICES GROUP, INC.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/28-CA-212163 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.

