

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

**ARAKELIAN ENTERPRISES, INC.,
D/B/A ATHENS SERVICES**

and

TEAMSTERS LOCAL 396

**Cases 31-CA-223801
31-CA-226550
31-CA-232590
31-CA-237885**

**COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS AND BRIEF IN
SUPPORT OF EXCEPTIONS TO THE DECISION AND RECOMMENDED
ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully Submitted by:

Amanda W. Laufer, Esq.
Christine Flack, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 31
11500 W Olympic Blvd., Suite 600
Los Angeles, CA 90064

TABLE OF CONTENTS

I. INTRODUCTION 1

II. GENERAL COUNSEL’S EXCEPTIONS..... 2

III. ARGUMENT IN SUPPORT OF EXCEPTIONS..... 6

A. The ALJ should have found that Respondent violated Section 8(a)(1) of the Act by issuing a discipline to Jose Maldonado in May 2018 (Complaint Paragraph 8; Exception No. 1)..... 6

 1. The ALJ’s factual recitation includes unsupported findings and improperly excludes evidence including unrefuted admissions from an admitted supervisor..... 6

 2. The ALJ erroneously found that the General Counsel did not establish a *prima facie case* of discrimination..... 11

 3. Respondent did not meet its *Wright Line* burden of proving it would have disciplined Jose in the absence of Section 7 activity..... 15

B. The ALJ should have found that Respondent violated Section 8(a)(1) of the Act by creating the impression that employees’ union activities were under surveillance on July 12, 2018 (Complaint Paragraph 9; Exception No. 2)..... 16

C. The ALJ erred by repeatedly characterizing Respondent’s unlawful surveillance and rule promulgation on July 12, 2018 as based on a “misunderstanding” or “miscommunication” (Complaint Paragraphs 10, 11, and 15(b); Exception No. 3)..... 18

 1. The ALJ made improper, unsupported findings regarding why Respondent violated Section 8(a)(1) by surveillance and promulgating restrictions on Union activity..... 19

 2. There is woefully insufficient evidence to support Respondent’s claim that the coercive conduct on July 12 was predicated on a managerial miscommunication and/or misunderstanding..... 22

 3. The ALJ erroneously rejected the introduction of evidence relevant to whether Respondent fabricated the “misunderstanding” defense *ex post facto*..... 24

 4. The ALJ’s findings of a “misunderstanding” or “miscommunication” on July 12 should be disavowed and reversed..... 26

D. The ALJ should have found that Respondent violated Section 8(a)(1) of the Act by promulgating a rule prohibiting employees from wearing their company uniforms while meeting with Union representatives in response to Union activity (Complaint Paragraph 11(b); Exception No. 4).....	27
E. The ALJ should have found that Respondent violated Section 8(a)(1) of the Act by unlawfully surveilling employees on August 2, 2018 (Complaint Paragraph 12; Exception No. 5).....	29
F. The ALJ should have found that Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully removing a lunchroom in response to Union activity (Complaint Paragraph 15(b); Exception No. 6).....	35
G. The ALJ should have found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to engage in decisional bargaining (Complaint Paragraph 15(d); Exception No. 7).....	39
IV. CONCLUSION	44

TABLE OF AUTHORITIES

Cases

<i>American Freightways Co., Inc.</i> , 124 NLRB 146 (1959).....	21
<i>Arbah Hotel Corp. d/b/a Meadowlands View Hotel</i> , 368 NLRB No. 119 (2019).....	14
<i>Austal USA</i> , 356 NLRB No. 65 (2010).....	12
<i>Bottom Line Enterprises</i> , 302 NLRB 373 (1991).....	6, 39
<i>Challenge Mfg. Co., LLC</i> , 368 NLRB No. 35 (2019).....	17
<i>Cooper Thermometer Company</i> , 154 NLRB 502, fn. 2 (1965)	21
<i>Dillon Companies, Inc.</i> , 340 NLRB 1260 (2003).....	28
<i>El Rancho Mkt.</i> , 235 NLRB 468 (1978).....	21
<i>Emerson Electric Co.</i> , 287 NLRB 1065 (1988).....	17
<i>F.W. Woolworth Co.</i> , 310 NLRB 1197 (1993).....	34
<i>Flexsteel Indus.</i> , 311 NLRB 257 (1993).....	16
<i>Greco & Haines, Inc.</i> , 306 NLRB 634 (1992).....	14
<i>Greg Murrieta</i> , 323 NLRB 125 (1997).....	21
<i>Hankins Lumber Co.</i> , 316 NLRB 837 (1995).....	41, 42
<i>IFG Stockton</i> , 357 NLRB #	43
<i>In Property Resources Corp.</i> , 285 NLRB 1105 fn. 2 (1987)	22
<i>L&L Wine & Liquor Corp.</i> , 323 NLRB 848 (1997).....	43
<i>Lucky Cab Co.</i> , 360 NLRB 271 (2014).....	14
<i>Maple Grove Care Center</i> , 330 NLRB 775 (2000).....	42

<i>Naperville Ready Mix Inc.,</i> 329 NLRB 174 (1999).....	42
<i>National Steel & Shipbuilding Co.,</i> 156 F.3d 1268 (D.C. Cir. 1998)	34
<i>NLRB v. Seaport Printing & Ad Specialties, Inc.,</i> 589 F.3d 812 (5th Cir. 2009).....	42
<i>North Memorial Health Care,</i> 364 NLRB No. 61 (2016).....	35
<i>Pace Industries, Inc. v. NLRB,</i> 118 F.3d 585 (8th Cir. 1997).....	14
<i>Phelps Dodge Copper Products Corp.,</i> 101 NLRB 360 (1952).....	40
<i>Philadelphia Coca-Cola Bottling Co.,</i> 340 NLRB 349 (2003).....	7
<i>Pleasantview Nursing Home,</i> 335 NLRB 961 (2001).....	43
<i>Precision Industries, Inc.,</i> 320 NLRB 661 (1996).....	14
<i>Promedica Health Sys., Inc,</i> 343 NLRB 1351 (2004).....	17
<i>RBE Electronics of S.D.,</i> 320 NLRB 80 (1995).....	40
<i>Sartorius Inc.,</i> 323 NLRB 1275 (1997).....	43
<i>Seaport Printing & Ad Specialties, Inc.,</i> 351 NLRB 1269 (2007).....	42
<i>Shattuck Denn Mining Co. v. NLRB,</i> 362 F.2d 466 (9th Cir. 1966).....	14
<i>Spurlino Materials,</i> 353 NLRB 1198 (2009).....	38
<i>Stone Container Corp.,</i> 313 NLRB 336 (1993).....	41
<i>Triple A Fire Protection,</i> 315 NLRB 409 (1994).....	41
<i>Tschiggfrie Properties, Ltd.,</i> 368 NLRB No. 120 (Nov. 22, 2019).....	11
<i>TXU Electric Co.,</i> 343 NLRB 1404 (2004).....	40
<i>United States Postal Serv.,</i> 253 NLRB 1203 (1981).....	21
<i>United States Postal Serv.,</i> 350 NLRB 125 (2007).....	21

<i>United States Testing Co.,</i> 324 NLRB 854 (1997).....	43
<i>Wright Line,</i> 251 NLRB, n.12	14
<i>Zimmerman Plumbing and Heating Co.,</i> 325 NLRB 106 (1997).....	12

I. INTRODUCTION

This case was tried before the Honorable Jeffrey D. Wedekind from August 6 through August 19, 2019, in Los Angeles, California, based on an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing (Complaint) issued by the Regional Director for Region 31, on May 29, 2019. GC Ex.1(aa). The Complaint is based on the above-captioned unfair labor practice charges filed by Teamsters Local 396 (Union). GC Ex. 1(a), amended GC Ex. 1(d), (g); GC Ex. 1(j), GC Ex. 1(m), GC Ex. 1(s), amended GC Ex. 1(x).

The Complaint alleges that beginning in about March 2018, and continuing to date, Arakelian Enterprises, Inc., d/b/a Athens Services (Respondent or Athens) took multiple actions at its work locations in Pacoima, Torrance, and Sun Valley, California, in violation of Section 8(a)(5), (3), and (1) of the National Labor Relations Act. The General Counsel's exceptions concern the following actions by Respondent at the Pacoima yard: disciplining open Union supporter, shop steward, and bargaining committee member Jose Maldonado because he presented a schedule-change request to management on behalf of his coworkers; orally promulgating a "policy" that prohibits lawful engagement with Union representatives while wearing company uniforms in response to employees' union activities; locking and making unavailable a room that employee for years used to take their lunch breaks in response to their union activity and without notice to or bargaining with the Union; and finally, on several occasions, surveilling and creating impressions of surveilling employees' interactions with Union representatives.

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel respectfully files the following exceptions and

brief in support of exceptions to the decision and recommended order of Administrative Law Judge Jeffrey D. Wedekind.

II. GENERAL COUNSEL’S EXCEPTIONS

Exception Number	JD Page:Line	Exception
1	5:15–8:29	The ALJ should have found that Respondent violated Section 8(a)(1) of the Act by issuing a discipline to Jose Maldonado in May 2018.
1(a)	7:26–8:2	The ALJ erred in finding that there was no past practice as to a rotating Saturday schedule, that “there was no formal alternating schedule,” that there was “no requirement or rule that only one of them could work on Saturdays,” and that Manager Martorana “would not necessarily have known or assumed that only one of them was supposed to work after the barbeque on May 19.”
1(b)	5:15–8:29	The ALJ ignored un rebutted evidence that Jose Maldonado called in sick for May 12, 2018, 24 hours in advance, in accordance with Respondent’s Attendance Policy, and erred in failing to make a finding in this regard.
1(c)	7:15–17	The ALJ erred in finding that Jose Maldonado’s recollection of what options Manager Martorana gave for working the weekend of May 19, 2018, revealed a “significant inconsistency” that “tended to support the complaint’s theory that Martorana resented Jose’s request on behalf of employees to work Saturday.”
1(d)	5:15–8:29	The ALJ erred in failing to find that Saturday May 19, 2018, was David Maldonado’s Saturday to work and not Jose Maldonado’s day to work.
1(e)	5:15–8:29	The ALJ ignored an un rebutted admission from admitted statutory supervisor Eric Zufall that Jose Maldonado was disciplined because that’s what you get for speaking up for the guys and they let you down.
1(f)	7:1–8:29	The ALJ erroneously found that the General Counsel did not establish a <i>prima facie</i> case of discrimination with respect to Jose Maldonado’s discipline.
1(g)	7:19–24	The ALJ wrongly disregarded the contemporaneous reaction of Foreman/Agent Richard Gonzalez to Jose Maldonado’s concerted activity.
1(h)	7:1–8:29	The ALJ erred in failing to find that Manager Martorana’s false testimony regarding the reasons for disciplining Jose Maldonado demonstrate animus and improper motive.
1(i)	7:1–8:29	The ALJ erred by ignoring that Respondent offered shifting reasons for disciplining Jose Maldonado.

1(j)	7:1–8:29	The ALJ erred by ignoring and that Respondent deviated from its past tolerance, over a 2-year period, of the rotating Saturday schedule for Jose Maldonado and David Maldonado.
1(k)	7:1–8:29	The ALJ erred by failing to find that Respondent did not meet its <i>Wright Line</i> burden of proving it would have disciplined Jose Maldonado in the absence of his Section 7 activity.
2	9:5–10:7	The ALJ should have found that Respondent violated Section 8(a)(1) of the Act by creating the impression that employees’ union activities were under surveillance on July 12, 2018.
2(a)	9:5–10:7	The ALJ erred by failing to find that Manager Martorana did not reveal the source of his knowledge of union activity or any basis for concern over the amount of time spent between Union activity and working time.
2(b)	9:5–10:7	The ALJ erred by failing to weigh credited evidence showing that Respondent engaged in multiple acts of surveillance and coercive conduct on July 12, 2018, in determining how a reasonable employee would construe Manager Martorana’s statement that day.
3	10:20-21, 12:2, 13:20, 19:13, 29:31, 49:35	The ALJ erred by repeatedly characterizing Respondent’s unlawful surveillance and rule promulgation on July 12, 2018, as based on a “misunderstanding” or “miscommunication”.
3(a)	10, fn. 22.	The ALJ erred in finding that “there is no other apparent reason revealed by the record why Martorana and Furquan would have taken the unusual and unprecedented actions they subsequently did that day.”
3(b)	19:11–13.	The ALJ erred in finding that the July 12 surveillance was based “on Zufall’s report of a verbal altercation between the union representatives and Furquan, and on Martorana’s misunderstanding of Solis’s instructions about how to address it.”
3(c)	49:35–37	The ALJ erred in stating that at the Pacoima yard, Respondent “committed a few 8(a)(1) violations due to a miscommunication and misunderstanding.”
3(d)	29:31–32.	The ALJ erred in stating that Respondent took actions that were “unintentional, based on a misunderstanding of the assistant general manager’s instructions.”
3(e)	10:10–13:31	The ALJ disregarded established precedent holding that an employer’s motivation, intention, or reason for engaging in conduct that interferes with and restrains union activity is not relevant to whether the conduct violated Section 8(a)(1).
3(f)	10:10–13:31	The ALJ erred in failing to find that no evidence demonstrates that employees were racially harassing Guard/Agent Furquan.
3(g)	10:10–13:31	The ALJ erred in failing to draw an adverse inference against Respondent for its failure to call Furquan to testify about the alleged harassment.

3(h)	10:10–13:31	The ALJ erred in failing to find that employees were not harassing Furquan on July 12, 2018.
3(i)	10:10–13:31	The ALJ erred in failing to find that Respondent invented a fictional story of harassment to justify its coercive behavior on July 12.
3(j)	10, fn. 22	The ALJ erred by suggesting that whether harassment actually occurred on July 12, 2018, is not relevant.
3(k)	GC Rejected Exhibit 1	The ALJ erroneously rejected the introduction of evidence relevant to whether Respondent fabricated the “misunderstanding” defense <i>ex post facto</i> .
3(l)	10, fn. 22	The ALJ erred in failing to find that the timing between the filing of decertification petitions on Friday July 6, 2018, and Respondent’s unlawful surveillance and rule promulgation on Thursday July 12, 2018, circumstantially demonstrates that the actions were taken to coerce, restrain, and interfere with employees in the exercise of protected rights, and failed to find that Respondent committed the violations the very first time that the Union was present at the facility following the filing of decertification petitions.
4	13:35–14-10	The ALJ should have found that Respondent violated Section 8(a)(1) of the Act by promulgating a rule <i>in response to Union activity</i> prohibiting employees from wearing their company uniforms while meeting with Union representatives.
4(a)	13:35–14-10	The ALJ erred in failing to find that Respondent did not meet its burden of proving the existence of actual employee misconduct sufficient to justify the policy promulgated in response to Union activity.
5	14:13–17:23	The ALJ should have found that Respondent violated Section 8(a)(1) of the Act by unlawfully surveilling employees on August 2, 2018.
5(a)	14:13–17:23, 16:31–27	The ALJ erred as a matter of law in finding that Respondent had a reasonable belief that the Union representatives were trespassing on August 2, 2018.
5(b)	14:13–17:23	The ALJ ignored evidence showing that the Labor Peace Agreement places no restrictions on who may serve as a Union representative, has no requirement that that the Union inform Respondent who would serve as the Union’s representatives, and contains no limitation on how long the Union could stay at a facility on a particular visit.
5(c)	14:13–17:23	The ALJ erred in failing to find that Union representatives regularly met with employees at Respondent’s Pacoima facility on Thursdays between the hours of 1:00 or 2:00 PM and 7:00 PM.
5(d)	14:13–17:23, 16:31–27, 17, fn. 38	The ALJ erred by implying that Respondent’s concern over the presence of an employee of Republic Services supported a reasonable belief of trespass.

5(e)	17:4-13	The ALJ erred by failing to find that the Union's right to access the facility under the LPA was not limited to when the yard was open for business.
5(f)	14:13-17:23	The ALJ erred by failing to find that Respondent knew that the Shop employees ate lunch in the training room and that the Union met with the Shop employees on the non-working time including meal breaks.
5(g)	14:20-28, 14:13-17:23	The ALJ erred by suggesting that emails between the parties' attorneys modify the access rights under the LPA.
5(h)	14:20-28, 14:13-17:23	The ALJ erred by suggesting that emails between the parties' attorneys change the parties' past practice of allowing three Union representatives to access the facility.
5(i)	14:13-17:23	The ALJ erred by failing to find that Guard/Agent Furquan's video surveillance of shop employees on August 2, 2018, had a reasonable tendency to interfere with protected activity.
5(j)	14:13-17:23, fn. 39	The ALJ erred in failing to make a finding that Agent/Foreman Gonzalez's presence in the lunchroom on August 2, 2018, had a tendency to interfere with employees' protected activities.
5(k)	14:13-17:23, fn. 39	The ALJ erred in failing to find that even assuming <i>arguendo</i> Respondent had reasonable belief of trespass that justified Furquan's video recording, there is no reason to then have Foreman/Agent Gonzalez enter the room other than to listen to conversation between employees and their union representatives and to engage in coercive surveillance.
6	17:26-20:8	The ALJ should have found that Respondent violated Section 8(a)(3) and (1) of the Act by permanently closing a lunchroom in response to and because of employees' Union activity.
6(a)	19:7-20:8	The ALJ erred in finding that there was insufficient evidence that Respondent had animus against the employees' protected union activities or that those activities were a motivating factor in Respondent's decision to ban employee access to the training room/lunchroom on August 3, 2018.
6(b)	19:7-13	The ALJ erred in failing to find evidence of animus based on Respondent's promulgation of a policy in direct response to union activity prohibiting employees from lawfully speaking with Union representatives.
6(c)	19:7-13	The ALJ erred in failing to find evidence of animus based on Respondent's blatant surveillance of employees' union activity on July 12 and August 2, 2018, in violation of Section 8(a)(1).
6(d)	19:7-20:8	The ALJ erred in failing to find that animus toward union activity is circumstantially demonstrated by the timing of employees' union activity relative to Respondent closing the training room off to employees.
6(e)	19:15-28	The ALJ erred in failing to find that there is no record evidence to support that Respondent reasonably perceived the training room as a working area between the hours of 6:00 and 7:00 PM.

6(f)	19:30–33	The ALJ erred in finding that the locking of the training room was not a grossly disproportionate response to the events that occurred on August 2, 2018.
7	36:17–39:8	The ALJ should have found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to engage in decisional bargaining over the closure of the training room/lunchroom.
7(a)	36:28	The ALJ erred as a matter of law in finding that “extenuating circumstances” justified the closure of the training room/lunchroom.
7(b)	36:17–39:8	The ALJ erred as a matter of law by failing to find that closure of the training room was not privileged by any of the exceptions to <i>Bottom Line Enterprises</i> , 302 NLRB 373 (1991), and its progeny, or any other valid exception to the duty to bargain.
8	17, fn. 39	The ALJ erred by failing to find that Foreman Richard Gonzalez is Respondent’s statutory agent under Section 2(13) of the Act.

III. ARGUMENT IN SUPPORT OF EXCEPTIONS

A. The ALJ should have found that Respondent violated Section 8(a)(1) of the Act by issuing a discipline to Jose Maldonado in May 2018 (Complaint Paragraph 8; Exception No. 1)

1. *The ALJ’s factual recitation includes unsupported findings and improperly excludes evidence including unrefuted admissions from an admitted supervisor*

At the Pacoima Yard, several shop employees regularly work on Saturdays as part of a 6-day-per-week schedule. As the ALJ properly found, in 2016, Fleet Manager Mark Martorana approved Tire Mechanics Jose Maldonado (Jose) and David Maldonado (David) to work an alternating Saturday schedule, such that only one of them worked on Saturdays, unless it was following a holiday or a supervisor specifically asked both to work. JD 5:25-31. Respondent Exhibit 1 shows that David and Jose only worked the same Saturday a mere handful of Saturdays following bank holidays in calendar years 2017 and 2018. Hence, Respondent had a practice of allowing only one tire mechanic to work on Saturday.¹

¹ At all times material, Jose has been a Union shop steward, Union bargaining committee member, and known pro-Union employee. JD 5:20-22. The judge failed to mention Jose’s status as a steward.

The ALJ erred in finding that “there was no formal alternating schedule” and “no requirement or rule that only one of them could work on Saturdays.” JD 7:26-32. The record is clear that Respondent had a past practice of tolerating and allowing the tire mechanics to work on alternating Saturdays. A practice such as the tire mechanics’ rotating Saturday schedule, that occurs with regularity and frequency for an extended period of years with a reasonable expectation on employees’ part that it will continue, constitutes a past practice. See, e.g., *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), *enfd.* 112 Fed.Appx. 65 (D.C. Cir 2004). The absence of a formal, written schedule does not negate the existence of Respondent’s past practice. Hence, with respect to the ALJ’s finding that Martorana “would not necessarily have known or assumed that only one of them [David or Jose] was supposed to work after the barbeque on May 19,” this is contradicted by the ALJ’s own finding that 2 years earlier, in 2016, Martorana agreed to allow the tire mechanics to rotate on Saturdays. JD at 5:25-30.

Pursuant to this established “rotating Saturdays” past practice, the record is clear that Saturday May 5, 2018, was David’s Saturday to work, and David worked that day. R Ex. 1 (page “ATHENS(B115LFDH9)-00080”). Saturday May 12, 2018, in turn, was Jose’s Saturday to work. With respect to May 12, the ALJ ignored unrebutted, undisputed evidence that Jose called in sick that day, 24 hours in advance, in accordance with Respondent’s Attendance Policy. J Ex. 58; Tr. 73:19-23, 134:6-11 (Jose). Respondent did not discipline Jose for his valid absence on May 12, or say anything about it following the call out. Jose, moreover, was not discredited this point and Respondent offered nothing to rebut it. Respondent chose not to call its Section

2(13) agent, Foreman Richard Gonzalez, to rebut Jose's testimony.² The record, accordingly, establishes that Jose validly called out on May 12, 2018.

As the ALJ explained, for the next Saturday May 19, 2018, Respondent scheduled a barbeque at the facility, conflicting with the shop employees' regular Saturday schedule. Around the beginning of May 2018, during a safety meeting with shop employees, Manager Martorana informed employees of the barbeque and resulting need to alter schedules. It is undisputed that at this meeting, Martorana told employees they may have to work on Sunday May 20. Tire Mechanic David and Manager Martorana testified that Martorana gave shop employees the option of working Sunday May 20 *or* Saturday afternoon on May 19. While Jose did not specifically recall an either/or option, there is an obvious explanation for Jose's recollection, which the ALJ failed to consider. In particular, Jose's testimony was consistent with what happened immediately after the safety meeting, when Jose walked back to the shop with coworkers and everyone was talking about not wanting to work on Sunday May 20. Tr. 67 (Jose). The employees were in the process of building consensus around not working Sunday. Then, as the ALJ found, Supervisor Eric Zufall walked by and said everyone was going to have to work on Sunday, thereby taking the Saturday option off the table, which confused and upset the employees. JD at 6:7-9.

Once Zufall left, employees kept talking about not wanting to work Sunday and asked Jose, the shop steward, to talk to Martorana about it. Jose agreed. Jose, David, and about 10 coworkers proceeded to Martorana's office as a group. Jose entered the office with coworkers

² Counsel for the General Counsel argued, but the judge failed to make a finding, that at all material times, Gonzalez was Respondent's agent under Section 2(13). This argument is based on Gonzalez's job duties as the shop foreman and his perceived status a conduit between Manager Martorana and employees on numerous work-related issues. GC Post-Hearing Brief at 12-16.

behind him and stated on behalf of the employees that they wanted to work on Saturday after the barbeque ended, and they did not want to work Sunday May 20. Foreman/Agent Richard Gonzalez answered angrily that he would fire them all. Martorana told Gonzalez to shut up, it was no problem, and he had it under control. JD at 6:6-19. Tr. 70 (Jose), 265 (David).

The ALJ improperly viewed Jose's recollection of what options Martorana gave for working the weekend of May 19 as revealing a "significant inconsistency" that "tended to support the complaint's theory that Martorana resented Jose's request on behalf of employees to work Saturday." JD at 7:15-17. Notwithstanding the ALJ's contrary statement, Jose's testimony was consistent with all other record evidence on key points, and the record does not support finding that Jose's memory that management said employees have to work Sunday is a "significant inconsistency" proffered to support the complaint. The ALJ failed to consider the innocent explanation that Jose merely misheard Martorana during the meeting; he also failed to consider that Supervisor Zufall's comments coupled with employees' robust discussions of not wanting to work on Sunday likely colored Jose's recollection, recalled over one year later, of what schedule options management presented for the weekend of the barbeque – these are two inherent possibilities that the ALJ erroneously overlooked. The ALJ then drew a flawed, unsupported conclusion about the reliability of Jose's testimony. Specifically, the ALJ disregarded undisputed facts that Martorana indeed *did* tell employees they may have to work on Sunday May 20; immediately after that, employees discussed not wanting to work Sunday; moments later, Supervisor Zufall told the employees they would have to work on Sunday after all, and employees then tasked Jose with relaying their position to Martorana, which Jose did.³

³ To be sure, Martorana himself testified that when Jose presented the group concern, Jose asked: "So we're working Saturday, Mark?" And Martorana's first thought was: "weren't you listening in the meeting?" Tr. 1751 (Martorana). Not paying attention in a meeting or being

In any event, it is undisputed and the credited evidence shows that Saturday May 19, 2018, the day of the barbeque, was David's Saturday to work. Tr. 257 (David), 126 (Jose). It was **not** Jose's Saturday to work, pursuant to the 2-year-old rotating Saturday schedule. No management official told both employees to report to work on May 19, nor was it following a holiday. The ALJ erred by failing to find that May 19, 2018, was David's Saturday to work, and not Jose's Saturday to work.

On May 19, David was a "no call/no show." Jose did not come to work on May 19, because he was neither scheduled nor directed to report. Several other shop employees also failed to report on May 19, leaving Respondent understaffed following the company barbeque.

Respondent seized on this opportunity to discipline Jose based on resentment toward Jose's status as a union shop steward who brought a group schedule-request to management,

confused following a meeting is not equivalent with offering testimony in favor of the complaint. Furthermore, Martorana testified that during the meeting, he told the employees it will be "all hands on deck" after the barbeque. But the judge found it proper to give "no weight . . . to Martorana's testimony in this respect." JD at 8, fn. 17. Pursuant to the judge's own reasoning and the record evidence on this point, there was clearly a high level of confusion and lack of clarity following the safety meeting at which Martorana announced and discussed the schedule-change issues arising from the May 19 barbeque. Weighing all the evidence, it is improper to deem Jose not reliable merely because he recalled management telling employees they might have to work Sunday May 20, when no one disputes that Martorana presented Sunday as an option. Thus, Jose testified without significant inconsistencies. Importantly, the judge erroneously found that Jose testified that Martorana did *not* give them the option, when Jose actually testified that he *did not recall* Martorana giving them the option of Saturday. Tr. 67.

Finding Jose not "particularly reliable" is not a demeanor-based finding. JD 7:11-17. Footnote 9 of the judge's decision contains a reference to witness demeanor, but this is not a substitute for the lack of any finding that Jose's demeanor influenced the judge in calling into question Jose's reliability. A preponderance of evidence and the inherent probabilities detailed above demonstrate that it was error to suggest that Jose offered self-supporting testimony. Moreover, weight should have been accorded to the fact that Jose is a current employee, who testified against his pecuniary interests and who stood to gain hardly anything by testifying about a lowest-level discipline, especially where that discipline was removed from his file by the time of the hearing in this matter. The judge's credibility findings with respect to Jose, therefore, are not supported by the preponderance of evidence and reasonable inferences.

especially where the group did not abide by the schedule on the operative day, leaving Respondent short-staffed. Indeed, Jose was called to Martorana's office and handed a disciplinary action form for "Failure to provide adequate notice for absence – 05/19/18." (GC Ex. 2). Martorana told Jose he missed three Saturdays in a row. Jose said he did not think that was accurate, but he ultimately signed the discipline form.

The ALJ improperly weighed the un rebutted evidence that shortly after the disciplinary meeting, Jose told admitted statutory supervisor Zufall that he did not think he deserved the write-up. Supervisor Zufall said not to worry about it. Jose said he thought it happened because he spoke up for his coworkers a few days earlier by telling Martorana they want to work on Saturday not Sunday. Supervisor Zufall replied: that's what you get for speaking up for the guys and they let you down. There is no basis to disregard the un rebutted statement by Zufall as Respondent offered nothing to contradict a statement by its admitted supervisor and it is well settled that supervisors' statements are binding on employers.

2. The ALJ erroneously found that the General Counsel did not establish a prima facie case of discrimination

In *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (Nov. 22, 2019), the Board clarified the settled principle that "the evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Here, the General Counsel introduced sufficient evidence showing that Respondent's hostility to Jose's concerted activity "contributed to" its decision to discipline him for not showing up on a Saturday that he was not even scheduled to work.

Statements of animus directed to the employee about his protected activities have long been sufficient to make an initial showing of animus.⁴ Here, as noted, the ALJ failed to properly weigh the un rebutted admission by Supervisor Zufall that Jose’s discipline was “what you get for speaking up for the guys.” Such statement is direct evidence of animus and sufficient in itself to shift the burden to Respondent.

Moreover, the ALJ wrongly disregarded the contemporaneous reaction of Foreman/Agent Gonzalez to Jose’s concerted activity. The judge credibly found that Gonzalez angrily stated he would fire them all. JD 5:15 (“Gonzalez responded first, angrily saying that he would fire all of them”), 7:21-24 (finding “Gonzalez was present and upset for some reason”). It is well settled that employers are bound by the unreputed conduct of their agents where the evidence shows that employees would reasonably believe the foreman was speaking for management. E.g., *Zimmerman Plumbing and Heating Co.*, 325 NLRB 106 (1997). The evidence demonstrates that Richard Gonzalez was at all material times Respondent’s statutory agent under Section 2(13) and that employees reasonably believed he spoke and acted for management.⁵ The ALJ reasoned that Gonzalez’s reaction is not evidence of animus because Gonzalez did not have supervisory authority or involvement in the decision to discipline Jose. But Gonzalez’s involvement in the consequent decision to discipline Jose is of no moment, because when a statutory agent reacts to known Section 7 activity by angrily threatening to fire all participants, it is particularized evidence of animus toward the activity, sufficient to shift the burden to the employer. While employees may not have reasonably perceived Gonzalez to be capable of effectuating the

⁴ See, e.g., *Austal USA*, 356 NLRB No. 65 (2010) (unlawful motivation found where supervisors told union activist that management was "after her" because of her union activities), *enfd.* 343 F. Appx. 448 (11th Cir. 2009)

⁵ This argument was briefed to the judge at GC Post Hearing Brief. at 12-16.

threatened termination, employees would reasonably believe that Gonzalez was expressing hostility toward Jose's protected concerted activity of making a group schedule-change request.⁶ Besides hostility, there is no other explanation for why Gonzalez reacted with an angry threat to fire all the employees who stood behind Jose when he asked if they could work Saturday after the barbeque. Accordingly, Gonzalez's reaction is binding on Respondent and demonstrates animus toward Jose's concerted activity.

Next, the ALJ expressly found that Martorana was not a reliable witness (see JD at 8:23-24, citing fns. 17 and 41). The ALJ's findings in footnote 17 and 41, establish that Martorana offered demonstrably false testimony regarding the circumstances surrounding the discipline and the reasons for it. In addition to these findings, the ALJ overlooked the fact that Martorana provided further testimony contradicted by credited testimony of Jose and David; specifically, conveniently claiming that Gonzalez did not say anything to Jose and the employees, when the judge credited employee testimony to the contrary. Tr. 1752 (Martorana: "Richard, as I recall, did not chime in"). While the ALJ merely declined to give this false testimony weight, Board law holds that an actual consequence should result when a supervisor testifies about non-discriminatory explanations and knowingly denies knowledge of hostile statements, when such testimony is contradicted by other credited evidence. Specifically, this sort of false testimony shows animus and improper motive, insofar as it indicates a desire to conceal the true reason for

⁶ The judge found Martorana "rebuked" Gonzalez for his termination threat. JD at 6:15-17. The record does not support finding that Gonzalez's statement was repudiated or disavowed; rather, Martorana merely left Gonzalez's statement unaddressed, told him to shut up and that he (Martorana) would handle it. There is no evidence that Martorana told the employees that Gonzalez's statement was not the truth, that Martorana offered assurances against reprisal, or that Martorana sufficiently disavowed Gonzalez's statement. Saying essentially "shut up I'll handle it" is not a repudiation that renders Agent Gonzalez's immediate reaction irrelevant in this case.

the discipline.⁷ The ALJ erred by glossing over Martorana's false testimony and treating it without any consequence when it should be properly treated as evidence of a causal link.⁸

Relatedly, the ALJ ignored that Respondent offered shifting reasons for disciplining Jose and that Respondent deviated from its past tolerance, over a two-year period, of the rotating Saturday schedule for Jose and David. As the ALJ found, in issuing the discipline, Jose told Martorana that Saturday May 19 was his Saturday off. Tr. 1757 (Martorana). That should have been enough to avoid a write-up.⁹ But Martorana replied by telling Jose that according to Kronos, Jose had missed the previous two Saturdays (May 5 and May 12), and he had missed three Saturdays in a row. JD 6:30-32. Respondent did not prove, and the evidence does not show, that missing the two prior Saturdays was a legitimate reason to discipline Jose. To the contrary, for the past 2 years prior to this incident in May 2018, Respondent allowed Jose and

⁷ Cases support that false or misleading testimony as exists here demonstrate animus include: *Arbah Hotel Corp. d/b/a Meadowlands View Hotel*, 368 NLRB No. 119 (2019); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014). See, e.g., *Precision Industries, Inc.*, 320 NLRB 661, 662 n.7 (1996), enfd. sub nom. *Pace Industries, Inc. v. NLRB*, 118 F.3d 585 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12 (citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)).

⁸ The judge further erred by making no mention of the fact that Martorana insisted during his testimony that there was no such thing as a rotating Saturday schedule for Jose and David and Martorana expected them both to be there 6 days a week. The judge expressly found that Martorana agreed to the rotating-Saturday schedule. JD 5:28. The judge should have found that Martorana's testimony denying knowledge of the Saturday schedule is false testimony offered in support of a non-discriminatory explanation. In this connection, the judge declined to credit Martorana's testimony that he told shop employees it was "all hands on deck" after the barbeque. JD at 8, fn. 16. This testimony was offered to support Respondent's defense that Jose was expressly scheduled to work after the barbeque and that Respondent was justified in issuing the discipline for Jose's absence on that basis, which the judge found was not the case. Martorana's testimony on various non-discriminatory explanations – which were contradicted, unsubstantiated, not credited, and/or afforded no weight – are evidence of animus and intent to conceal a true motive.

⁹ Since Martorana met with David first and David admitted his mistake and apologized for not showing up on May 19, Martorana was well aware that Jose was not responsible for being present on May 19.

David to rotate Saturdays. As noted, Jose properly called out sick on May 12, so it makes no sense to raise an excused absence as a basis for discipline. As to May 5, it was indisputably not Jose's Saturday – David worked that Saturday and Respondent had the staffing coverage that it required that day. R Ex. 1. There is no explanation for why Martorana held Jose accountable for missing work on May 5 (David's scheduled Saturday), or why Martorana relied on Jose's absence on May 5 to justify the discipline. Nor can Respondent explain why Martorana brought up Jose's absence on May 12, which was a legitimate excused absence, or why Martorana sought to hold Jose accountable for this absence many days after it happened. Martorana only raised concern about Jose "missing work" on May 5 and May 12, *after* Jose engaged in his concerted schedule-change request on behalf of the shop. These shifting, varying, and baseless reasons are evidence of animus and a causal connection between Respondent's decision to discipline Jose and his protected activity.

Jose's May 5 and 12 absences, moreover, are not referenced *anywhere* on Jose's disciplinary form. Martorana's reliance on these absences in issuing the discipline reveal a classic shifting- and/or false-reasons circumstance. The Board has long found such baseless and piled-on justifications are circumstantial evidence of animus, and the Board should so find here.

In sum, the General Counsel satisfied the initial burden of proving that Respondent's animus toward Jose's Section 7 activity contributed to and motivated Respondent's issuance of discipline on May 20, 2018.

3. Respondent did not meet its Wright Line burden of proving it would have disciplined Jose in the absence of Section 7 activity

The disciplinary form states that Jose was disciplined for missing work on May 19, 2018. The evidence shows that May 19 was not Jose's Saturday to work. The reason upon which Respondent relied to issue the discipline, therefore, is not a valid reason. Respondent further

offered shifting and contradictory reasons for the discipline, explained above. Respondent's reasons are pretextual and unsupported. As such, Respondent necessarily did not meet its burden of showing that it would have disciplined Jose for missing work on May 19, absent Jose's action as a shop steward in bringing a concerted schedule-change request to Respondent's attention.

B. The ALJ should have found that Respondent violated Section 8(a)(1) of the Act by creating the impression that employees' union activities were under surveillance on July 12, 2018 (Complaint Paragraph 9; Exception No. 2)

The credited evidence establishes that on July 12, 2018, Respondent violated 8(a)(1) by creating an impression of surveillance. On this day, Manager Martorana approached Jose Maldonado just before Jose took his lunch break while Jose was helping a coworker put up the flag. Agent/Foreman Gonzalez accompanied Martorana. Martorana stated to Jose: if you give the Union 30 minutes, you have to give the Company 30 minutes. Jose said: yes, that's fine. Martorana and Gonzalez walked away.

Jose – a steward, bargaining committee member, and open Union supporter – regularly talked with the Union representatives when they were at or around the work facility. With respect to July 12, before Jose clocked in to work, he spoke with Union representatives outside of work. Tr. 84 (Jose). Furthermore, just moments after Martorana made his coercive remark at the flagpole, Jose went to the Union tent during lunch, and while he was there, Guard/Agent Furquan subjected Jose to unlawful surveillance and directed Jose to stop talking to the union while wearing his uniform – two instances of conduct that the judge properly found violate Section 8(a)(1). See JD at 11:10-15.

Manager Martorana's statement at the flagpole and the surrounding circumstances are not in dispute. The only issue is whether an employee would reasonably assume from this statement that his union activities had been placed under surveillance. See *Flexsteel Indus.*, 311 NLRB

257 (1993) (“an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement”), citing *Emerson Electric Co.*, 287 NLRB 1065 (1988). The settled test is “whether the remark would reasonably tend to interfere with the free exercise of employees' Section 7 rights, and does not look at the motivation behind the remark, or rely on the success or failure of the remark in suppressing protected activity.” *Challenge Mfg. Co., LLC*, 368 NLRB No. 35 (2019) (finding impression of surveillance where supervisor tells employee to “watch your back”). Board law holds that it is coercive for a supervisor to communicate that he knows of an employee’s union activity, but to decline to reveal a source of the knowledge of that activity. This is because the refusal to reveal the source tends to create “the impression that the information was obtained by management surveilling the employee's protected activity.” *Promedica Health Sys., Inc.*, 343 NLRB 1351, 1352 (2004).

In this case, Manager Martorana’s out-of-the-blue, unprompted statement conveyed that Respondent had observed Maldonado engaging in union activity and that Jose needs to devote equal time between union activities and work. Martorana did not reveal the source of his knowledge, nor did he reveal any basis for his apparent concern over the amount of time Jose was allotting between Union activity and working time.

To dismiss the allegation, the ALJ reasoned that Martorana was referring to Jose speaking with the Union during the 30-minute meal break, that break time is not work time, and that employees clearly were not taking time away from Respondent by talking to the union during their meal break. This reasoning misses the mark in terms of explaining whether the statement created an impression of surveillance. Regardless of whether Martorana was referring to Jose speaking with the Union on his 30-minute meal break, Martorana conveyed that he was taking note of how long Jose was talking to the Union. Martorana also conveyed that *if* Jose

gives the Union 30 minutes of his time, *then* he needs to give the company the same amount of time. These statements reasonably convey that Martorana had been looking over Jose's shoulder and monitoring Union activity down to the minute. Indeed, in the absence of any reason to believe that employees were improperly using company time to do union activities, Martorana, a high-ranking manager at the facility, told Jose without any further context or explanation that he needed to give Respondent 30 minutes if he gives the Union 30 minutes. By making this statement, Martorana implied that he knew how much time Jose was spending talking to the Union because Respondent had been furtively watching Jose's union activities. It is also relevant that this statement was made on the first Thursday following the filing of decertification petitions; timing which bolsters the intimidating impact of Martorana's comment and how it would be reasonably perceived. The Board should reverse the ALJ and find this statement violates 8(a)(1) as creating the impression of surveillance.

The Board should also consider the judge's findings that Respondent engaged in further acts of surveillance on July 12, in determining how a reasonable employee would construe Martorana's statement at the flagpole. JD at 12:7-14:9. A reasonable employee, viewing all the events of the day, would reasonably believe that Respondent was watching employees' Union activities and monitoring them.

C. The ALJ erred by repeatedly characterizing Respondent's unlawful surveillance and rule promulgation on July 12, 2018 as based on a "misunderstanding" or "miscommunication" (Complaint Paragraphs 10, 11, and 15(b); Exception No. 3)

The ALJ properly found that on July 12, 2018, Guard/Agent Furquan both created the impression that union activities were under surveillance and, in fact, surveilled union activities. JD at 10:10-13:31. The ALJ further found, correctly, that on July 12, on at least two separate occasions, both Guard/Agent Furquan and Manager Martorana approached employees and

promulgated an unlawful rule restricting uniformed employees from speaking to Union representatives. JD10:10-14:9.

In finding these violations, the ALJ made unsupported, improper factual findings regarding the reason Respondent took these actions. The ALJ also failed to draw a well-supported adverse inference against Respondent which, if drawn, would have undermined the legitimacy of the justification that Respondent offered for its action. Last, the ALJ erroneously rejected evidence offered by the General Counsel which, if introduced, further undermines Respondent's proffered justification for illegally surveilling employees and enacting rules against Union activity.

1. The ALJ made improper, unsupported findings regarding why Respondent violated Section 8(a)(1) by surveillance and promulgating restrictions on Union activity

With respect to what occurred on July 12, the ALJ correctly found that Manager Martorana instructed Guard/Agent Furquan to take the following coercive actions on this day: (1) inform Union representatives that employees would not be allowed to talk to them while wearing their uniforms at the Union tent¹⁰; (2) inform employees that Furquan would take pictures and show the pictures to Solis if employees kept talking to the Union; (3) inform employees that they could not talk to Union representatives while wearing their uniforms; (4) take photographs of the employees when they refused to stop talking to the Union in their uniforms. JD at 12:7-15.

As will be explained, in making these findings, the ALJ erred in lending credence to Respondent's asserted defense and finding that the below-described confusing sequence of events in fact occurred on July 12. The evidence shows that Respondent concocted a confusing

¹⁰ The tent was set up on a public sidewalk and not on Respondent's property.

sequence of events *ex post facto*, in an attempt to show that its conduct was all based on a misunderstanding and/or communication breakdown, to avoid liability in this proceeding. In particular, according to Respondent, the following occurred on July 12: first, Supervisor Zufall told Martorana that union representatives and employees were cursing and calling Furquan a racial epithet; then Martorana relayed to Solis by phone that employees were harassing Furquan; next Solis instructed Martorana to have Furquan take a photo of the uniformed employees so they could be identified; but Martorana misheard Solis and thought Solis said employees should not be out on the sidewalk in their uniforms engaging with the Union and to have Furquan take a photo of them if they did so; pursuant to this confused understanding, Martorana told Zufall to tell Furquan to tell the union representatives that employees could no longer talk to them off the property while wearing their uniforms.

The ALJ found that “there is no other apparent reason revealed by the record why Martorana and Furquan would have taken the unusual and unprecedented actions they subsequently did that day.” JD at 10, fn. 22. Later in his decision, the ALJ found that the July 12 surveillance was based “on Zufall’s report of a verbal altercation between the union representatives and Furquan, and on Martorana’s misunderstanding of Solis’s instructions about how to address it.” JD 19:11-13. The ALJ also opined that at the Pacoima yard, Respondent “committed a few 8(a)(1) violations due to a miscommunication and misunderstanding,” JD at 49:35-37, and took actions that were “unintentional, based on a misunderstanding of the assistant general manager’s instructions.” JD at 29:31-32. These findings are in plain error and should be disavowed.

The Board has long held that an employer's motivation, intention, or reason for engaging in conduct that interferes with union activity is not relevant to whether the conduct violated Section 8(a)(1). As the Board explained in *El Rancho Mkt.*, 235 NLRB 468, 471 (1978)

It is too well settled to brook [*sic*] dispute that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive nor on the successful effect of the coercion. Rather, the illegality of an employer's conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act.

Id. (expressly disavowing the implication inherent in the administrative law ALJ's approach to analyzing alleged violations of Section 8(a)(1) "that the touchstone of such a violation is a determination of intent and effect."). See also *United States Postal Serv.*, 253 NLRB 1203, 1206 (1981) (emphasis added) ("Respondent's *intention or motive is irrelevant* to a finding that Sec. 8(a)(1) of the Act has been violated), citing *Cooper Thermometer Company*, 154 NLRB 502, 503, fn. 2 (1965). Related to this principle is the rule that "state of mind or subjective impressions of either the speaker or the listener are irrelevant." *United States Postal Serv.*, 350 NLRB 125, 130 (2007) (dating this principle back to the decision in *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959)). Accordingly, there can be little doubt that "reasoning based on the supervisor's motive or intent in making the statement has no relevancy in an 8(a)(1) context." *Greg Murrieta*, 323 NLRB 125, 127 (1997).

In this case, the Board should disavow the ALJ's discussion of why Furquan and Martorana engaged in conduct violating Section 8(a)(1) on July 12, 2018, because it is irrelevant to whether these violations occurred. Furthermore, the reasons Respondent introduced are not a valid defense to the violations or to the consequences that flow from committing the violations.

/

2. *There is woefully insufficient evidence to support Respondent's claim that the coercive conduct on July 12 was predicated on a managerial miscommunication and/or misunderstanding*

Assuming *arguendo* that the reasons underlying Respondent's conduct on July 12 are relevant, which they are not, Respondent bore the burden of establishing that its version of events actually occurred and that the professed "misunderstanding" is credible. Indeed, Respondent introduced evidence of this managerial "misunderstanding" by way of asserting a defense and proving that its action on July 12 were lawful, justifiable, a "one-off", and/or *de minimis*. The only evidence Respondent offered to support finding the "misunderstanding" came from testimony of Manager Martorana (who was discredited in footnotes 17 and 41), Manager Solis, and Manager Lupe Ramirez. The ALJ apparently failed to consider that Respondent introduced *zero* evidence that employees were racially harassing Furquan and *zero* evidence that Respondent had any legitimate, substantiated basis to interfere with employees' Union activities on July 12.

With respect to proving its "misunderstanding" defense, Respondent inexplicably failed to call Furquan – its agent under Section 2(13) – to testify about the harassment he allegedly experienced. In *Property Resources Corp.*, 285 NLRB 1105, 1105 fn. 2 (1987), *enfd.* 863 F.2d 964 (D.C. Cir. 1988), the Board explained:

An adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party.

All elements necessary to draw an adverse inference are present here. It may be assumed that Furquan would have testified that employees harassed him and called him racial slurs.

Because Respondent did not call Furquan to testify, the ALJ should have found that employees were not in fact harassing Furquan and that Respondent invented a fictional story of

harassment to justify its coercive behavior on July 12. Absent evidence of harassment, the factual predicate to the alleged resulting “misunderstanding” among managers does not exist, and the misunderstanding defense unravels as lacking any foundation or basis in reality. The ALJ erred by failing to draw a critical adverse inference that casts enormous doubt on the credibility of this defense.

The ALJ downplayed the lack any evidence showing actual harassment by stating that it was “Zufall who Martorana testified informed him about the verbal altercation and racial epithet.” JD at 10, fn 22. The mere fact that Martorana said he heard about the harassment from Zufall, however, does not mean that whether harassment actually occurred is irrelevant. To the contrary, evidence that no one directed harassing statements or epithets to Furquan makes Martorana’s testimony that Zufall told him otherwise highly suspect and unbelievable. Additionally, evidence showing whether the alleged racial harassment actually occurred goes to whether Respondent’s actions on July 12, 2018, were truly premised on a big misunderstanding, or whether Respondent fabricated the existence of a misunderstanding in preparing for the August 2019 hearing in this matter.

The ALJ made several findings at page 13, lines 10 to 25, in connection with whether the unlawful July 12 actions were repudiated, that are relevant to whether Furquan and Martorana engaged in coercive conduct because of a true “misunderstanding.” The ALJ’s well-reasoned findings in this section underscore that there is woefully insufficient evidence to corroborate or substantiate Respondent’s “misunderstanding” defense. If the misunderstanding actually happened, it makes no sense why Respondent took zero actions to correct it or why Respondent had no paper trail or other evidence to support that the misunderstanding occurred. It is extremely telling that Respondent did not introduce any evidence showing that between July

2018, and the date of trial in August 2019, it informed anyone that its conduct on July 12 was all due to a communication breakdown between managers.

In sum, the ALJ's several references to a "misunderstanding" and/or "miscommunication" on July 12, lack evidentiary foundation and are contradicted by the record evidence and reasonable inference drawn therefrom. Accordingly, these findings should be disavowed, as the record supports finding that the "misunderstanding" was devised *ex post facto*.

3. *The ALJ erroneously rejected the introduction of evidence relevant to whether Respondent fabricated the "misunderstanding" defense ex post facto*

To be sure, Respondent bore the burden of establishing this "misunderstanding" defense. At trial, the General Counsel sought to introduce evidence on rebuttal showing that between July 2018, and the opening of the hearing in August 2019, Respondent never told anyone about this "misunderstanding," and instead, consistently denied that it made any restrictions on union activity in July 2018. The General Counsel sought to introduce the evidence in Rejected GC Exhibit 1, Respondent's Petition to Revoke Subpoena Duces Tecum before trial, a formal filing that Respondent submitted to the ALJ. In this document, Respondent declined to produce "documents that 'show or describe a conversation between Security Guard Furquan, Manager Martorana, and employees on or about July 12, 2018, concerning employees being prohibited from speaking to the Union representatives while wearing company uniforms.'" Respondent stated in Rejected GC Exhibit 1: "It is the Respondent position that **this event did not occur** and therefore there are no known responsive documents to this request" (bold added).¹¹

¹¹ Moreover, in its Answers as amended beginning March 2019, Respondent initially denied Complaint paragraph 11(a), alleging that Respondent promulgated a restriction on Union activity in uniform. Respondent maintained its denial until the second day of trial, when suddenly on record, Respondent admitted that the rule was promulgated. Tr. 305:3-22 (Attorney Adam Abrams: "we're admitting that the - that by Mark - that - by Mark Martorana and the security officer, Furquan, there was a rule promulgated."). The only thing that changed is that

It defies logic that Respondent would not have mentioned anything about the July 12 “misunderstanding” at any time before the hearing, and would repeatedly deny restricting union activity in uniform, if Managers Solis and Ramirez were actually aware that Martorana had promulgated such a restriction on union activity and if they actually told Martorana to fix it, as they testified at the hearing. If Managers Solis and Ramirez were aware of the “misunderstanding” and “miscommunication” on the day that it allegedly happened, then it is not credible for Respondent to claim that this event did not occur. After formally representing that the event did not occur, it is not credible for the managers to testify that the event did in fact occur, but it was due to a big miscommunication.

The rejected evidence should have been admitted for purposes of bolstering the General Counsel’s argument that Respondent’s “misunderstanding” defense to conduct on July 12, is an after-the-fact, fictitious explanation. See GC Post-Hearing Brief at 42-43 (arguing that the misunderstanding defense is nonsensical and not supported by the record as a whole). The ALJ erred by excluding evidence relevant to the credibility of Managers Solis, Ramirez, and Martorana. The rejected evidence demonstrates that neither Solis nor Ramirez contemporaneously knew that Martorana restricted union activity on July 12, and further that there was no managerial misunderstanding on July 12 underlying the commissions of ULPs. Instead, that defense was invented well after the fact and presented for the first time at the hearing in an effort to defend against liability.

/

/

Respondent viewed the video evidence of the rule promulgation introduced as General Counsel Exhibits, realized the conduct demonstrably occurred, and only then did Respondent raise this “misunderstanding” defense. The ALJ failed to consider the suspicious timing.

4. The ALJ's findings of a "misunderstanding" or "miscommunication" on July 12 should be disavowed and reversed

The Board should disavow as irrelevant the ALJ's discussion of Respondent's reasons for engaging in coercive behavior on July 12, 2018. Alternatively, the Board should draw an adverse inference for failing to call Furquan and find there was no racial harassment, reverse the ALJ's exclusion of evidence relevant to whether the July 12 violations were truly due to a managerial misunderstanding, and find that the testimony offered in support of the "misunderstanding" does not credibly explain why Respondent engaged in a flurry of Section 8(a)(1) conduct on July 12. The evidence demonstrates that Respondent concocted the "misunderstanding" defense *ex post facto*.

Contrary to the ALJ's statement in footnote 22, the reason Martorana and Furquan took these actions on July 12 is straightforward and well supported by the record and reasonable inferences drawn therefrom: after decertification petitions were filed on Friday July 6, 2018, the Union's next visit and tent set-up occurred on Thursday July 12, 2018; emboldened by the decertification effort and in order to intimidate and restrain employees engaged in lawful off-premise Union activity, Respondent engaged in surveillance and attempted to interfere with employees' peacefully conferring with the Union by telling them they could not be out there in company uniform. Nothing in the video evidence supports that the reason Respondent took these actions was due to a "misunderstanding." Even assuming Martorana was acting pursuant to a misunderstanding, that has absolutely no relevance to whether the conduct in which he and Furquan engaged violates Section 8(a)(1) as a restraint on protected activity.

/

/

D. The ALJ should have found that Respondent violated Section 8(a)(1) of the Act by promulgating a rule prohibiting employees from wearing their company uniforms while meeting with Union representatives in response to Union activity (Complaint Paragraph 11(b); Exception No. 4)

It is undisputed, as referenced *supra* in Section C and as alleged in admitted Complaint Paragraph 11(a), that: “About July 12, 2018, Respondent, by Mark Martorana and Furquan (last name unknown), promulgated a rule prohibiting employees from speaking to Union representatives while wearing company uniforms.” In addition to Respondent admitting on the record at trial that it promulgated the rule as alleged, Respondent’s coercive behavior is fully documented on video. See GC Exhibit 14(b) through (e). The videos show that Guard Furquan approached employees at the Union tent, where they were lawfully conferring with the Union, and told the employees that Manager Solis said they cannot wear uniforms while talking to the Union and Furquan will take pictures if they do not stop. When the employees did not stop talking to the Union, Manager Martorana came outside with Furquan at his side, relayed the exact same instruction to stop talking to the Union in uniform, and clarified that it was Respondent’s “policy” to prohibit Union activity in uniform.¹²

The ALJ found that because the no-union-activity rule expressly prohibits employees from engaging in valid union activity, it is unlawful on that basis. Such finding is proper and well supported. The ALJ declined to make a finding, however, on whether the rule was

¹² While the video footage shows use of profanity, there is not a shred of evidence of employees harassing Furquan, employees making racially offensive comments, or Respondent taking any reasonable steps toward de-escalating a potential physical fight or claimed harassment. The content of the videos showing what happened on July 12 at the Union tent further undermine the judge’s findings that Respondent had a “misunderstanding” that day and was reacting to employees’ harassing Furquan. These findings are not supported by the record as a whole. Respondent utterly failed to prove by a preponderance of evidence that in promulgating the restriction on Union activity, it harbored a reasonable belief of racial harassment or physical fighting.

promulgated in response to union activity and to discourage such activity. JD 13:35-15:9. The evidence demonstrates that the rule was enacted in direct reaction to Union activity, and the ALJ should have found as much.

It is difficult to imagine a clearer example of a rule promulgated in response to protected activity. Here, Manager Martorana and Guard/Agent Furquan disseminated an express “policy,” while standing right in the middle of employees’ union activity, providing that employees cannot engage in off-the-clock, off-the-property union activity in company uniform – a rule like this never existed in any form prior to July 12, 2018, which was a mere 6 days after the decertification petitions were filed. Although the rule is invalid for the reasons the ALJ stated, it is additionally invalid because the circumstances and timing leave no doubt that the rule was in direct response to employees’ union activity in an atmosphere where petitions to decertify the union had just been filed.

It is settled law that once it has been shown that the rule was promulgated in the context of union activity, the employer has the burden of explanation, and mere assertions of employee misconduct will not suffice. As the Board found in *Dillon Companies, Inc.*, 340 NLRB 1260 (2003), when the misconduct that the employer claims justifies the rule is in fact protected concerted or union activity, evidence of such employee “misconduct” does not transform an unlawful rule into a lawful one. Here, to the extent Respondent argues that the rule was promulgated due to Manager Martorana misunderstanding what Solis told him to do, that defense has no support in Board law. Put differently, Manager Martorana’s mistaken belief that he was acting pursuant to the instructions of his superior does not make the policy he promulgated valid, nor does it mean the policy was not promulgated in direct response to union activity. The evidence clearly shows that Martorana promulgated the rule in direct reaction to lawful union

activity; Martorana's mistaken belief that he had a right to communicate the policy is irrelevant and no defense. In this case, the "miscommunication" defense should not be accepted as valid.

Accordingly, the ALJ erred by failing to find that the rules promulgated on July 12 were promulgated in response to union activity.¹³

E. The ALJ should have found that Respondent violated Section 8(a)(1) of the Act by unlawfully surveilling employees on August 2, 2018 (Complaint Paragraph 12; Exception No. 5)

The ALJ found that on Thursday, August 2, 2018, Security Guard Furquan used his cell phone to photograph and/or videotape three Union representatives who were meeting with Shop employees while they ate lunch in Respondent's training room.¹⁴ JD 16:14-16. The ALJ also found that soon after Security Guard Furquan left the room, Shop Foreman Richard Gonzalez, who had never eaten with the Shop employees in the training room, walked in with a pizza, sat down on the other side of the room, and began eating. Gonzalez continued eating his pizza and watching the Shop employees and the Union representatives until they left the training room about 10 minutes later.¹⁵ ALJ 16:16-20.

The ALJ found that the conduct by Furquan and Gonzalez was not unlawful because Respondent had a reasonable concern about trespassing. JD 16:24-25, 31. For the reasons set forth below, the ALJ erred as a matter of law because Respondent did not have a reasonable belief that the Union representatives were trespassing on August 2, 2018. Even assuming

¹³ Although the judge's error does not materially affect the remedy as it relates to Complaint paragraph 11, the findings do materially and prejudicially affect Complaint paragraph 15(b) concerning Respondent's closure of the training room, an action which was once again due to employees' union activities.

¹⁴ The evidence reflects that there were at least five Shop employees present. Tr. 88 (Jose); GC Ex. 14(f) (video footage).

¹⁵ The ALJ did not address Respondent's argument that the General Counsel failed to establish that Gonzalez and Furquan were acting as agents of Respondent within the meaning of Section 2(13) of the Act on August 2. JD 17: fn. 39.

arguendo that Furquan's surveillance was justified by a reasonable concern over trespass, which it was not, Foreman/Agent Richard Gonzalez's subsequent presence in the lunchroom served no legitimate purpose other than to listen to employees' conversations with the Union and engage in surveillance. Gonzalez's conduct, therefore, violated Section 8(a)(1), even if Furquan's conduct did not.

Notably, the Union representatives' August 2, 2018 meeting with employees was in accordance with the terms of the parties' Labor Peace Agreement (LPA). The LPA provides, among other things, that upon 24-hour notice, up to three Union representatives are allowed access to nonwork areas at Respondent's facilities during nonwork times for up to 32 hours each month to communicate with employees.¹⁶ JD 1; 2:4-6; Jt. Ex. 2, p.4. On July 30, 2018, the Union notified Respondent that it intended to visit the Pacoima facility on August 2, 2018, at 1:00 PM. GC Ex. 23. The LPA places no restrictions on who may serve as a Union representative, has no requirement that the Union inform Respondent who would serve as the Union's representatives, and contains no limitation on how long the Union could stay at a facility on a particular visit. August 2nd, moreover, was the first visit of the month; therefore, the Union was nowhere near exceeding the 32-hour maximum of the LPA.

Further, Union representatives regularly met with employees at Respondent's Pacoima facility. Uncontradicted record evidence reflects that prior to August 2, 2018 (a Thursday), Union representatives typically met with employees at Respondent's Pacoima facility on Thursdays, between the hours of 1:00 or 2:00 PM and 7:00 PM.¹⁷ The Union representatives

¹⁶ While the ALJ correctly notes that the Complaint did not include an allegation concerning access, this fact is not dispositive as to whether Respondent reasonably believed the Union representatives were trespassing.

¹⁷ The ALJ noted that for the August 2 visit, the Union said it would be at the facility at 1:00 PM not 6:30 PM. This fact, however, is irrelevant because the LPA placed no restrictions

stayed until 7:00 PM because, as the ALJ found, the Shop employees took their meal break periods between the hours of 6:00 and 7:00 PM. JD 15: Footnote 32. The ALJ also recognized that the Union representatives had met with Shop employees in the past during their meal breaks. JD 15:24-25.

Given that the Union notified the Employer in advance of its visit, complied with the terms of the parties' LPA, and acted in accordance with its past practice for meeting with employees at the Pacoima facility, there was no reasonable basis for Respondent to believe that the Union representatives were trespassing on August 2, 2018. Respondent clearly wanted to tell the Union it was trespassing as a means of keeping employees from speaking with the Union, however. Nevertheless, the ALJ erroneously found that Respondent had a reasonable belief that the Union representatives were trespassing on August 2nd, focusing on several facts, which are addressed below in turn.

First, the ALJ focused on the fact that an employee of Republic Services – Frank Trevino – was one of the three Union representatives that accessed Respondent's facility at various times that day.¹⁸ Specifically, the ALJ focused on how earlier in the day, HR Manager Ramirez told the Union representatives that they could not bring Frank Trevino into the yard because he worked for Republic Services. JD 14:17-19. As the ALJ noted, however, when Assistant General Manager Tomas Solis saw the Union representatives in the yard that day, including Frank Trevino, he did not tell them to leave; rather, he simply told Trevino to put on a safety

on the number of hours that the Union could spend at the facility on a particular visit; rather, it only placed a limit on the total hours in a month and there is no evidence that the Union was approaching the monthly limit. JD 17:5-6.

¹⁸ Frank Trevino was also a Union member. Union representative David Acosta's uncontradicted testimony established that the Union occasionally brought Union members employed by other employers to facilities so that they could talk with drivers about the benefits of unionization. Tr. 742 (Acosta).

vest. JD 15: fn. 34. It therefore defies logic to claim that Trevino's presence incited a trespass concern, as Solis previously acquiesced to it and neglected to raise concerns over his presence.

In addition, focusing on the presence of Trevino that evening necessarily avoids several other important facts. Specifically, at around 6:20 PM that day, Security Guard Furquan closed and locked the main gate as per Martorana's direction.¹⁹ JD 15:2-7. According to the Union representatives, this was the first time Respondent had ever locked the gate when they visited the facility, and when Furquan locked the gate, he said nothing about Trevino.²⁰ Moreover, when the Union representatives entered through another gate to go speak with the Shop employees on their meal period, Martorana told Furquan to tell the Union representatives that they were not allowed in the yard and were trespassing. Also, when Martorana spoke to the Union representatives, he did not say anything indicating that the issue was Trevino. JD 15:10-14. Rather, Martorana simply stated that they all needed to leave, without articulating any reason why or any reasonable belief of trespass.

Accordingly, the evidence fails to establish a reasonable belief of trespassing, as there is no evidence indicating that the Union's right to access the facility under the LPA was limited to when the yard was open, especially when it is undisputed that the Shop employees were still working inside and would soon be taking their meal breaks. In other words, there is no

¹⁹ Furquan did not testify at the hearing, but the ALJ nevertheless found that he closed the gate at Martorana's direction because dispatch had reported that the last truck had returned for the day. JD 15:2-7.

²⁰ The testimony of Respondent's HR Vice President Michael Pompay further supports that it was not unusual for the Union to be at the facility until 7:00 PM. As the ALJ points out, Pompay ultimately told Martorana to let the Union representatives stay until 7:00 PM on August 2 and then tell them they had to leave or the police would be called.

reasonable explanation as to why Respondent locked the gate on August 2nd other than attempting to keep the Union representatives out.

The ALJ also highlights that when the Union representatives said they had the right to be there, Martorana asserted that the Shop employees were no longer on their meal break and could not talk to them. JD15:20-22. This, however, was contradicted by the evidence establishing that the Shop employees regularly took their lunch between 6:00 and 7:00 PM. JD 15: fn. 32. Accordingly, this fact fails to establish a reasonable belief of trespassing.

Next, the ALJ notes how Martorana objected to the fact that the Union was meeting with the employees in the training room, stating that they were only allowed in the common area. JD 15:24-26. Although the ALJ stated that there was no record evidence that any supervisor or manager knew prior to August 2nd that Union representatives met with employees in this training room, this is illogical. JD 19:18-21. The facts establish that Respondent knew that the Shop employees ate lunch in the training room and that the Union met with Shop employees on their non-working time such as lunch, therefore, Respondent knew that the Union met with Shop employees where they took their meal breaks, which was the training room. Moreover, as the ALJ found, Respondent never used the training room after 6:00 PM. JD 17:31-32. Accordingly, this fact also fails to establish a reasonable belief of trespassing.

The ALJ also focused on a series of e-mails exchanged between Respondent's counsel Adam Abrahms and Union's counsel Paul More on August 2nd. JD 14:21-28. More's representations to Abrahms, however, did not modify the access rights under the LPA or change the parties' past practice of allowing three Union representatives to access the facility. Just because the Union agreed, without conceding to Respondent's position, that in the future it would not have Union members that were employed by other employers serve as one of the three

Union representatives, the Union's representations do nothing by way of generating for Respondent a reasonable belief of trespassing on August 2nd.

Based on the above, the ALJ erred in finding that Respondent had a reasonable concern about trespassing such that its subsequent acts of surveillance by Furquan and Gonzalez would be lawful or privileged. Instead, the evidence is clear that Furquan and Gonzalez's conduct constitutes unlawful surveillance as described in *F.W. Woolworth Co.*, 310 NLRB 1197 (1993) and *National Steel & Shipbuilding Co.*, 156 F.3d 1268 (D.C. Cir. 1998). With respect to Furquan, the evidence established that his presence in the training room was out of the ordinary, that he held his camera up and moved it around the room, thereby pointing it at the Union representatives and at the Shop employees, and this conduct had a reasonable tendency to interfere with protected activity under the circumstances of this case, in violation of Section 8(a)(1).

Moreover, even if Furquan's photographing or videotaping was lawful in order to document the Union's alleged misconduct, which it was not, there is no reason that Gonzalez would need to go into the training room minutes later to observe the employees meeting with the Union representatives. Furquan had already documented the evidence supporting the alleged trespassory concerns and there was no intervening concern over trespass. The evidence established that Gonzalez's presence in the training room following Furquan was extremely out of the ordinary – he never ate in that room or spent time with the Shop employees when they were in the room. Equally importantly is the fact that by the time Gonzalez went into the training room, Respondent's VP of HR Michael Pompay had already granted the Union representatives the right to stay until 7:00 PM. And as noted, Furquan indisputably had already preserved video evidence documenting the prior purported trespass concerns.

Despite the parties reaching a resolution of their dispute over access rights, Respondent fully recording the purported trespass, and no intervening trespass concerns, Gonzalez nevertheless entered and stayed in the training room until shortly before 7:00 PM, to silently monitor employees' meeting with the Union. Given those circumstances, which the judge failed to consider, employees would reasonably believe that Gonzalez was there to listen to their conversations and to monitor their engagement with the Union, thus generating an atmosphere of intimidation and restraint that is prohibited by Section 8(a)(1). Gonzalez's presence is not explained by any other basis except for surveillance of concerted activity.

As such, separate and apart from the actions Furquan took, Gonzalez's conduct had a reasonable tendency to interfere with protected activity, in violation of Section 8(a)(1). See *North Memorial Health Care*, 364 NLRB No. 61 (2016) (manager's close proximity to employees as they spoke to union representatives in cafeteria and interference with those meetings was out of ordinary and constituted unlawful surveillance).

F. The ALJ should have found that Respondent violated Section 8(a)(3) and (1) of the Act by permanently closing a lunchroom in response to Union Activity (Complaint Paragraph 15(b); Exception No. 6)

As stated in the previous section, the ALJ found that for years, Shop employees regularly took their evening meal breaks in the training room and that Respondent never used that room after 6:00 PM, which is when the Shop employees typically began taking their meal breaks. JD 17:28-32. The ALJ also found that Shop Supervisor Zufall, Fleet Manager Martorana, and HR Manager Ramirez were aware that shop employees took their lunch breaks in this training room and that none of them told the employees they could not do so.²¹ JD 18:4-6. However, this all

²¹ Importantly, the ALJ expressly credited the employee testimony that no one in management ever told them prior to August 3 that they could not take their meal breaks in the

changed on Friday, August 3rd, the day after the incident discussed *supra* in Section E, when Respondent locked the door to the training room and informed shop employees that they could no longer take their meal breaks in that room. JD 18:10-12.

The ALJ erroneously found that there was insufficient evidence that Respondent had animus against the employees' protected union activities or that those activities were a motivating factor in Respondent's decision to lock the training room on August 3rd. In support of this conclusion, the ALJ cited the following: (i) his conclusion that alleged instances of surveillance on August 2nd were not unlawful; (ii) his conclusion that the surveillance in July 2018 was not based on Union animus but was based on a misunderstanding between supervisors; (iii) that Respondent's objection was not to employees meeting with Union representatives during their meal breaks but to them doing so in what it perceived to be a working area rather than a nonworking area; and (iv) that the locking of the training room was not a grossly disproportionate response to the Union's perceived misconduct and violation of the LPA on August 2nd.

Contrary to the ALJ's assertion, the record reflects ample evidence of animus toward employees' union activities. For the reasons set forth in Sections B, C, D, and E, *supra*, Respondent's animus was evident from both its promulgation of a policy, in direct response to union activity, prohibiting employees from speaking with Union representatives while in uniform, a mere 3 or 4 weeks prior to this incident in August. Animus was further evidenced by Respondent's blatant surveillance of employees' union activities on July 12 and August 2, 2018.

room. The ALJ expressly rejected as not credible or substantiated Respondent's main defense that the shop employees had *never* been allowed to eat in the training room. JD 18: fn. 41.

The close timing between Respondent's conduct violating Section 8(a)(1), employees' engagement with the Union on the heels of decertification petitions, and Respondent's closure of employees' lunch area on August 3, further supports finding that the Respondent's action was motivated by animus toward union activities.

It would not be reasonable for Respondent to perceive this training room as a working area rather than a nonworking area, despite the judge's contrary suggestion. JD 19:15-28. As the credited facts make clear, for years the Shop employees regularly used this training room during their meal breaks; the room had a microwave in it; at least three of Respondent's high ranking officials were aware that employees took their meal breaks in that training room and never said they were not allowed to do so; the Shop employees took meal breaks between 6:00 and 7:00 PM; and there is no evidence that Respondent ever used the training room after 6:00 PM for work purposes. Accordingly, there is no factual basis in the record for Respondent to perceive this training room as a working area between the hours of 6:00 and 7:00 PM.

Furthermore, the ALJ erred in finding that the locking of the training room was not a grossly disproportionate response to the events that occurred on August 2nd. The evidence establishes that the Union visited the Pacoima facility no more than once per week, typically on Thursdays, and that the Union must provide 24-hour notice prior to accessing the facility. In those circumstances, there was no reason to believe that the Union would return on August 3rd to meet with Shop employees in that training room. Instead, Respondent would reasonably expect that the Union would not return until the following Thursday, absent 24-hours' notice otherwise, which means that Respondent had ample time to communicate and bargain with the Union about the August 2nd incident and what it proposed to do in response (see the next section *infra* for

discussion regarding Respondent's duty to bargain with the Union before implementing this change to the breakroom).

Despite these circumstances, Respondent hastily decided to strip the employees of the lunchroom they had used for several years to eat lunch, when the employees themselves were not involved in the August 2nd incident. In support of the ALJ's conclusion, he compared the facts with the Board's finding in *Spurlino Materials*, 353 NLRB 1198, 1221 (2009) (finding that the employer's discipline of an employee was discriminatorily motivated in part because it was out of proportion to the gravity of the employee's relatively minor offense). Importantly, in *Spurlino*, the employee at issue engaged in a relatively minor offense, that resulted in no harm to Respondent, and the Board determined it was appropriate to consider the disproportionality in determining whether the discipline was legitimate or pretextual. Here, the employees engaged in *no misconduct*, yet Respondent deprived them access to their lunchroom and told them the room would be used for active shooter situations. Respondent's change to employees' working conditions was plainly out of proportion to the employees' conduct; such disproportionate and harsh reaction should be considered in determining whether the change was legitimate or pretextual.²² Indeed, Respondent would not be reasonable in harboring concerns that the alleged trespassory conduct by the Union would repeat itself on Friday August 3, and its rush in unilaterally locking the room and inconveniencing employees with respect to where they eat

²² The ALJ, moreover, erroneously said nothing about uncontradicted evidence showing that on August 3, when Respondent informed employees it was closing the room, it told them a pretextual, unsubstantial reason. Specifically, Martorana told them the room would be used for active shooters and employees should not be eating there anymore. Tr. 93 (Jose), 281 (David). Respondent said nothing about concerns over the Union trespassing on its property – the so-called “misconduct” that the judge reasoned privileged Respondent to lock off the room. Respondent failed to prove that it had any plans to shut down the room or convert it to an active-shooter room.

lunch demonstrates that the closure was not based on legitimate concerns but rather in reaction to Union activity and to punish the employees. Employees would not likely miss the clear implication Respondent conveyed – that engaging in Union activity on Thursday means the lunchroom where everyone prefers to eat is locked on Friday and permanently closed.

Accordingly, the ALJ's asserted reasons are insufficient to support his conclusion. The record reveals sufficient evidence that Respondent had animus against the employees' protected Union activities and that those activities were a motivating factor in locking the training room, thereby preventing employees from continuing to take meal breaks there. Respondent therefore violated Section 8(a)(3) of the Act, as alleged.

G. The ALJ should have found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to engage in decisional bargaining²³ (Complaint Paragraph 15(d); Exception No. 7)

The ALJ found that since August 3, 2018, Respondent has prevented employees at the Pacoima facility from using the training room during their meal breaks as they had been allowed to do in the past. JD 36:18-20. The ALJ found that this change constituted a material and substantial change. JD 37:6-15. The ALJ also found that the parties have been bargaining for an initial collective-bargaining agreement since November 2017, and that between November 2017 and late November 2018, the parties met numerous times but had not reached a contract. JD 2:23-28.

Despite these facts, the ALJ found that Respondent was excused from giving the Union notice and opportunity to bargain regarding its decision to lock the training room. The ALJ reasoned that there were "extenuating circumstances," but he failed to properly apply *Bottom*

²³ The ALJ correctly found that Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with notice and an opportunity to bargain over the effects on employees of the decision to begin locking the training room on August 3. JD 39:5-8.

Line Enterprises, 302 NLRB 373 (1991). JD 36:28-36.²⁴ In making his findings, the ALJ cited the events that occurred on August 2nd.²⁵ For the reasons set forth below, the ALJ erred as a matter of law and should have found that Respondent was required to provide notice and opportunity to bargain to the Union regarding its decision to lock the training room.

In *Bottom Line*, the Board held that an employer has a heightened obligation to refrain from making unilateral changes where no collective-bargaining agreement is in place and the parties are currently engaged in bargaining for an overall contract. 302 NLRB at 374. In such circumstances, “an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.” *Id.*

The Board has recognized only limited exceptions to the *Bottom Line* rule against first-contract unilateral changes. *TXU Electric Co.*, 343 NLRB 1404, 1407 (2004). Initially, the Board reasoned that an employer may unilaterally implement when a union continually avoids or delays bargaining or “when *economic* exigencies compel prompt action.” *Bottom Line*, 302 NLRB at 374 (emphasis added). The Board has limited the economic exigencies that excuse bargaining altogether to “extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.” *RBE Electronics of*

²⁴ In support of conclusion, the ALJ cited *Phelps Dodge Copper Products Corp.*, 101 NLRB 360 (1952) (union’s unprotected slowdown/partial strike in support of its contract demands suspended an employer’s duty to bargain over the contract). That case, however, was decided in 1952, well before the Board’s 1991 decision in *Bottom Line*. As such, that case did not apply any of the exceptions to *Bottom Line* and is not applicable to the instant matter. Moreover, here the Union did not engage in a slowdown or partial strike, and no one argues otherwise.

²⁵ See discussion in Section D and E, *supra*, regarding Counsel for the General Counsel’s exception to the events that took place on August 2.

S.D., 320 NLRB 80, 81 (1995) citing *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995). In that regard, “[a]bsent a dire financial emergency, ... economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action. *RBE Electronics of S.D.*, 320 NLRB at 81 (1995), citing *Triple A Fire Protection*, 315 NLRB 409, 414 (1994).

In *RBE Electronics*, the Board articulated a second, lesser economic exigency for situations which are not serious enough to forgo notice and opportunity to bargain altogether, but require the employer to provide the union with notice and opportunity to bargain to impasse on that issue, at which time the employer can unilaterally implement its final proposal. 320 NLRB at 82. These lesser exigencies are limited to situations where time is of the essence and prompt action is required. To avail itself of this exception, an employer must also show that exigency was caused by external events, was beyond its control, or was not reasonably foreseeable. *Id.* Moreover, the Board requires an employer to prove first that there is a need for prompt implementation of the particular change and second that its proposed changes were “compelled.” *Id.*

In *Stone Container Corp.*, 313 NLRB 336 (1993), the Board recognized a final exception to the *Bottom Line* rule of overall impasse. The Board held that, during first contract bargaining, an employer may lawfully implement a proposal relating to terms and conditions of employment where the proposal concerns “a discrete event, such as an annually scheduled wage review...that simply happens to occur while contract negotiations are in progress,” as long as it provides the union with notice and an opportunity to bargain about the intended change. *Id.*

Here, the ALJ did not discuss the above precedent or explain how he reached his conclusion that the circumstances of this case fall within one of the enumerated exceptions to

Bottom Line. In fact, Respondent did not even contend that the facts here demonstrated the existence of compelling economic considerations that would excuse bargaining altogether.²⁶

Under extant Board law, none of the exceptions to *Bottom Line* apply. First, there is no evidence that the Union delayed or avoided bargaining at the time when Respondent implemented the change at issue. Second, the change at issue was not related to a discrete, annually recurring event that simply happened to arise during contract negotiations and required prompt action, hence the *Stone Container* exception does not apply.

The “economic exigency” exception, therefore, is the only remaining option. The record makes clear that Respondent has not met the stringent requirements of showing an economic exigency that would excuse bargaining. Importantly, there is no evidence that the circumstances on August 2, 2018, had a “major economic effect [requiring] the company to take immediate action.” *Hankins Lumber Co.*, 316 NLRB at 838. In fact, the circumstances on August 2, are entirely distinguishable from the kind of sudden, extraordinary event that the Board has determined will justify implementation without bargaining. *See, e.g., Seaport Printing & Ad Specialties, Inc.*, 351 NLRB 1269, 1269 (2007) (economic exigency excused unilateral layoff of employees after a hurricane caused a citywide evacuation), *enfd. sub nom. NLRB v. Seaport Printing & Ad Specialties, Inc.*, 589 F.3d 812 (5th Cir. 2009). Furthermore, the events of August 2, were not an “economic exigency” under *RBE Electronics*.²⁷ Even under *RBE Electronics*, an

²⁶ In Respondent’s Post-Hearing Brief, Respondent proffered several arguments for why it had no duty to bargain with the Union regarding this change, each of which was rejected by the ALJ. JD 37:6-36; 38:1-48; and 39:1-3. However, not once did Respondent cite *Bottom Line* or its progeny to justify its unilateral action.

²⁷ *See Maple Grove Care Center*, 330 NLRB 775, 779 (2000) (increased premiums in health coverage not an economic exigency, in which time was of the essence and which demands prompt action; Board concludes that, as here, it is highly unlikely that respondent would have been placed in straitened financial circumstances had it paid the entire premium increase until overall impasse had been reached); *Naperville Ready Mix Inc.*, 329 NLRB 174, 182-183 (1999),

employer still must provide the union with opportunity to bargain to impasse on the specific issue, after which employer can unilaterally implement its final proposal. Here, in contrast, Respondent gave the Union no notice and engage in no bargaining.

Accordingly, based on the foregoing analysis and well-established precedent, Respondent did not demonstrate the existence of any exceptions to *Bottom Line* and therefore the ALJ should have found that Respondent violated Section 8(a)(5) of the Act by preventing employees at the Pacoima facility from using the training room during their meal breaks as they had been allowed to do in the past, without providing the Union with notice and opportunity to bargain over the decision.

/

/

/

/

/

/

enfd 242 F.3d 744 (7th Cir. 2001) (refusal to bargain over sale of trucks not justified under *RBE Electronics*' economic exigency exception, although employer could save some money if scheme was implemented before July 1 when licenses for trucks were to be renewed, an expected event that occurred annually on that date; Board concludes that this argument that employer "might make in support of its proposals, but it in no way meets the economic exigency standard in advance of an impasse in contractual negotiations"); *L&L Wine & Liquor Corp.*, 323 NLRB 848, 851-852 (1997) (concern over high insurance costs does not warrant implantation prior to contract impasse); *United States Testing Co.*, 324 NLRB 854 (1997) (respondent failed to offer evidence that its financial situation was so dire that it either had to implement its final offer when it did or suffer financial ruin); *Sartorius Inc.*, 323 NLRB 1275, 1284-1286 (1997) (unilateral implantation of incentive bonus program not justified by alleged economic exigency of increases in scrap rate on machine and unexpected high orders); *Pleasantview Nursing Home*, 335 NLRB 961, 962 (2001), enfd. in part, 351 F.3d 747 (6th Cir. 2003). See also *IFG Stockton*, 357 NLRB #118 JD slip op at 7-8 (2011) (inadequately trained employees not an economic exigency under *RBE Electronics*, justifying unilateral implementation of subcontracting).

IV. CONCLUSION

Based on the entire record in this matter and on the foregoing argument, Counsel for the General Counsel respectfully requests that the Board grant these exceptions and amend the Conclusions of Law, Remedy, recommended Order, and Notice to Employees accordingly.

Dated at February 14, 2020

Respectfully submitted,

/s/

Amanda Laufer
Christine Flack
Counsel for the General Counsel
National Labor Relations Board
Region 31
11500 West Olympic Boulevard
Suite 600
Los Angeles, California 90064