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

WISMETTAC ASIAN FOODS, INC.		
and	**Cases**	**21-CA-207463**
		21-CA-208128
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 630		**21-CA-209337**
		21-CA-213978
		21-CA-219153
and		
ROLANDO LOPEZ, an Individual	**Case**	**21-CA-212285**
and		
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 630	**Case**	**21-RC-204759**
Petitioner		

GENERAL COUNSEL'S ANSWERING BRIEF TO THE RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. PRELIMINARY STATEMENT OF THE CASE

On August 30, 2019, Administrative Law Judge (ALJ) Eleanor Laws issued her decision in these cases, finding that Wismettac Asian Foods, Inc. (Wismettac or Respondent) violated the National Labor Relations Act (Act) by unlawfully promising employees better benefits and improved terms and conditions of employment if they rejected International Brotherhood of Teamsters, Local 630 (Union); disciplining, suspending, and terminating employees for engaging in union and protected concerted activities; refusing to re-hire and consider for re-hire known union supporters; and soliciting employees to revoke their union-authorization cards.

Since the spring of 2017, the Respondent's employees have been organizing to join the Union. On August 21, 2017, after learning about the union-organizing campaign, the Respondent quickly hired anti-union labor consultants to thwart the employees' organizing efforts. Then, just before the first union-representation election was held on September 19, 2017, as the ALJ properly found, time-and-time again, the Respondent engaged in unlawful conduct by making promises of benefits to employees to dissuade them from supporting the Union.

After the first election was set aside, aware that a second election was approaching, the Respondent intensified its anti-union tactics by targeting and retaliating against known union supporters. The Respondent unlawfully issued known union supporter Ruben Munoz (Munoz), a written warning, removed him from his lead position, and changed his work schedule. In finding the Respondent's actions against Munoz to be unlawful, the ALJ properly found the suspect timing of events and the Respondent's unorthodox investigation to be strong evidence of discriminatory intent. Moreover, the ALJ properly rejected the Respondent's defense that Munoz was disciplined because of anti-union employees' complaints against Munoz, noting that the complaints against him were mere pretext in an attempt to conceal the Respondent's true discriminatory motive.

Similarly, the ALJ found that employee Alberto Rodriguez (Rodriguez), also a known union supporter, was unlawfully disciplined, suspended just days before the second election, and terminated shortly after. In rejecting the Respondent's defense, the ALJ found that the reason proffered for Rodriguez's suspension – that he had allegedly threatened employees to vote for the Union – lacked evidentiary support. The ALJ further concluded that the numerous reasons proffered for Rodriguez's termination were similarly unsubstantiated. And, absent the unlawful suspension, the Respondent would not have terminated Rodriguez's employment.

Furthermore, the ALJ properly found that the Respondent unlawfully terminated Pedro Hernandez (Hernandez) and unlawfully refused to re-hire and consider for re-hire Hernandez, Fanor Zamora (Zamora), and Jeremiah Zermeno (Zermeno), all known union supporters who were "temporary" employees referred to the Respondent by staffing agency Randstad, when they applied to their former warehouse positions.[1] Prior to the first election, the Union and the Respondent agreed that temporary employees would also be permitted to vote in the election. After the results from the first election, which the Union overwhelmingly won, the Respondent learned that a majority of the temporary employees also supported the Union. Knowing that a second election was forthcoming, on October 31, 2017, the Respondent decided to terminate the employment of the Randstad day-shift employees, while permitting the night-shift Randstad employees to continue working. Even though Hernandez was a Randstad night-shift warehouse employee, on October 31, 2017, the Respondent singled him out and terminated him simply because of his union activism. The ALJ found that the Respondent's shifting explanations for terminating Hernandez were indicative of pretext. Furthermore, when Hernandez, Zamora, and

[1] The Respondent refers to employees it obtains through staffing agencies such as Randstad as "temporary" employees, as opposed to direct hires, which are referred to by the Respondent as "permanent" or "full-time" employees.

Zermeno attempted to return to work for the Respondent through other staffing agencies or by applying for work directly with the Respondent, the Respondent turned them away even as it hired over a dozen other new employees. In rejecting the Respondent's defense, the ALJ properly found that the Respondent had failed to meet its burden that employees Hernandez, Zamora, and Zermeno were not qualified for the open warehouse positions or that the individuals hired for these positions had superior qualifications.

In addition, the ALJ properly found that the Respondent unlawfully solicited employees to revoke their union-authorization cards. The Respondent, at meetings conducted with employees during work time, crossed the line by providing employees with instructions and sample letters for employees to use to withdraw their union-authorization cards.

And, while the Respondent's unlawful acts centered around the anti-union campaign to undermine the employees' organizing drive, the ALJ found that the Respondent also violated the Act by unlawfully disciplining driver Rolando Lopez (R. Lopez) for speaking about drivers' working conditions at a safety meeting.

In its exceptions, the Respondent now seeks to undermine the ALJ's well-supported findings with baseless arguments in an effort to deflect from the clear evidence that cuts against it. Accordingly, it is respectfully requested that the Respondent's exceptions be rejected, as they do not warrant disturbing the ALJ's findings and conclusions of law.

II. BACKGROUND

A. Employees Initiated Organizing Campaign in Early 2017

In early 2017, Wismettac employees contacted the Union to explore organizing the warehouse workers and drivers, and in February or March 2017, the Union formed a union

committee of about 10 to 12 employees.[2] (ALJD 3:25-4:6; Tr. 36-37, 112-113.)[3] The union committee members included Rodriguez, Zamora, R. Lopez, and Luis Lopez (L. Lopez), who organized and educated their co-workers about their rights and communicated information to them about the Union. (ALJD 4:6-10; Tr. 38, 136.) In August 2017, the Union distributed 70 black t-shirts with "Teamsters Local 630" printed on them along with the Union's logo. (ALJD 4:12-13; Tr. 40-41, 218, 501.) The Union also distributed union buttons to drivers, which stated "Respect is in a union contract." (ALJD 4:12-15; Tr. 41-42.) Plant manager Anthony Vasquez (Vasquez), also known as Jose, observed some warehouse employees wear the union t-shirt on Fridays and other employees wear the t-shirt almost every day. (ALJD 4:15-16; Tr. 650.)

B. August 21, 2017 – Union Request for Voluntary Recognition

On August 21, 2017, in the morning, over 60 employees participated in a union delegation at the Respondent's facility to request that the Respondent voluntarily recognize the Union as their representative. (ALJD 4:20-21; Tr. 46-47.) During the delegation, employees wore union t-shirts and sang and chanted in support of the Union. (ALJD 4:21-22; Tr. 46, 300; R. Exh. 13.)[4] Union secretary-treasurer Lou Villalvazo (Villalvazo) and organizers Carlos Quinonez (Quinonez) and Oscar Ruiz (Ruiz) accompanied the group. (ALJD 4:20-21; Tr. 46-47, 300.)

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[2] Wismettac, a Japanese food distributor, is a California corporation with an office and place of business located in Santa Fe Springs, California (Los Angeles facility). (ALJD 2:17-20.)

[3] References to the ALJ's decision are cited herein as "ALJD" followed by the page(s) and line number(s). Citations to the hearing transcript will be referred to as "Tr." followed by the appropriate page number(s). Citations to the Counsel for the General Counsel's exhibits, the Respondent's exhibits, and the Union's exhibits will be referred to as "GC Exh.," "R. Exh.," and "U Exh.," respectively, followed by the appropriate exhibit number(s). Citations to the Respondent's Brief in Support of its Exceptions will be referred to as "R. Br." followed by the appropriate page number(s).

[4] The Respondent's exception no. 1 excepts to the ALJ's findings that during the Union's request for recognition, "there were no threats, assaults, or any other malfeasance…" Similarly, the Respondent exception no. 8 excepts to the ALJ's finding that "…Respondent's employees were scared they were going to be sued by the Respondent." However, the Respondent fails to state how these findings of fact impact any of the ALJ's legal conclusions regarding the unfair labor practice charges.

The entire group proceeded to the office of Yoshinori Narimoto (Narimoto), the Respondent's director of logistics, and Villalvazo showed Narimoto a stack of signed union-authorization cards and asked him to sign a document recognizing the Union and negotiate a contract, rather than spending money on a "union buster" attorney. (ALJD 4:20-22; Tr. 46-48, 300). Ron Minch (Minch), national distribution logistics general manager for the Respondent, intervened, declined to sign the paperwork acknowledging the Union, and asked the Union representatives to leave. (ALJD 4:24-27; R. Exh. 13.) The employees and Union representatives then walked back to the warehouse. (ALJD 4:25-26; Tr. 49; R. Exh. 13.) Minch approached and asked the Union officials to leave, and they left. (ALJD 4:26-27; Tr. 53, 275.) The Union delegation lasted about 15 minutes. (ALJD 4:28-29; Tr. 224, 304-305.)

C. September 19, 2017 – First Union-Representation Election and Results: Majority of Employees Voted in Favor of the Union

On August 21, 2017, after the Respondent refused to voluntarily recognize the Union, the Union filed an election petition with the National Labor Relations Board (Board), Region 21. (ALJD 4:31-34; Tr. 46.) On September 19, 2017, pursuant to a stipulated election agreement, a union-representation election was conducted for the following unit:

> **INCLUDED**: All full-time and regular part-time class A, B, and C drivers, warehouse clerks, inventory control employees, assemblers/selectors, labelers, forklift drivers, warehouse employees, and leads in all departments, including the shipping and receiving department, state department, international export department, dry department, and cooler freezer department, and employees in the job classifications described herein who are supplied by temporary agencies, employed by the Employer [Respondent] at its facility currently located at 13409 Orden Drive, Santa Fe Springs, California.
>
> **EXCLUDED**: All other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.[5]

(ALJD 8:10-38; GC Exh. 1(aj).)

[5] The Respondent and the Union also agreed, pursuant to the stipulated election agreement, to permit GPO distribution coordinators, GPO central purchase clerks, central purchase clerks, and logistics office clerks to vote in the election, subject to challenge.

At the first election, the Union prevailed. Out of 119 eligible voters, 75 votes were cast for the Union, and 22 votes were cast against the Union. There were 2 void ballots and 31 challenged ballots, which were not sufficient to affect the results of the election. (ALJD 8:40-42; GC Exh. 1(aj).)

On September 26, 2017, the Respondent filed objections with Region 21 of the Board, and on December 15, 2017, Region 21 set aside the first election due to Board agent misconduct. (ALJD 9:8; GC Exh. 1(aj)). Region 21 scheduled a second election for January 9, 2018, which was cancelled and rescheduled for February 6, 2018. (Tr. 49-50; GC Exh. 1(aj).)

D. February 6, 2018 – Second Union-Representation Election and Results: Employees Continue to Support the Union

On February 6, 2018, the second union-representation election was conducted. (ALJD 24:20-21; GC Exh. 1(aj).) Out of 187 eligible voters, 76 voters were cast for the Union and 46 votes were cast against the Union. There were 53 challenged ballots, a number that was sufficient to affect the results of the election. (ALJD 24:34-35; GC Exh. 1(aj).)

III. STATEMENT OF FACTS

A. Prior to the September 19, 2017 Election, the Respondent Held Numerous Meetings With Employees and Made Promises of Benefits and Improved Working Conditions

Soon after the Union filed the petition, the Respondent's primary goal was to convince eligible voters to reject the Union. (ALJD 5:16-20.) Frank Matheu (Matheu), acting deputy general manager for the Respondent, was brought in from the Respondent's facility in Orlando, Florida, to specifically assist with the Respondent's anti-union campaign. (ALJD 2:36-39, 5:16-26; Tr. 773, 802-804.) While at the Los Angeles facility, Matheu, with the assistance of newly hired anti-union labor consultants, led numerous meetings and held one-on-one conversations with

eligible voters, during which Matheu made promises of benefits and improved working conditions by telling employees that he had the "green light" and authority to make the necessary changes, but only if employees rejected the Union. (ALJD 5:6-8, 5:16-26, 5:33-35.)

For example, on September 8, 2017, Matheu and labor consultant Gustavo Flores (G. Flores) met with drivers R. Lopez and L. Lopez. (ALJD 5:37-40, 6:1-5.) The sole purpose of the meeting was to address the ongoing organizing campaign and ask the drivers to reject the Union. (ALJD 5:37-40; 6:1-5.) During the meeting, Mattheu told the two drivers that the owner had given him the green light to make improvements and the changes within the company, but he was going to do it as long as there wasn't a third party. (ALJD 5:37-40, 6:1-5.)

Then, in mid-September 2017, as driver L. Lopez was loading his work truck by the loading dock, Matheu approached him in another attempt to convince him to reject the Union. (ALJD 6:7-12.) During this one-on-one conversation, Matheu reiterated his authority to make changes at the warehouse by telling L. Lopez to think about it well and give the company the opportunity to make improvements. (ALJD 6:7-10.) Matheu further stated that he had the power to make changes, that he knew that the company had taken away the employees' bonuses and they had not paid employees their retroactive pay, and he was going to bring it back. (ALJD 6:10-12.)

Similarly, on September 13, 2017, Matheu approached driver Yader Alvarado (Alvarado) by the time-clock machine and reminded him of the work improvements that Matheu had already implemented. (ALJD 6:14-19.) Matheu then stressed that those improvements were only the beginning and asked Alvarado to give him some time to carry out all the necessary changes. (ALJD 6:14-19.) As with other employees, Matheu stressed that he would do everything possible to give employees back their bonuses and retroactive pay. (ALJD 6:14-19.)

A few days later, on September 15, 2017, Matheu and G. Flores held a meeting with several drivers. (ALJD 6:21-24.) During the meeting, Matheu again told the drivers that he had the green light to make the necessary changes but needed more time. (ALJD 6:21-24.)

Also, on about September 15 and 18, 2017, right before the first election, the Respondent held an additional round of meetings with all eligible voters, both drivers and warehouse employees, where the Respondent again made promises of benefits to them. (ALJD 6:31-33.) The meeting was attended by the Respondent's owner, managers, supervisors, and anti-union labor consultants. (ALJD 7:17-18.) Matheu spoke at the September 15 and September 18, 2017 meetings, delivering the same message to the employees present. (ALJD 6:31-7:12.) During these meetings, Matheu reiterated that he would make changes that employees needed. (ALJD 7:28-30, 8:4-6.) As in prior meetings, Matheu echoed that he had the green light to make the necessary changes, so long as the Union was not elected. (ALJD 6:23-24, 8:1-6.)[6]

B. March 2018 Meetings: The Respondent Solicited Employees to Revoke Their Union-Authorization Cards

On February 6, 2018, the second election for representation was held. (ALJD 24:20.) In March 2018, while the final results of the second election were pending, the Respondent solicited employees to revoke their union-authorization cards at numerous meetings. (ALJD 26:1-12.)

Labor consultant G. Flores conducted these meetings in an effort to quash the employees' organizing drive. (ALJD 5:6-8, 26:1-12.) At these meetings, G. Flores, reading from a document prepared by the Respondent, instructed employees on how to revoke their signed union-authorization cards from the Union. (ALJD 26:1-12; GC Exh. 20.) The Respondent did not stop

[6] In speaking to employees, Matheu relied on talking points he prepared, which include phrases like, "There will be changes," "Give me a chance to do what I love doing – making a difference," "Fix root of problem," "Bring back appreciation for your efforts," and "I will now have full support from upper management, they will listen, I will justify, and will change whatever needs to be changed to improve work environment, and give you what you need to get the job done." (ALJD 6:31-7:12; GC Exh. 56.)

there. At these meetings, G. Flores also had sample letters the Respondent prepared for employees to use to revoke their authorization cards. (ALJD 26:1-12; GC Exh. 21.) Employee witnesses testified that despite having to attend these meetings during worktime, they had never requested information from the Respondent as to how to revoke their authorization cards from the Union. (ALJD 26:9-11.) Additionally, the sample revocation letters prepared by the Respondent were also distributed to employees after the meetings. (ALJD 26:11-12.)[7]

Towards the end of March 2018, the Union received revocation letters from two eligible employee voters, who used the revocation letters prepared and made available by the Respondent to employees during the March 2018 meetings. (ALJD 26:14-15; GC Exhs. 17-18, 21.)

C. December 5, 2017 – Verbal Counseling Issued to Rolando Lopez for Raising Drivers' Concerted Safety Concerns

The Respondent further violated the Act by disciplining longtime driver R. Lopez for voicing safety concerns at a December 4, 2017 safety meeting. (ALJD 32:18-20; GC Exh. 3.) Specifically, on December 5, 2017, the Respondent issued Lopez a verbal counseling for "making comments of other drivers [sic] issues that we had, that had nothing to do with the briefing." (ALJD 32:18-20; GC Exh. 3.)

Just a few days before the December 4, 2017 safety meeting, after plant manager Vasquez ordered driver Agustin Troncoso (Troncoso) to operate an overweight delivery truck, drivers R. Lopez, Alvarado, and Troncoso openly discussed with one another their concerns about operating overweight delivery trucks. (ALJD 15:32-37.) Then, on December 4, 2017, the Respondent held a safety meeting with all of the drivers, about 30 of them, including R. Lopez, Alvarado, and driver Giovanni (last name unknown). (ALJD 15:40-44, 16:1-3.) Also present at this meeting were

[7] Although G. Flores claimed that employees requested information on revoking their signed authorization cards, the Respondent never presented any employee witnesses to testify that they sought such information. (Tr. 1042-1043.)

Matheu, Vasquez, supervisor Jose Romero (Romero), and assistant operations manager Susan Sands (Sands). (ALJD 15:40-41.)

Matheu started the safety meeting by reviewing accidents that had occurred at other warehouses of the Respondent the previous week. (ALJD 15:40-16:3.) Realizing that the meeting was to address safety issues, R. Lopez sought an opportunity to make upper management aware of the safety issues drivers were facing. (ALJD 16:1-4.) R. Lopez asked Matheu if he could speak, and then told Matheu that he believed Vasquez forced driver Troncoso to drive an overweight truck. (ALJD 16:1-5.) After some back-and-forth, Matheu asked R. Lopez to lower his voice. (ALJD 16:5-6.) In response to the safety concerns raised by R. Lopez, Romero told R. Lopez that there was no reason to bring up an individual case during the safety meeting, claiming that Troncoso's issue on the day in question was his airbrakes. (ALJD 16:5-8.) However, at the meeting, driver Giovanni flat out rejected Romero's claim and reiterated R. Lopez's position that the problem was, in fact, the overweight delivery trucks that drivers were being forced to operate. (ALJD 16:8-11.) At no point during the safety meeting did R. Lopez use any profanity, threaten anyone, or engage in any physical contact with any of the attendees. (ALJD 16:11-12.)[8]

On December 5, 2017, the day after the safety meeting, Romero and Vasquez summoned R. Lopez to a meeting, and Romero told Lopez that he was going to be issued a verbal warning for having brought up an individual case at the safety meeting. (ALJD 16:14-16.) The written verbal counseling record issued to R. Lopez confirms that he was disciplined for speaking about other drivers' issues at the safety meeting.[9] (ALJD 16:16-18; GC Exh. 3.)

[8] R. Lopez spoke in Spanish at the meeting, which Sands does not speak or understand. (ALJD 16:22.)
[9] R. Lopez did not realize that he had been issued a *written* verbal counseling record until several weeks later when he was reviewing his personnel file and discovered the document. (ALJD 16 fn. 21.)

Only after R. Lopez was issued the verbal counseling, at human resources' request, Sands met with human resources on December 8, 2017, and submitted a statement to human resources on December 11, 2017, regarding what had transpired at the December 4, 2017 safety meeting. (ALJD 16:20-27; R. Exh. 3.)

D. October 23, 2017 – Written Warning Issued to Ruben Munoz; Removal From Lead Position; and Change in Work Schedule from Night to Day Shift Because of His Union Activities

Warehouse worker Ruben Munoz (Munoz) worked for the Respondent for over 10 years without any disciplinary issues. (ALJD 9:12-13.) In light of Munoz's knowledge and skills, months before the Respondent first learned about employees' wish to be represented by the Union, Munoz was promoted to a lead position. (ALJD 9:13-14; GC Exh. 2, p. 2.) A few months later, at the height of the organizing drive, for no reason other than Munoz's union activities, the Respondent issued Munoz his first *ever* written warning, removed him from his lead position, and changed his work schedule from the night shift to the day shift. (GC Exh. 2, pp. 6-7; GC Exh. 48.)

The Respondent admits that Munoz was an open union supporter. (ALJD 33:4.) In fact, on September 26, 2017, in the Respondent's Offer of Proof filed in support of the Respondent's objections to the first election, the Respondent fully acknowledged Munoz's union activities. (ALJD 9:20-24; GC Exh. 47, p. 5.) In the Offer of Proof, among other things, the Respondent accused Munoz of operating equipment in an unsafe manner against employees who did not support the Union and claimed that Munoz intimidated employees for not supporting the Union. (ALJD 9:20-24; GC Exh. 47, p. 5.) Specifically, the Respondent accused Munoz of intimidating anti-union employee Jose Rosas (Rosas). (ALJD 9:20-24; GC Exh. 47, p. 5.)

Thereafter, on October 23, 2017, the Respondent issued Munoz a written warning for alleged "Unsafe Operation of Company Equipment & Unprofessional Conduct." (ALJD 10:11-

40; GC Exh. 2, pp. 1, 6-7.) The written warning failed to provide a timeline as to when the alleged incidents occurred. (GC Exh. 2, p. 6.) Furthermore, Matheu admitted that one of the accusations against Munoz included in the written warning was an error on the Respondent's part. (ALJD 10 fn. 13.) In addition to the written warning, the Respondent also removed Munoz from the night-shift lead position and moved him into a regular day-shift warehouse position. (ALJD 10:37-40; GC Exh. 2, pp. 1-2; GC Exh. 48.)

The Respondent contends that it disciplined and removed Munoz from his lead position after employees Walter Vargas (Vargas), Oscar Ortiz (Ortiz), and Rosas complained about Munoz. (ALJD 10 fn. 14.)[10] The Respondent well knew that Vargas, Ortiz, and Rosas were anti-union employees. (ALJD 9:31-41.) Additionally, despite having a human resources department responsible for investigating employee complaints, Matheu, along with the assistance of anti-union labor consultants, personally investigated the complaints filed by anti-union employees against Munoz, a known union supporter.[11] (ALJD 9:33-35.) For example, Matheu and labor consultants G. Flores and C. Flores met with Vargas at Rosas's home. (ALJD 34:46-47, 35:1-2.) At this meeting, Vargas reported that he felt intimidated by Munoz's presence, that Munoz and other employees were constantly harassing Vargas, that Vargas was afraid to be around Munoz or ask him questions, and that Munoz crashed into employees. (ALJD 9:33-38; GC Exh. 59.)[12] However, in the written statement prepared by Vargas, the *only* remark Vargas made about Munoz is that Munoz questioned Vargas about his communications with one of the labor consultants, and nothing else. (ALJD 10:7-9; GC Exh. 58.)

[10] When Munoz questioned his supervisor, Isidro Garcia, about whether he had received any complaints against him, Garcia affirmed that he had not received any complaints against Munoz. (ALJD 9:24-26.)
[11] It is unknown exactly when the Respondent met with the complaining employees. (ALJD 9:33-35, 10:4-5; GC Exhs. 58, 61.)
[12] The Respondent did not present Vargas, Ortiz, or Rosas for testimony at the hearing. (ALJD 34:44-45.)

Matheu and G. Flores also met with anti-union employee Ortiz outside the facility. (ALJD 9:40-41.) During the meeting with Ortiz, Ortiz generally complained about Munoz becoming more aggressive towards employees. (ALJD 9:45-10:2; GC Exh. 61.) In his written statement, Ortiz accused Munoz of being disrespectful, lying about an injury that Ortiz had sustained, and pressuring employees to vote for the Union. (ALJD 10:5-9; GC Exh. 61.)

The Respondent also met with anti-union employee Rosas. (ALJD 35:22-23.) During this meeting, Rosas similarly complained about Munoz's union activities. (ALJD 35:23-24.) Then, on about October 18, 2017, Rosas submitted a written statement outlining work incidents involving Munoz, and once again complained about Munoz pressuring employees to vote for the Union. (ALJD 9:32-33, 35:25-28; GC Exh. 62.)

At no point during the investigation did the Respondent ever meet with Munoz. (ALJD 35:14-16.) Furthermore, supervisor Isidro Garcia (Garcia), who at the time supervised night-shift employees Vargas, Ortiz, and Munoz, was not involved in the investigation led by Matheu and the labor consultants. (ALJD 3: 6-7, 9:24-25, 10:1-2.) Thereafter, relying solely on the three anti-union employees' complaints, Matheu issued Munoz a written discipline and demoted him from his night-shift lead position to a regular day-shift warehouse position. (ALJD 10:11-40.)

E. The Respondent Disciplined, Suspended, and Terminated Alberto Rodriguez Because of His Union Activities

1. December 21, 2017 Written Warning

In 2015, Rodriguez started working for the Respondent through Horizon Personnel Services (Horizon), a temporary staffing agency, and on March 27, 2017, he became a direct, permanent employee of the Respondent.[13] (ALJD 16:42-43; Tr. 209-210; GC Exh. 33.) Rodriguez

[13] On March 31, 2017, Rodriguez signed a "mutual agreement to arbitrate claims." The arbitration agreement states, in relevant part:

first worked as an order selector and then became a forklift driver. He worked the night shift and was supervised by Garcia. (ALJD 16:42-17:2; Tr. 67, 210-213.)

Prior to the first union election on September 19, 2017, Rodriguez became one of the most active and visible supporters of the Union's organizing efforts. Rodriguez was in the front of the group of employees who participated in the August 21, 2017 union delegation. (ALJD 17:4-5; R. Exh. 13.) As part of the union campaign, Rodriguez also joined the union-organizing committee, attended union meetings, spoke with numerous co-workers to educate them about the Union, visited their homes, collected signed union-authorization cards, and conveyed information regarding employees' union support to union representative Quinonez. (ALJD 17:2-3; Tr. 41-44, 214-217, 220, 294-296.) Rodriguez also wore his union t-shirt to work almost every day, including after the first election, when half of the employees who had been wearing the union t-shirt stopped doing so. (ALJD 17:3-4; Tr. 218-220.)

On December 21, 2017, just 6 days after Region 21 issued its December 15, 2017 order directing a second election, the Respondent ramped up its discipline towards Rodriguez by issuing him a written warning. (ALJD 17:14; Tr. 225; GC Exh. 1(aj); GC Exh. 34.) The written warning states:

- We received complaints from your colleagues that you reject requests from your team members to bring down the merchandise from the top of the shelves.

> Claims subject to binding arbitration include, to the maximum extent permissible, all claims concerning and/or arising out of the employment relationship with the Company to the maximum extent possible, whether in law or in equity, including but not limited to wrongful or constructive termination, express or implied contract, breach of public policy, federal and state civil rights, claims, causes of action or damages arising under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Fair Labor Standards Act of 1938, the Employee Retirement Income Security Act, the Americans with Disabilities Act, the National Labor Relations Act, the Vocational Rehabilitation Act of 1973, the California Fair Employment and Housing Act or the California Labor Code, sexual harassment, emotional distress, defamation, invasion of privacy; fraud or negligent misrepresentation, breach of covenant of good faith and fair dealing, as well as sexual harassment or discrimination claims; California Unfair Business Practices Act (Business & Professions Code Section 17200 and following) or any other state or federal law, or any claims to the maximum extent permitted by law, local employment practices legislation, or under federal or state common law.

(Tr. 289; R. Exh. 2.)

- Several employees addressed their concern about you watching and monitoring your colleagues while they are working and that your behavior makes others feel very uncomfortable to work around you.
- We received a report from several employees regarding your antagonistic behavior towards your coworkers. You have called your colleague "idiot" and "stupid." You yelled and talked down to others, creating a very hostile workplace.

(ALJD 17:15-26; GC Exh. 34.) Matheu issued Rodriguez the written warning, with Vasquez and Romero present. (ALJD 17:33; Tr. 225-226, 537, 630, 773.) Rodriguez's own supervisor, Garcia, was not present or aware of the discipline. (ALJD 17:34; Tr. 225-226.) In response to the Respondent's accusations, Rodriguez told Matheu that it was not true that he was not bringing down merchandise for his co-workers. (ALJD 17:34-36; Tr. 226-227.) Rodriguez also asked Matheu whether Garcia knew that he was getting the written warning, to which Matheu responded that it did not matter. (Tr. 230.) Matheu also told Rodriguez that he was not authorized to drive the forklift anymore, and that he would be put back to the order selector position. (ALJD 17 fn. 22; Tr. 230, 232.) Management nevertheless continued to direct Rodriguez to operate the forklift. (ALJD 17 fn. 22; Tr. 232-234, 696.)

Rodriguez testified that the Respondent's allegations against him were untrue, as he always brought merchandise down and never rejected requests to perform work. (ALJD 40:15-17; Tr. 305-306, 325.) Rodriguez also testified that he did not look at co-workers while they were working, and he did not know what Matheu was referring to regarding this allegation. (Tr. 227, 305-306, 325.) With respect to the third allegation, Rodriguez readily admitted that he and his co-worker Steve Herrera jokingly called each other nicknames because they got along well together.[14]

[14] For example, Rodriguez called Herrera "foca," which means "seal" in Spanish, and Herrera called Rodriguez "stupid" and other names. (Tr. 228.)

(ALJD 40:15-19; Tr. 228.) Rodriguez provided unrefuted testimony that everyone at the warehouse, including managers, called each other names.[15] (ALJD 40 fn. 59; Tr. 229.)

Although Matheu made the decision to issue Rodriguez the December 21, 2017 written warning, he never investigated the incidents himself by speaking with the employees who allegedly complained about Rodriguez. (ALJD 17:29-31; Tr. 938-939.) Matheu also claimed that human resources conducted an investigation, but the Respondent produced no documentary or testimonial evidence that such an investigation was ever conducted or that employees had in fact complained about Rodriguez. (ALJD 17:29-31, 17 fn. 23; Tr. 938-939.)

2. Respondent's Internal Communications Regarding Rodriguez's Union Activities

Less than 1 month before Rodriguez's suspension on February 2, 2018, the Respondent began actively monitoring and documenting Rodriguez's union activities. On January 7, 2018, Gerber Flores (Ge. Flores), a supervisor for the Respondent, e-mailed assistant branch manager Chris McCormick (McCormick), relaying what employee Jose Avila had told him:

> Alberto Rodriguez approached him and told him that he felt pressured from most employees and he figured it was because he was pro union but his lawyer was going to come to the LA facility on Monday.

(ALJD 18:29-32; Tr. 752; GC Exh. 53.)[16]

[15] Human resources representative Laura Garza admitted that she heard employees use cuss words in the warehouse. (Tr. 1088.) Employee Munoz testified that employees regularly called each other names or used bad words or phrases such as "asshole" or "don't fuck" in a joking manner. (Tr. 453-454.) Munoz also testified that employee Oscar Ortiz used obscene language on a daily basis, and that he reported Ortiz to a supervisor for telling employees that Munoz was a "piece of shit," "to send me to hell," "to go fuck my mother," and other insults. (Tr. 398-399, 444, 451-453.) However, Ortiz was never disciplined even after three other employees reported Ortiz's language. (Tr. 452-453.)

[16] Despite having admitted to receiving this e-mail, McCormick repeatedly and inexplicably claimed in his testimony that he did not know whether Rodriguez supported the Union. (ALJD 40:37-41:31; Tr. 752-753.)

Furthermore, the Respondent's anti-union labor consultants were part of several internal e-mail exchanges, which criticized Rodriguez's union support.[17] For example, on January 10, 2018, McCormick sent an e-mail to Matheu and labor consultant G. Flores regarding Rodriguez. (ALJD 19:1-2; Tr. 706; GC Exh. 52.) In this e-mail, McCormick wrote the following, in part:

> I wanted to bring to your attention a complaint that Marcus Mack brought to Gerber [Flores] and I. Tonight, at roughly 10:30 pm or so, Marcus came into the office and specifically said, "**we have a poison pill on our hands** [emphasis added]." Marcus at that point went into detail regarding his comment stating that he heard Alberto Rodriguez complaining about the recent management and leadership changes that are taking place.

(ALJD 19:2-8, 41:31-38; GC Exh. 52.) The e-mail goes on to state that employee Marcus Mack (Mack) complained that Rodriguez talked about the Union on two occasions, "making some commotion stating that he was going to call the Union" and that Mack was "upset about Rodriguez's remarks." (ALJD 19:10-34; GC Exh. 52.)[18] The Respondent admitted that it knew Mack was an anti-union employee. (ALJD 19 fn. 25; Tr. 754.)

3. January 11, 2018 – Incident Between Marcus Mack and Alberto Rodriguez, and Mack's Threats Toward Rodriguez

In an incident on January 11, 2018, Rodriguez was on his work break sitting down next to the dock area, listening to music on his cell phone through the Pandora application, which randomly shuffled through different songs and types of music. (ALJD 19:38-40; Tr. 244-245, 248-250, 314, 325, 330.) Mack was about 15 to 20 away from Rodriguez talking on his cell phone, and at one point, a song by the rapper $tupid Young streamed through Rodriguez's cell phone. (ALJD 19:38-40; Tr. 245, 248-250, 821.) Mack did not complain to Rodriguez about the music,

[17] The Respondent argues that no inference should be drawn from the use of its anti-union labor consultants. However, it is undisputed that their duties did not involve the discipline, hiring, or firing of warehouse employees, and their unexplained involvement in such matters is evidence of the Respondent's unlawful motive. (Tr. 761-762, 792, 885, 1014-1015.)

[18] The e-mail further documented McCormick's remarks to Rodriguez, in which McCormick informed Rodriguez that employees complained that he was talking about the Union, and that he could do so only on breaks and lunch, to which Rodriguez responded that he knew that. (ALJD 19:10-34; GC Exh. 52.)

but when McCormick walked by, Mack asked McCormick to tell Rodriguez to turn the music off. (ALJD 19:41-42; Tr. 245, 248, 313-315, 330.) According to Mack, McCormick asked Rodriguez to turn off his music, and Rodriguez responded that he was on his break and could play whatever music he wanted.[19] (ALJD 19:42-20:1; Tr. 822-823.) McCormick asked Rodriguez a second time to turn the music off, and Rodriguez then turned it off and McCormick left. (ALJD 20:1-3; Tr. 822-823; R. Exhs. 11, 12.) Mack testified that the song contained the word "nigger," but neither Mack nor McCormick told Rodriguez that Mack was upset about the song's lyrics or the reason why Mack wanted Rodriguez to turn the music off.[20] (Tr. 248, 313, 326-327, 822.) Mack claimed that Rodriguez then continued to play the music and turned it up during a racist hook, and that Mack left the area within a minute.[21] (ALJD 20:6-8; Tr. 245-249, 823; GC Exh. 37.)

After McCormick left, Rodriguez made a clicking sound with his teeth. (ALJD 20:5; Tr. 246.) Mack told Rodriguez to "shut the fuck up" and threatened to "kick his ass." (ALJD 20:5-6, 20 fn. 27; Tr. 246; GC Exh. 37.) Mack made a gesture by throwing his body toward Rodriguez. (Tr. 278.) Rodriguez asked him what he was talking about. (Tr. 246.) Mack then told Rodriguez he was going to fuck him up and to "do something." (Tr. 246.) Rodriguez stayed quiet and continued listening to his music because Mack was much larger than Rodriguez.[22] (Tr. 246; GC Exh. 37.) After Mack left the area, Rodriguez went straight to McCormick's office to report

[19] According to Rodriguez, Rodriguez responded that he was not going to turn the music off because he was on his break time, and McCormick responded that he would check with human resources to see if he was allowed to listen to music during his break. (Tr. 245, 332.) Rodriguez believed that he was simply being told that he was not allowed to play music. (Tr. 326-327.)

[20] Rodriguez did not recall whether the song contained that word. (Tr. 318.) Rodriguez never used the "n" word and did not sing along to the $tupid Young song. (Tr. 328.)

[21] The ALJ determined that Mack's January 11, 2018 statement that "every other word was nigga" and that Rodriguez turned up the volume on the parts that said "fuck that nigga" was an embellishment, given that McCormick said he would consult with HR to determine if the song was offensive. (ALJD 20 fn. 28; Tr. 823; GC Exh. 12.)

[22] Rodriguez is 5'4" tall and weighs 140 pounds. Mack is 6'1" tall and weights 240 pounds. (ALJD 20 fn. 29; Tr. 250-251, 844.)

Mack's threats, and he wrote a statement. (ALJD 20:10-11; Tr. 247; GC Exh. 37.) Rodriguez told McCormick that he felt threatened by Mack's actions and wanted to file a police report. (ALJD 20:10-11; Tr. 251.) However, McCormick told him not to do so. (Tr. 251.)

The following day, on January 12, 2018, McCormick sent an e-mail to Matheu and Narimoto, copying labor consultant G. Flores, human resources manager Hikari Konishi (Konishi), and Vasquez. In this e-mail, McCormick wrote that he told Rodriguez that the music was offensive to Mack, but also told Rodriguez, "I'll find out exactly what is offensive with HR!"[23] Unbelievably, McCormick testified that he did "not recall" why he once again included labor consultant G. Flores on this e-mail about Rodriguez. (Tr. 761.)

After the incident, over the following couple of weeks, while at work, Mack continued to intimidate and threaten Rodriguez by bumping into Rodriguez on three separate occasions. (ALJD 21:8-9; Tr. 252.) On another occasion, Mack drove his forklift straight at Rodriguez and almost hit him. (ALJD 21:8-9; Tr. 254-255.) Rodriguez reported the incidents to Konishi and Vasquez to no avail. (ALJD 21:9-11; Tr. 253-254.) On February 1, 2018, Rodriguez wrote a statement and gave it to Vasquez, in which he again reported Mack's verbal and physical threats against him, including that Mack said "that he was going to kick my ass," and that he felt scared, threatened, and in danger because Mack had been pushing him with his elbow. (Tr. 255; GC Exh. 38.)

Rodriguez was not disciplined for the January 11, 2018 incident at that time. (Tr. 256.) Mack was never disciplined for his verbal and physical assaults against Rodriguez. Mack testified that he was only questioned about the threats months later by McCormick and Vasquez. (Tr. 761, 769, 825-827, 945.)

4. Rodriguez's February 2, 2018 Suspension and February 16, 2018 Termination

[23] However, neither Rodriguez nor Mack testified that McCormick told Rodriguez that the music was offensive to Mack.

On February 2, 2018, just 4 days before the second union-representation election was held, the Respondent suspended Rodriguez indefinitely without pay, pending an investigation of an alleged incident that occurred on January 31, 2018. (ALJD 22:26-29; GC Exh. 35.) The prior day, on February 1, 2018, anti-union employee Mack gave a written statement to McCormick regarding the alleged incident that caused Rodriguez's suspension, stating:

> To [sic] employees are having a conversation about the Union. A third employee overheard and he felt threatened by what was just said by the two employees. There will be hell to pay. If they vote (NO) Basically be ready to Fight if it does not the Union's way [sic]. That's what I was told by the other employee.

(ALJD 22:29-37; GC Exh. 12 p. 2.) Mack testified that the "two employees" having a conversation about the Union were Rodriguez and Benjamin Fili (Fili), and the "third employee" who overheard the conversation was Eric McLoughlin (McLoughlin). (Tr. 835-837, 842-843.) However, Mack himself **never** heard any of the alleged comments that he attributed to Rodriguez, and he provided only vague hearsay testimony that he heard "another gentleman who overheard Mr. Rodriguez and another gentleman speaking at the door about that." (ALJD 23:39; Tr. 835-837.) In response to a leading question from the Respondent's counsel, and although Mack's written statement makes no mention of Rodriguez, Mack vaguely testified as follows:

> BY RESPONDENT: So when Gentleman X told you that there was going to be an altercation, was he referring to what he heard Alberto Rodriguez say?
>
> A: Yes. He said he felt threatened because they followed him all the way to his car.[24]

(Tr. 838.)

[24] Mack identified "Employee X" as McLoughlin, in response to further leading questions from the Respondent's counsel. (Tr. 845:23-25.) As noted below, McLoughlin's February 2, 2018 statement regarding the incident notes that he saw "a driver standing next to my car looking at it five minutes after the incident." No evidence was presented that Rodriguez, a warehouse worker, not a driver, followed anyone to their car.

Then, on February 2, 2018, McCormick wrote the following "double hearsay" statement regarding what Mack told him about the incident, which McCormick listed as having occurred on February 1, 2018, rather than on January 31, 2018:

> Yesterday during the Siliker audit, I stepped out for a moment and happened to run into Gus.[25] Gus informed me there was an issue regarding Marcus Mack and asked if I'd look into it. After the audit, I got with Marcus and we sat down together. At that time, Marcus informed me that he overheard some conversation regarding Alberto Rodriguez saying things like "if the union doesn't win, we are going to kick your ass." These were the words used to describe the situation. I asked Marcus Mack to write a witness statement describing these events as best he could.

(ALJD 23:1-12; GC Exh. 12, p. 6.)

In another undated statement prepared by McCormick, McCormick wrote the following concerning his interview with Mack, regarding an "incident" during the "week of January 29th":

> Eric McLoughlin approached Marcus [Mack], he told Marcus that "Beto [Alberto Rodriguez] and the driver in the Compton hat [Benjamin Fili] were having a conversation stating that if the vote did not go the Union way there was going to be hell to pay." Marcus says it was understood that it was going to go down; meaning there was going to be a physical fight if the Union did not get their way.

(ALJD 23 fn. 38; Tr. 843-844; GC Exh. 12, p. 5.)

On February 2, 2018, McLoughlin[26] also wrote the following statement regarding the incident, which he listed as having occurred on January 30, 2018:

> When returning from my break Tuesday evening (01/30/18) I entered the warehouse to overhear the Wismettac employee I know as Beto [Alberto Rodriguez] talking to a driver and another employee about the union. When Beto Rodriguez seen [sic] me walking by he told the driver to keep it down because I talk to Jose Rosas and I was a union buster. They then said "Let me find out he's one. I don't give a fuck." "Motherfucken union busters don't even make union buster wages." They said it loud enough for me to hear I'm assuming to intimidate me. They have also made it clear that if the union loses the election they will start a physical fight. Five minutes after the incident they sent another employee to ask Jose Rosas if we were brothers. I also observed the driver standing next to my car looking at it five minutes after the incident. When he

[25] Gus refers to labor consultant G. Flores. (Tr. 771.)
[26] The Respondent failed to present McLoughlin for testimony at the hearing.

> seen [sic] me he stepped back a little but stayed right there until I went back in the warehouse.

(ALJD 23:14-28; GC Exh. 12, p. 3.)

At some point on or after February 6, 2018, McLoughlin was interviewed, and the notes from that interview state, in part:

> What happened? Coming back from lunch, Eric was heading back to where the time clock area is. Eric saw "Beto" [Alberto Rodriguez] speaking to a driver wearing a Compton hat [Benjamin Fili]. As Rodriguez saw Eric walking in, Rodriguez made a comment to Fili saying "he's one of them" to which Fili responded "let me find out he's one of them I don't give a fuck! Fucking Union-Busters don't even make Union-Buster Wages!" Eric just kept walking. Fili then went outside to the parking lot and stood feet away from my car, as he began to play with his phone. I went outside to make sure it was locked and went back to work.

(ALJD 23:30-40; GC Exh. 12, p.4.)

When Matheu suspended Rodriguez on February 2, 2018, Matheu told Rodriguez that he was being fired because he threatened his co-workers to vote for the Union.[27] (ALJD 24:3-5; Tr. 235, 287.) Rodriguez had no knowledge of what alleged "threats" Matheu was even referring to. (Tr. 237, 287.) At the time of the suspension, Matheu gave Rodriguez a letter, which stated that he was suspended without pay effective February 2, 2018, "until the company will notify you of its decision upon completion of the investigation on the incidence occurred on January 31, 2018 [sic]." (ALJD 24:3-5; Tr. 236-237; GC Exh. 35.)

On February 6, 2018, Rodriguez voted during the morning session of the second union-representation election at the Los Angeles facility, and was then told by the Respondent to leave the premises. (ALJD 24:20-21; Tr. 237-239.) Rodriguez returned to the Los Angeles facility at about 5:00 p.m. and served as an observer on behalf of the Union for the second session of the

[27] Although Matheu told Rodriguez he was being "fired" on February 2, 2018, Rodriguez was not officially terminated until February 16, 2018. (ALJD 24:3-7; Tr. 235.)

election. (ALJD 24:20-21; Tr. 240-241.) During the second voting session, Mack also served as an observer, but on behalf of the Respondent. (ALJD 24:21; Tr. 247-248.)

Rodriguez was officially terminated on February 16, 2018, in a letter signed by Konishi, which stated:

> The reason for your termination is as follows:
>
> (1) You've been warned repeatedly for violations of Company policy over the past eight (8) months;[28]
>
> (2) And recently, WLA [Wismettac] has determined that you engaged in threats of violence against coworkers, racial harassment of a coworker, and insubordination.

(ALJD 24:5-7; GC Exh. 36.) Matheu made the decision, along with Narimoto and senior vice president Toshi Nishikawa, to terminate Rodriguez. (Tr. 878, 940.) However, Matheu testified that he did not know what the term "insubordination" in the termination letter referred to. (ALJD

[28] The termination letter references past violations. On June 13, 2017, Rodriguez received a verbal counseling record for tardiness on several days between April and June 2017, although he called in beforehand. (ALJD 17:7-8; Tr. 256-257, 325; GC Exh. 39.)
On June 22, 2017, Rodriguez received another verbal counseling record for clocking in 2 minutes after his start time, after the Respondent changed to a strict tardiness policy. (ALJD 17:8-9; Tr. 257-258; GC Exh. 40.)
On December 11, 2017, the Respondent issued Rodriguez a verbal counseling record for allegedly making a derogatory comment during a meeting to a co-worker who made a mistake. (ALJD 17:9-11; Tr. 257-261; GC Exh. 41.) Rodriguez had jokingly called the co-worker a "slow ass," which Matheu overheard. (Tr. 260, 326.)
On January 26, 2018, Vasquez issued Rodriguez a verbal counseling record for telling warehouse supervisor Howard Lu (Lu) that he could not perform an assignment. (ALJD 21:17-34; Tr. 261-262; GC Exh. 42; U Exh. 53.) Rodriguez told Lu that he would do it after he completed a work order he was working on, and that he did not have his pallet jack at the time because a driver had taken it. (ALJD 21:34-39; Tr. 262.) After Romero told Rodriguez to grab another pallet jack, Rodriguez complied. (ALJD 21:39; Tr. 263-264.)
On January 31, 2018, McCormick issued Rodriguez a written warning for taking time off in order to relocate after being evicted and due to an injury earlier in the month because he did not have leave available. (ALJD 22:1-24; Tr. 264-267; GC Exh. 43.) The Respondent permitted such absences without available leave for certain reasons, and the written warning noted that the discipline would be disregarded if Rodriguez brought in a doctor's note and "other supporting documents (Court order) by Feb 7th, 2018," even though Rodriguez previously submitted a doctor's note. (Tr. 268, 767; GC Exh. 43; R. Exh. 7, pp. 1-3.) Prior to issuing Rodriguez the written warning, McCormick exchanged e-mails concerning Rodriguez's leave with four anti-union labor consultants, including Ed Hinkle (Hinkle), who advised in an e-mail dated January 30, 2018, that Rodriguez be sent home and "put on a timeline" because Rodriguez had not yet produced his eviction notice. (ALJD 22:13-17; R. Exh. 7, p. 1.) Rodriguez was not able to find his eviction notice and submit it to the Respondent before the February 7, 2018 deadline because the Respondent suspended him on February 2, 2018. (Tr. 269-270.)

24:7-8; Tr. 941.) Rodriguez was never interviewed or given a chance to respond to any of the allegations referenced in his termination letter. (ALJD 24:8-9; Tr. 242-243, 941.)[29]

F. Termination of Pedro Hernandez, and Refusal to Re-Hire and Consider for Re-Hire Hernandez, Fanor Zamora, and Jeremiah Zermeno

The Respondent further targeted active union supporters when, on October 31, 2017, weeks before the Respondent's nationwide staffing agreement with staffing agency Randstad was to actually end, the Respondent prematurely terminated all day-shift employees supplied by Randstad only at its Los Angeles facility, including Fanor Zamora (Zamora) and Jeremiah Zermeno (Zermeno). (GC Exh. 29, pp. 2-5; Tr. 146-149, 474-479, 590-593.) That same day, the Respondent singled out Pedro Hernandez (Hernandez), by terminating him as well, the sole night-shift employee supplied by Randstad to be terminated that day. (Tr. 462-463; GC Exh. 29, p.9.) Then, when Hernandez, Zamora, and Zermeno attempted to apply for their former positions, the Respondent refused to re-hire them despite numerous openings. (Tr. 150-159, 481-494, 594-599.)

1. Pedro Hernandez, Fanor Zamora, and Jeremiah Zermeno Were Known, Active Union Supporters

Hernandez worked for the Respondent, through staffing agency Randstad, from June 2017 until he was terminated on October 31, 2017. (ALJD 12:27-30; Tr. 461-462.) He worked as a forklift driver on the night shift. (ALJD 12:30; Tr. 462-463.) Starting in August 2017, Hernandez became an open supporter of the Union by speaking with co-workers daily about the Union and meeting with union organizer Quinonez. (Tr. 43-45, 464-465, 503.) About 2 weeks before the

[29] In contrast to Rodriguez's termination, the Respondent acted swiftly in terminating two other employees for racial or sexual harassment. The Respondent terminated Cameron San Nicholas for calling a co-worker "nigger" and throwing a box at him on March 15, 2016, just 2 business days after the alleged incident. (R. Exh. 82, p. 11.) The Respondent suspended John Kirby on July 27, 2018, and terminated him on August 1, 2018, after the Respondent received complaints on July 26, 2018, about his "profanity and making derogatory comments" such as "women should be domesticated and 'whored' not working and making a living," and "where is Kayla that bitch ass nigger." (R. Exh. 16.) In both instances, the human resources department conducted thorough investigations by interviewing numerous witnesses and supervisors. (ALJD 44 fn. 62; Tr. 1402, 1414, 1081, 1087.)

September 19, 2017 union-representation election, Hernandez started wearing his union t-shirt to work every Friday. (ALJD 12:30-32; Tr. 466-467.) After the election, when other employees stopped wearing their union t-shirts, Hernandez continued to do so. (ALJD 12:30-32; Tr. 466-469.) Matheu knew that Hernandez was pro-union. (Tr. 946.)

Labor consultant G. Flores had told Matheu that Vargas, a known anti-union employee, had alleged that Hernandez created a hostile environment on the p.m. shift. (ALJD 13:4-5; Tr. 869-870, 1045-1048.) In October 2017, Matheu interviewed Vargas at the house of employee Rosas, who was also known to be anti-union, with labor consultants G. Flores and Carlos Flores (C. Flores) also present.[30] (ALJD 13:5-7; Tr. 897.) Matheu's interview notes regarding what Vargas said about Hernandez state:

> Pedro Hernandez – "called me dumbass"
> "Union will win" Treats me very bad.
> Very abusive and discrimitory [sic] behavior
> "clapping + calling me dumbass"
> Slave like – abusive actions.
> Told me- he will beat me
> And will kick my "---"

(ALJD 13:7-12; Tr. 903; GC Exh. 59.) In contrast with Matheu's notes, Vargas's own notes about Hernandez state *only* the following:

> Pedro the Machinist.
> He is telling the new people that if they are going to vote, to vote for the union.
> He spends his time conversing with them.

(ALJD 13:14-16; Tr. 1075; GC Exh. 58.)[31] Matheu never interviewed or spoke with Hernandez about these accusations. (ALJD 13:12; Tr. 494, 934-935.)

[30] Matheu initially claimed in his testimony that he did not interview Vargas about Hernandez and did not know whether the topic of the Union ever came up, but later in his testimony, conceded that he had done so. (ALJD 37:17-38:21; Tr. 870-871, 911-912, 934.)

[31] The Respondent failed to present Vargas for testimony and failed to provide any other testimonial or non-hearsay evidence regarding Hernandez's alleged statements.

Like Hernandez, Zamora worked for Wismettac through Randstad as an order puller on the day shift, from April 11, 2017, through his termination on October 31, 2017. (ALJD 14:19-20; Tr. 134-135.) Zamora joined the union-organizing committee and, as part of the organizing effort, regularly communicated with his co-workers and union organizer Quinonez about the Union during his breaks and outside of work. (Tr. 41-42, 44, 135-136, 142-143.) Before the September 19, 2017 election, Zamora wore his union t-shirt twice to work, and after the election, he continued to wear the union t-shirt every Friday to work until he was terminated. (ALJD 14:20-22; Tr. 143-144, 165, 168-169.)

Zermeno also worked as an order puller for Wismettac through Randstad, on the day shift, from March 2017 through his termination on October 31, 2017. (ALJD 13:38-39; Tr. 584-585.) Zermeno became an active union supporter as soon as the Union showed up to the plant, and he attended union meetings, signed a union-representation card, and spoke with employees about his past experience as a unionized employee. (ALJD 13:39-40; Tr. 44-45, 586-590.) Zermeno also wore a union t-shirt to work starting 1 week before the September 17, 2017 election, and continued to wear it every Friday after the election. (ALJD 13:40-14:2; Tr. 587-588; 600.) He also wore a union pin to work every day. (ALJD 13:40-14:2; Tr. 588-589.)

Sometime during the last week of October 2017, the union-organizing committee conducted a meeting for a group of employees in the parking lot of the Los Angeles facility from about 5:00 p.m. to 8:00 p.m., to discuss the objections to the first election and how things would proceed. (ALJD 8:44-45; Tr. 114-117, 136-137, 161, 338, 360, 470-471, 547-548.) Hernandez, Zamora, and Zermeno were present at the meeting. (ALJD 8:45-46; Tr. 115, 138, 337-338, 548-549.) Numerous employees testified that they saw Narimoto, Matheu, Vasquez, and Garcia watch them from inside the warehouse through the entrance door window. (Tr. 117-119, 138-142, 161,

337-342, 472-474, 549-552.) Two employees also testified that they saw Narimoto outside smoking while watching the group. (Tr. 119, 138-140.) Vasquez admitted that he and Romero observed the group of employees from 6:00 p.m. to 8:00 p.m. through a security camera. (Tr. 651-656, 673-674, 685-686.)

2. October 31, 2017 Termination of Day-Shift Employees Referred by Randstad, Including Fanor Zamora and Jeremiah Zermeno

On October 24, 2017, Diana Meza, senior branch manager at Randstad, e-mailed Atsushi Fujimoto (Fujimoto), the Respondent's planning and recruiting manager, informing him that Randstad would terminate its service agreement with the Respondent nationwide effective November 23, 2017. (ALJD 11:1-27; GC Exhs. 8, 29.) That same day, Fujimoto e-mailed all branch managers, including Matheu, informing them that Randstad had terminated its contract with Wismettac, and that they could: (1) convert the temporary employees from Randstad to permanent Wismettac employees; (2) roll them over to another staffing agency; or (3) end their assignment. (ALJD 11:29-35; GC Exh. 29, pp. 2-3.) On October 31, 2017, Fujimoto sent a follow-up e-mail, again to all branch managers, stating that they could either convert the temporary employees from Randstad to permanent employees or end their assignments by November 23, 2017. (ALJD 11:35-37; GC Exh. 22, pp. 1-2.)

On October 31, 2017, at 6:00 p.m., Matheu and Vasquez conducted a meeting for both the day-shift and night-shift employees working under the Respondent's contract with Randstad. (ALJD 11:39-40; Tr. 146-147, 166, 474-479, 590-593.) Matheu informed the employees that its contract with Randstad was ending, but that they could apply to work for Wismettac directly. (ALJD 11:40-41; Tr. 148.) When Zamora asked whether they could apply through a different staffing agency so they could work the following day, Matheu responded that he could not advise them, and that it was their decision. (Tr. 147-149.) During the meeting, Matheu informed

employees that the day-shift employees were being laid off, but that the night-shift employees would continue working until the contract ended on November 23, 2017. (ALJD 11:42-43; Tr. 149-150.) Zamora and Zermeno were among the day-shift employees terminated that day. (ALJD 12:1-4; GC Exh. 23.) At the meeting, out of frustration, Zermeno said that this was "bullshit," to no one in particular, and that he could have taken a "fucking job" he had been offered at $18 per hour. (ALJD 14:4-7; Tr. 593, 659, 868-869.)

Zamora was never disciplined during his employment with the Respondent. (ALJD 15:10; Tr. 150.) Zermeno was written up just once in June or July 2017 for attendance. (ALJD 14:14-15; Tr. 593-595.) The Respondent's records show that the only reason for the end of Zamora's and Zermeno's employment was "due to Randstad terminating service." (GC Exh. 23.)[32] Of the Randstad day-shift employees who were terminated on October 31, 2017, Zamora and Zermeno had worked for the Respondent for the longest period of time, over 6 months each. (GC Exh. 23.)

3. October 31, 2017 Termination of Pedro Hernandez

After Matheu told the day-shift employees referred by Randstad that they were terminated, Matheu met with Hernandez and told him that his contract was over, and that he no longer worked there. (ALJD 12:35-36; Tr. 478-480.) Matheu did not give Hernandez any other reason for his termination. (Tr. 481, 508.) Matheu told Hernandez that he could apply online directly with Wismettac for a job. (Tr. 480-481.) The other night-shift employees were permitted to work through the end of the Randstad contract on November 23, 2017. (ALJD 12:36-37; Tr. 930; GC Exh. 51.) Hernandez had never been disciplined by the Respondent. (Tr. 494.)

[32] R. Exh. 14 purports to list the employment status of employees employed by the Respondent through various staffing agencies from October 2017 through March 2018. (ALJD 12 fn. 15; Tr. 994-995; R. Exh. 14.) However, Fujimoto admitted that much of the information was missing, incomplete, or inaccurate, so as to render the document unreliable. (ALJD 12 fn. 15; Tr. 1101-1106, 1018-1019, 1112-1118; GC Exh. 64.)

The following day, on November 1, 2017, Fujimoto e-mailed Randstad, stating that Hernandez had been terminated "due to his behavioral/performance issues as well as operational changes within his Department."[33] (GC Exh. 45.) Matheu vaguely testified that he terminated Hernandez's employment because employees made "allegations of him also creating a hostile environment in the p.m. shift, refusing to help employees, being offensive to them." (ALJD 31:21-23; Tr. 869.) However, Matheu could only specifically identify anti-union employee Vargas as having made accusations against Hernandez, and neither Vargas's nor Matheu's statements reference any refusal on the part of Hernandez to help other employees. (ALJD 38:33-36; Tr. 869-870, 933.) The Respondent's own records show that the only reason for Hernandez's termination was "Ended assignment due to Randstad terminating service." (ALJD 13:20-21; GC Exh. 23.)

4. Failure to Re-Hire and Consider for Re-Hire Pedro Hernandez, Fanor Zamora, and Jeremiah Zermeno, Despite Numerous Job Openings

After Hernandez's termination, he attempted several times to apply for his former position, both directly with the Respondent and through other staffing agencies, but he was never re-hired. (Tr. 481-494.) On November 1, 2017, he applied to work directly for Wismettac for an open warehouse worker position posted on its website. (ALJD 13:25; Tr. 482-482; GC Exhs. 49, 50.) That same day, Hernandez also applied to work for Wismettac through the staffing agency Cornerstone Staffing Solutions (Cornerstone). (ALJD 13:25-26; Tr. 487-488; GC Exh. 28, pp. 4-6.) Later that same day, Cornerstone e-mailed supervisor Garcia, stating that Hernandez could start work for the Respondent the next day. (ALJD 13:26-28; GC Exh. 26, pp. 1-2.) However, Garcia replied by e-mail a few minutes later, stating, "Can we wait on Pedro Hernandez. I think he was a stocker of ours that we just let go of. Can you send information before moving forward?"

[33] Fujimoto testified that he did not know any specific details of the alleged "behavioral/performance issues," however. (Tr. 1023-1024.)

(ALJD 13:28-30; GC Exh. 26, p. 1.) On November 2, 2017, a Cornerstone representative called Hernandez and asked him to hold off on his drug test because Wismettac did not want him back. (ALJD 13:30-32; Tr. 488-490.) On November 6, 2017, Hernandez applied to work for Wismettac through Horizon, but never heard back. (ALJD 13:25-26; Tr. 490-492.)

Similarly, on November 1, 2017, Zamora submitted a third application to work directly for Wismettac through its website.[34] (ALJD 14:25-29; Tr. 153-154; GC Exh. 6, pp. 18-21.) On November 3, 2017, a human resources coordinator for Wismettac e-mailed Fujimoto about Zamora's job application, requesting that he follow up on Zamora's call inquiring about his application for one of the open positions. (ALJD 14:28-36; Tr. 1014-1015; GC Exh. 7, pp. 1, 8.) That same day, Fujimoto forwarded this e-mail to labor consultant Ed Hinkle (Hinkle), and wrote only "FYI," although Hinkle was not involved in the hiring or firing of warehouse employees. (ALJD 14:38-40; Tr. 1014-1015; GC Exh. 7, pp. 1, 8.) Zamora also applied to work for Wismettac through Cornerstone and Horizon. (Tr. 153-154.) However, a Cornerstone representative told Zamora that Wismettac did not want any of the laid-off employees back again. (ALJD 14:43-45; Tr. 155-156.) Likewise, a Horizon representative told Zamora that Wismettac did not want him back. (ALJD 14:45; Tr. 156-158.) Months after Zamora applied to work directly for the Respondent, on February 13, 2018, Wismettac e-mailed him, stating that it had "selected those applicants whose skills and qualifications more closely match the requirements of our current vacancy to continue on in the selection process." (ALJD 15:1-10; GC Exh. 19.)

The first week of November 2017, Zermeno contacted Cornerstone, where he had a prior application on file, in order to apply to return to work at Wismettac. (ALJD 14:11-12; Tr. 596-598; GC Exh. 28, pp. 1-3.) However, a Cornerstone representative told him that she had received

[34] Zamora previously applied twice for a direct position with Wismettac while he was still employed by Wismettac through Randstad. (Tr. 150-152.)

an e-mail stating that he and Hernandez were not welcome to return. (ALJD 14:12-14; Tr. 598.) On November 2, 2017, Vasquez e-mailed a Cornerstone representative regarding Zermeno, stating: "Due to the manner in which he left and derogatory comments, we do not want him back." (ALJD 14:9-11; GC Exh. 7, p. 9.)[35]

In November 2017, when Hernandez, Zamora, and Zermeno applied for re-hire, numerous warehouse worker positions were available. At least five open positions that were budgeted for in October 2017 still remained unfilled by the end of that month. (ALJD 12:21-22; Tr. 1013-1014; GC Exh. 5.) In November 2017 alone, Wismettac hired at least 21 new warehouse workers through other staffing agencies, including Horizon and Cornerstone, at its Los Angeles facility. (ALJD 12:22-24; Tr. 1019-1021; GC Exhs. 24, 46.) Wismettac continued to hire new temporary employees in December 2017. (ALJD 12:24-25; Tr. 690, 925.)

Additionally, even though the Respondent refused to re-hire union supporters Hernandez, Zamora, and Zermeno, the Respondent retained three other warehouse workers who had previously worked for the Respondent under the Randstad service agreement.[36] (GC Exhs. 23, 51.) However, each of these employees, Mack, Vargas, and McLoughlin, were known by the Respondent to be anti-union and had previously complained to management about other warehouse workers' union support, as described above. For instance, employee Mack was rolled over to temporary staffing agency Spectrum on November 23, 2017, and he continued working for Wismettac without any break in his employment. (ALJD 12:9-11; Tr. 839-841, 1023; GC Exh. 51.) In fact, on February 26, 2018, a couple weeks after he served as Wismettac's observer at the

[35] CSSI Talent, referenced at ALJD 14:9, appears to be the same entity as Cornerstone. (GC Exh. 7, pp. 9-10.)
[36] The ALJD references other employees from Randstad who continued to work for Wismettac through other staffing agencies, but those workers did not work at the Los Angeles faciltiy, which is coded as Department LA5000, as opposed to DC5000, FL5000, NJ5000, OL5000, etc., which refer to other Wismettac facilities. (ALJD 12:1-9; Tr. 928-930; GC Exh. 23.) Two other employees from Randstad, Harumi Tomimura and Marconi Limon, appear to have been retained by the Respondent at the Los Angeles facility, but their positions were driver and warehouse clerk, respectively, rather than warehouse worker. (GC Exh. 51.)

February 6, 2018 election, Mack was converted to a direct employee of the Respondent. (ALJD 12:9-11; Tr. 841, 945, 1023; GC Exh. 51.) Similarly, Vargas and McLoughlin were rolled over to staffing agency Horizon on November 23, 2017, and Vargas was converted to a direct employee of the Respondent on February 26, 2018. (ALJD 12:11-12; Tr. 1022-1023; GC Exh. 51.)

IV. ARGUMENT

A. The ALJ Properly Found That the Respondent's Statements to Employees Promising Benefits and Improved Terms and Conditions of Employment Violated Section 8(a)(1) of the Act and Were Not Protected Speech (Respondent's Exceptions Nos. 2-3, 14-17)

The ALJ properly found that the Respondent made unlawful promises of benefits and improved terms and conditions of employment. (ALJD 27:29-32.) In doing so, the ALJ properly rejected the Respondent's claims that these communications to employees were protected by Section 8(c) of the Act. (ALJD 27 fn. 41.)

Section 8(a)(1) of the Act makes it unlawful for an employer, by statements or conduct, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *Chipotle Services, LLC*, 363 NLRB No. 37, slip op. at 14 (2015), citing *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000). The law is well-settled that the test for determining whether an employer's statements or actions violate Section 8(a)(1) of the Act is an objective one. The employer's intent or motive is irrelevant. *El Rancho Market*, 235 NLRB 468, 471 (1978), citing *American Freightways Co.*, 124 NLRB 146, 147 (1959).

In holding that the Respondent made promises of benefits and improved working conditions, the ALJ properly found that employees corroborated one another's testimony that at countless meetings with employees, Matheu told them that he had the green light and authority to make the necessary changes, but only if employees rejected the Union. (ALJD 28:41-44, 30:9-10.) Moreover, during separate one-on-one conversations with drivers, Matheu specifically told

L. Lopez and Alvarado that he would give employees back their bonuses and retroactive pay. (ALJD 29:15-18, 29-32.)

In its exceptions, the Respondent incorrectly argues that because there was no evidence of threats made in its communications to employees, the Respondent's remarks are protected speech, relying on *Manhattan Crown Plaza Town Park Hotel Corp.*, 341 NLRB 619, 620-621 (2004) (in certifying the results of the election, the Board found that the employer made no implied threat to employees) and *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1311 (1977) (single misrepresentation did not warrant setting aside the election).

However, it is settled law that an employer "is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force **or promise of benefit**.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (emphasis added). In her decision, the ALJ explicitly addressed the issue of whether the Respondent's communications with employees constituted protected speech. (ALJD 27 fn. 41.) In rejecting the Respondent's arguments, the ALJ noted that conduct such as the Respondent's, which contains a "promise of benefit," is unprotected speech and violates Section 8(a)(1) of the Act. (ALJD 27:29-32.) Furthermore, unlike the cases cited by the Respondent, in the present case, the Respondent repeatedly promised employees benefits and improved working conditions if they rejected the Union, which, even in the absence of threats, the Board has held to be unlawful.[37]

Accordingly, the ALJ properly found that on about September 8, 15, and 18, 2017, Matheu unlawfully promised employees better benefits and improved terms and conditions of employment

[37] See, e.g., *Reno Hilton*, 319 NLRB 1154, 1156 (1995) (employer's request for chance to "deliver" was implied promise to remedy employees' grievances, implied promise to grant benefits, or both); *Litton Mellonics Systems Div.*, 258 NLRB 623 (1981) (finding that the employer reassuring employees that its management would be more sensitive and responsive to employee dissatisfaction in the future amounted to an implied promise of a benefit).

if they rejected the Union, and that these communications were not protected speech. (ALJD 30:9-12.) The ALJ further properly found that in mid-September 2017, on two separate occasions, Matheu unlawfully promised employees that the Respondent would return employees their bonuses and retroactive pay if they rejected the Union. (ALJD 30:9-12.)

B. The ALJ Properly Found That the Respondent Violated Section 8(a)(1) of the Act by Soliciting Employees to Revoke Their Union-Authorization Cards (Respondent's Exception No. 55)

There is no dispute that in March 2018, the Respondent held meetings with employees, where the Respondent provided them with sample letters and instructions as to how they could go about retrieving their signed union-authorization cards from the Union. (ALJD 26:1-12; GC Exhs. 20-21.) In its exceptions, in seeking to overturn the ALJ's findings, the Respondent simply contends that the assistance it provided to eligible voters was lawful.

It is well-settled that "[a]n employer violates Section 8(a)(1) of the Act by actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative." *Wire Products Mfg. Co.*, 326 NLRB 625, 640 (1998), citing *Central Washington Hosp.*, 279 NLRB 60, 64 (1986). In *Register Guard*, 344 NLRB 1142, 1143-1144 (2005), the Board found a violation where the employer "did more than inform employees of their right to revoke their cards – it enclosed a sample form with its…letter for employees to use to revoke their union authorizations." Likewise, in the present case, the Respondent's meetings with employees, where the Respondent provided them with information and sample letters to use to revoke their authorization cards, went far beyond mere "ministerial aid." *Times-Herald, Inc.*, 253 NLRB 524 (1980).

In support of its exceptions, the Respondent relies on *Ernst Home Centers, Inc.*, 308 NLRB 848, 848 (1992), where the Board found that the employer did not act unlawfully by complying

with an employee's request for petition language. In *Ernst Home*, the Board noted that the evidence was unclear as to who, if anyone, had suggested that the employee file a decertification petition. *Id*. However, in key contrast with *Ernst Home*, in the present case, many of the employees who attended the required meetings where the sample letters and instructions were made available *never* sought the Respondent's assistance in withdrawing their authorization cards. (ALJD 26:1-12.) Rather, the Respondent took the initiative to inform all eligible voters of how they could retrieve their authorization cards and went as far was providing employees, even those who had never inquired, with sample letters to revoke their authorization cards. (ALJD 26:1-12.)

Accordingly, the ALJ properly concluded that the Respondent's provision of sample letters to employees to revoke their signed union-authorization cards amounted to more than mere ministerial aid. (ALJD 46:28-38.) And, when considered in the context of other serious unfair labor practice violations committed by the Respondent, the Respondent's conduct violates Section 8(a)(1) of the Act. (ALJD 46:28-38.)[38]

C. The ALJ Properly Found That the Respondent Violated Section 8(a)(1) of the Act by Issuing a "Verbal Counseling Record" to Rolando Lopez on December 5, 2017 (Respondent's Exceptions Nos. 9, 18-20)

The ALJ found that driver R. Lopez – by speaking about safety issues at a safety meeting where other drivers also spoke up about those same issues – engaged in protected concerted activities and that he did not lose the protection of the Act. (ALJD 32:18-20.) The Respondent, in its exceptions, claims that R. Lopez was disciplined for insubordination, that he at no point engaged in protected concerted activities, and that even if he did, he lost the protection of the Act.

[38] See *L'Eggs Products, Inc.*, 236 NLRB 354, 389 (1978), enfd. in relevant part 619 F.2d 1337 (9th Cir. 1980) (employer's soliciting employees to revoke authorization cards was made in "inhibiting setting" because it was done "in the context of a campaign of interrogations and threats"); *Hall Industries, Inc.*, 293 NLRB 785, 791 fn. 11 (1989) (Board found "even ministerial acts which smooth the path to decertification" amounts to a violation when performed in the context of other unfair labor practices) (citing *D&H Mfg. Co.*, 239 NLRB 393 (1978)).

In general, to find an employee's activity to be "concerted," it must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*). Here, the Respondent arranged a meeting with the drivers, in part, to discuss safety issues. (ALJD 30:29-32.) Given the nature of the meeting, and the incident that had transpired a few days before the meeting, where a driver was forced to operate an overweight delivery truck, R. Lopez took the opportunity to raise drivers' safety concerns of being forced to operate overweight delivery trucks. (ALJD 30:29-32, 30 fn. 43.) Furthermore, R. Lopez's comments during the safety meeting were not mere griping about an individual's personal issues. (ALJD 30:29-32.) In fact, when Romero tried to dismiss R. Lopez's complaints by admonishing him for bringing up an "individual case" to a group meeting, at least one other driver similarly reiterated R. Lopez's safety concerns with the overweight delivery trucks. (ALJD 30:29-32; 30 fn. 43.)[39]

While the Respondent attempts to exaggerate R. Lopez's conduct at the meeting by claiming that he was insubordinate, the ALJ specifically rejected this argument. (ALJD 31:22-25.) Rather, the language in the verbal counseling record issued to R. Lopez stating that he "was making comments of other drivers' issues that we had…" is irrefutable evidence that Lopez was disciplined for concertedly presenting drivers' work issues in a group setting. (GC Exh. 3.)

Furthermore, contrary to the Respondent's claims, under *Atlantic Steel*,[40] nothing that R. Lopez did or said at the safety meeting was so outrageous that would warrant him losing the

[39] R. Lopez's conduct is distinguishable from *Quicken Loans, Inc.*, 367 NLRB No. 112 (2019), where the Board found that the employee's complaint about a client amounted to mere griping and was not concerted activity. Here, as the ALJ found, R. Lopez engaged in concerted activities because he did not complain alone nor was he speaking about an individual concern. (ALJD 30:29-32.)

[40] When an employee is engaged in protected conduct, an outburst will not necessarily cause the employee to lose the protection of the Act. Rather "[t]he decision as to whether the employee has crossed that line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

protection of the Act. (ALJD 30:39-31:39.) As the ALJ found, in applying the *Atlantic Steel* factors, the totality of the circumstances warrant finding that Lopez did not lose the protection of the Act. (ALJD 30:39-31:39.) First, the nature of the meeting was to address safety issues. (ALJD 31:8-13.) Second, given that the subject matter of the meeting was to address, in part, safety concerns, Lopez's initiative to present drivers' safety concerns was well within the scope of working conditions sought to be addressed at this meeting. (ALJD 31:15-20.) The third factor, Lopez's conduct at the meeting, in no way qualifies as an "outburst," as it is undisputed that Lopez's conduct did not involve any profanity, threats, insubordination, or physically intimidating conduct. (ALJD 16:11-12, 31:22-33.) Even if R. Lopez was disruptive as the Respondent claims, such conduct is hardly enough to qualify as an "outburst." (ALJD 31:22-33.)[41] Fourth, R. Lopez's comments at the safety meeting occurred in close proximity to the Respondent's other unlawful conduct (as outlined in this brief). (ALJD 31:35-39.)

In conclusion, as the ALJ correctly found, R. Lopez voiced concerted safety issues at a safety meeting and his conduct did not lose the protection of the Act under *Atlantic Steel*, and the Respondent's exceptions should therefore be rejected.[42]

D. The ALJ Properly Found That the Respondent Violated Section 8(a)(3) of the Act by Issuing Ruben Munoz a Written Warning; Removing Him From His Lead Position; and Changing His Work Schedule From Night to Day Shift on October 23, 2017 (Respondent's Exceptions Nos. 21-31)

[41] Furthermore, while the Respondent claims that Sands was frightened by Lopez's behavior at the meeting, this is simply the Respondent's attempt to distort the truth. First, given that Sands does not speak or understand Spanish, she was unable to understand the nature or context of Lopez's work complaints and not once during the meeting did Lopez direct himself towards Sands. (ALJD 31 fn. 44.) Moreover, despite the Respondent's attempts to exaggerate the severity of Lopez's conduct, Sands never initiated a complaint to human resources that she was frightened by Lopez's behavior at the meeting. (R. Exh. 3.) Instead, Sands did not submit a statement about the incident to human resources until almost a week *after* Lopez was issued the verbal counseling, and only after human resources contacted her. (ALJD 16:20-27, 31 fn. 44.)

[42] In its exception no. 9, the Respondent objects to the ALJ's finding that R. Lopez did not receive the paperwork about the verbal counseling record at the disciplinary meeting and only knew it existed when he reviewed his personnel file. In its supporting brief, the Respondent failed to present any facts or arguments as to how this finding impacts the ALJ's conclusion that the Respondent unlawfully disciplined R. Lopez.

The ALJ properly found that the Respondent unlawfully disciplined employee Munoz by issuing him a written warning on October 23, 2017, removing him from his lead position, and changing his work schedule from night to day shift. (ALJD 36:31-33.) In its exceptions, the Respondent excepts to the ALJ's findings that a *prima facie* case was established and that the Respondent failed to provide a valid *Wright Line* defense that it would have disciplined Munoz even in the absence of his union activities.

Under *Wright Line*,[43] the General Counsel has the burden of establishing that an employee's protected activity was a motivating factor for the adverse employment action taken against that employee. The General Counsel has meet this burden by showing that: (1) the employee was engaged in protected activity; (2) that the employer had knowledge of that activity; and (3) that the employer had animus toward the activity.[44] Because an employer will seldom admit that it was motivated by anti-union animus when it made its adverse employment decision, circumstantial evidence is sufficient to establish anti-union motive. *Healthcare Employees Union v. NLRB*, 463 F.3d 909, 919 (9th Cir. 2006), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Factors such as the employer's expressed hostility toward its employees' union activities, the commission of other unfair labor practices, and the timing of the adverse action in proximity to the employees' union activities create an inference of unlawful motive. *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 403-404 (1983).

Contrary to the Respondent's baseless claims, as the ALJ concluded, a *prima facie* case is easily established in this case. (ALJD 34:6-14.) With respect to the first and second *Wright Line* elements, the Respondent concedes that Munoz was a known union supporter. (ALJD 33:4.) As

[43] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).
[44] The Board recently clarified that the evidence must support a finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1 (2019).

to the third element, as noted by the ALJ, the record contains countless of examples of direct evidence showing the Respondent's disdain for employees' union activities, including Matheu's talking points to employees, where Matheu repeatedly asked employees to reject the Union. (ALJD 33:2-4.) Even more so, the Respondent's animus can also be inferred from other evidence, including the timing of events and the manner in which the investigation into the complaints launched against Munoz was conducted. (ALJD 33:6-17.)

First, as the ALJ found, the timing of Munoz's discipline was "highly suspicious." (ALJD 33:19.) Days after the first election, on September 26, 2017, when the Respondent filed its Offer of Proof in its objections to the first election, the Respondent specifically claimed that Munoz was operating equipment in an unsafe manner and that Munoz had intimidated anti-union employees, including employee Rosas. (ALJD 33:19-23.) However, it was not until sometime in October 2017, *after* the Respondent filed its Offer of Proof, that the Respondent actually met with Rosas to gather Rosas's evidence against Munoz. (ALJD 33:19-23.)

Second, equally suspicious were the circumstances in which the Respondent conducted the investigation. (ALJD 33:25-36.) Rather than allow its human resources department to conduct the investigation pursuant to past practice, the Respondent took the unusual step of having Matheu, a high-level manager, and several anti-union labor consultants, lead the investigations into employee complaints, which included meeting with employees off-site at employees' homes. (ALJD 33:25-31.) Also troubling was the fact that in investigating Munoz's alleged misconduct, not once did the Respondent afford Munoz, a long-term employee with an impeccable work record, an opportunity to address the allegations. (ALJD 33:33-36.) And, for unexplained reasons, the Respondent deliberately excluded Munoz's direct supervisor from the investigation and decision-making, although the supervisor supervised three of the four involved employees and likely would

have had relevant information about the alleged accusations. (ALJD 33:33-36.) Thus, based on the timing of the investigation, the unorthodox way in which the investigation was conducted, and the evidence of anti-union sentiment, the ALJ correctly found that the General Counsel had overwhelmingly established the initial *Wright Line* burden. (ALJD 34:6-14.)

If the General Counsel meets his burden and shows that the employee's protected activity was a motivating factor for the adverse employment action, the burden of persuasion shifts to the employer, who must prove it would have taken the same adverse employment action even in the absence of the employee's protected activity. *Wright Line*, *supra*. The ALJ properly rejected the Respondent's claims that Munoz was disciplined because of three anti-union employees' complaints about Munoz's temperament and character as lead. (ALJD 34:30-34.) Rather, as the ALJ found, the employees' complaints were heightened to justify disciplining Munoz and pretextually masked the Respondent's true discriminatory motivation. (ALJD 34:30-34.)

First, the Respondent admitted that at least one of the allegations that Munoz was accused of was incorrect, but nonetheless included the allegation in the written warning issued to Munoz. (ALJD 34:44-45.) Second, apart from Matheu's hearsay testimony and the written complaints submitted by three anti-union employees, the Respondent failed to present any firsthand testimony that Munoz in fact engaged in the conduct he was accused of. (ALJD 34:44-47.) Third, the complaints submitted by the three complaining employees are unreliable because they lack any specificity in support of the general complaints against Munoz, and the focus of those complaints were Munoz's unionism. (ALJD 35:5-28; GC Exhs. 58, 61-62.)[45] And, as noted above, in

[45] The ALJ also credited Munoz in finding that he did not engage in the conduct he was accused of. Under the standard set forth in *Standard Dry Wall Prods.*, 91 NLRB 544 (1950), enfd. F.2d 362 (3d Cir. 1951), the Board does not overrule an ALJ's credibility resolutions "except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." The Board defers to the ALJ's credibility findings because the ALJ has the advantage of observing the witnesses while they testify, and the Board allots great weight to the ALJ's credibility findings insofar as they are based on demeanor. *Id.*

rejecting the Respondent's defense, the ALJ questioned the reliability of the investigation given the active participation of the labor consultants and the exclusion of Munoz's direct supervisor. (ALJD 35:30-36:4.)

In summary, the Respondent conducted a one-sided investigation, relying exclusively on anti-union employees' unsupported complaints in an attempt to justify its unlawful decision to discipline a union supporter. (ALJD 36:22-29.) Based on the above, the ALJ properly concluded that the Respondent unlawfully discriminated against Munoz. (ALJD 36:29-31.)

E. The ALJ Properly Found That the Respondent Violated Section 8(a)(3) of the Act by Issuing Alberto Rodriguez a Written Warning on December 21, 2017; Suspending Him on February 2, 2018; and Terminating Him on February 16, 2018, Because of His Union Activities (Respondent's Exceptions Nos. 10-13, 38-47)

1. December 21, 2017 Written Warning

The ALJ properly concluded that the Respondent violated Section 8(a)(3) of the Act by unlawfully issuing Rodriguez a written warning on December 21, 2017.[46] (ALJD 39:28-40:30.)

The Respondent excepted to the ALJ's finding that there was "automatic" anti-union animus against Rodriguez because of his union activity and that the Respondent engaged in pretext by issuing Rodriguez a written warning on "December 17, 2017."[47] However, the ALJ did not find "automatic" anti-union animus. Instead, the ALJ found the record to be replete with direct evidence of Wismettac's disdain for the Union and substantial evidence supporting a finding that Rodriguez was disciplined because of his union support and activity, as Rodriguez's supervisor

[46] As an initial matter, the Respondent excepted to the ALJ's finding that Rodriguez's employment-related claims, including his February 2, 2018 suspension and February 16, 2018 termination are not subject to the arbitration agreement that he signed. (ALJD 39:19-26.) However, the Respondent failed to acknowledge the Board's decision in *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 4-5 (2019), holding that arbitration agreements restricting employees' right to file charges and access the Board's processes violate Section 8(a)(1) of the Act. The Respondent's exception should therefore be rejected. Furthermore, the Union, not Rodriguez, filed the charge involving Rodriguez.

[47] See Respondent's exceptions nos. 39 and 40. The Respondent appears to have incorrectly referenced the December 21, 2017 written warning as having occurred on December 17, 2017.

was bypassed when the written warning was issued; no attempt was made at determining the veracity of the undated and unnamed complaints against Rodriguez; and there was no evidence that the Respondent's human resources department conducted any investigation, despite the fact that Matheu testified that the discipline fell under the human resource's department purview. (ALJD 33:1-3, 40:4-13.) Additionally, the suspect timing of the December 21, 2017 written warning, issued against one of the most active union supporters between the first and second elections, a critical period during which the Union attempted to retain support from employees, further supports an inference of unlawful motive.

The Respondent also excepted to the ALJ's credibility determination regarding Rodriguez's testimony regarding the December 21, 2017 written warning. However, the Respondent offered no factual or legal argument in support of this exception. In fact, the Respondent failed to make any factual or legal arguments in support of any of its exceptions related to Rodriguez's December 21, 2017 written warning. Accordingly, the Respondent's exceptions regarding the December 21, 2017 written warning should be rejected.

2. February 2, 2018 Suspension

The ALJ properly concluded that the Respondent violated Section 8(a)(3) of the Act by unlawfully suspending Rodriguez on February 2, 2018. (ALJD 42:31-43:29.) The Respondent excepted to the ALJ's finding that the General Counsel established his initial burden under *Wright Line* and that the Respondent pretextually and unlawfully suspended Rodriguez. The Respondent also specifically excepted to the ALJ's finding that Mack's February 1, 2018 hearsay statement against Rodriguez "was not sufficient to warrant discipline."

The Respondent's only argument in support of these exceptions is that Rodriguez was "suspended/terminated based upon his entire disciplinary record," and that the Respondent was

thus "justified in the suspension." However, the Respondent misrepresents the record because Rodriguez was undisputedly suspended *solely* for an alleged incident that occurred on January 31, 2018. (ALJD 22:28-29; GC Exh. 35.) In fact, the suspension notice issued to Rodriguez specifically states that Rodriguez was being placed on suspension based on the January 31, 2018 incident, nothing else. (GC Exh. 35.) Furthermore, the ALJ correctly found that the Respondent had produced no competent evidence that Rodriguez ever threatened anyone and that Mack's February 1, 2018 statement regarding the alleged "incident" did not even name Rodriguez and consisted entirely of hearsay evidence. (ALJD 43:7-29.) Rather, as the ALJ found, the Respondent seized on a double hearsay statement from an anti-union employee against Rodriguez, a well-known union activist. (ALJD 43:23-25.) Accordingly, the Respondent's exceptions regarding Rodriguez's February 2, 2018 suspension should be rejected.

3. February 16, 2018 Termination

The ALJ properly concluded that the Respondent violated Section 8(a)(3) of the Act by unlawfully terminating Rodriguez on February 16, 2018. The Respondent excepted to the ALJ's findings that the General Counsel established his initial burden under *Wright Line* regarding Rodriguez's termination; that the Respondent pretextually and unlawfully terminated him; and that he was not justifiably terminated for racial harassment and other alleged misconduct.

The Respondent first argues that Rodriguez's termination was justified under the "totality of the circumstances," particularly as it "relates to the derogatory racial comments directed towards co-worker Marcus Mack." (R. Br. 12-13.) However, the Respondent cites no legal authority for a "totality of the circumstances" test that it attempts to apply to this case. Furthermore, the Respondent again misrepresents the record by stating that "racial comments" were directed at

Mack. Rodriguez made no racial "comments" or any such remarks; rather, a song with offensive lyrics played from his cell phone.[48]

In citing Rodriguez's "lengthy history of documented disciplinary issues" as a legitimate basis for Rodriguez's termination, the Respondent fails to address the ALJ's finding that the Respondent justified the termination, in part, on the discriminatorily-issued December 21, 2017 written warning and February 2, 2018 suspension. (ALJD 43:31-39.) As the ALJ also explained, Rodriguez **would not** have been terminated absent the unlawful suspension pending investigation, as the Respondent was not in the process of terminating Rodriguez's employment. (ALJD 44:8-12.) Furthermore, the timing is suspect as the Respondent only started issuing (and ratcheting up) the warnings to Rodriguez, one of the main union activists, in the midst of a contentious union-organizing campaign as it got closer to the second election.

In addition, although the Respondent excepted to the ALJ's finding that Matheu did not know what "insubordination" referred to in the termination letter he issued to Rodriguez, the Respondent offered no explanation for this exception. Matheu himself admitted that he did not know what the "insubordination" allegation pertained to.

Furthermore, with respect to the alleged "racial harassment of a coworker" listed on Rodriguez's termination notice, the Respondent argues that the ALJ disregarded testimony and documentary evidence of "similar incidents of racial slurs" resulting in employees being terminated. To the contrary, rather than disregarding such evidence, the ALJ based her decision, in part, on the disparity between the investigation involving Rodriguez and the human resources

[48] The Respondent's exception no. 11 to the ALJ's finding that Mack's January 11, 2018 statements that "every other word was nigga" and that Rodriguez turned the music up when the song said "fuck that nigga" were an embellishment should be rejected. The Respondent provided no factual or legal argument supporting this exception, and the ALJ's credibility determination should stand, as it is supported by the evidence. In particular, McCormick, who heard the song in question, said he would consult with HR to determine why the music was offensive, although McCormick himself was present when the music was playing. (ALJD 20 fn. 28.)

department's in-depth investigations into the incidents involving other employees. (ALJD 44 fn. 62.) As the record shows, human resources did not conduct any investigation at all into the January 11, 2018 incident between Rodriguez and Mack. In fact, McCormick advised Rodriguez *not* to go to human resources, although Rodriguez felt threatened by Mack based on their interactions.

The ALJ further relied on the disparity between the near-immediate terminations of other employees for racially-offensive remarks that they made, and the *over one-month* delay between the January 11, 2018 incident between Rodriguez and Mack and his February 18, 2018 termination, for which Rodriguez received no contemporaneous discipline.[49] (ALJD 43:42-44:6 (citing *Doctors' Hospital of Staten Island, Inc.*, 325 NLRB 730, 738 (1998) (delay in acting on alleged misconduct is evidence of pretext))). In conceding its delay in terminating Rodriguez, the Respondent improperly attempts to justify that unexplained delay by now claiming in its exceptions brief that the January 11, 2018 incident was "after-acquired evidence." (R. Br. 15.) However, the after-acquired evidence doctrine simply does not apply in the present case, as the Respondent had direct, contemporaneous knowledge of the January 11, 2018 incident on the very same day the incident occurred.[50] Furthermore, the after-acquired evidence doctrine applies to the determination of specific remedies, rather than the threshold issue of whether an employer has committed a violation of the Act. *Mojave Electrical Coop.*, 327 NLRB at 19.

The Respondent further misinterprets the ALJ's decision by stating in its exceptions brief that the ALJ "erroneously states that Mr. Rodriguez was only suspended after he served as an

[49] The Respondent excepted to the ALJ's finding that the January 11, 2018 incident with Mack did not factor into the level of discipline Rodriguez received when his January 31, 2018 written warning was discussed and issued. See Respondent's exception no. 46. The Respondent provided no explanation for this exception. It is undisputed that the January 31, 2018 written warning pertained solely to Rodriguez's requests for time off.

[50] See *Mojave Electrical Coop, Inc.*, 327 NLRB 13, 19 (1998) ("An employee who has been discharged in violation of the Act is not barred from all relief when, *after his discharge*, the employer discovers evidence of wrongdoing that, in any event, would have led to his termination on lawful and legitimate grounds had the employer known of it" (citing *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1994)) (emphasis added)).

election observer for the Union….There is no evidence that Respondent had any prior knowledge of Mr. Rodriguez acting as the Union's observer at the election." Here, Respondent confuses the timing of events between Rodriguez' suspension and his termination. Nonetheless, the ALJ's decision correctly states that the Respondent *terminated* Rodriguez after the February 6, 2018 election, not that Rodriguez was *suspended* after the election. (ALJD 43:42-44:6.)[51]

Finally, the Respondent manufactures an entirely new justification for its termination of Rodriguez by arguing that his "serious attendance problems," standing alone, was justification to terminate his employment, as employers "are not required to maintain the employment of employees with limited schedules." (R. Br. 14.) The Respondent never once raised the issue of Rodriguez's availability as a reason for his termination, either with Rodriguez directly or during the hearing (as opposed to simply his alleged failure to submit doctor's notes or eviction notices for his unpaid time-off). Furthermore, at the time of Rodriguez's suspension, Rodriguez had returned from his leave of absence and was working. The Respondent's continually shifting defenses therefore appear to be further evidence of its pretextual decision to terminate Rodriguez for his union support and activity. Accordingly, the Respondent's exceptions should be rejected.

F. The ALJ Correctly Decided That the Respondent Violated Section 8(a)(3) of the Act by Terminating Pedro Hernandez on October 31, 2017, and by Refusing to Re-Hire and Consider for Re-Hire Hernandez, Fanor Zamora, and Jeremiah Zermeno in November 2018 (Respondent's Exceptions Nos. 4-7, 32-37, 48-54)

1. Termination of Pedro Hernandez

The ALJ properly concluded that the Respondent violated Section 8(a)(3) by terminating Hernandez on October 31, 2017. (ALJD 36:33-39:10.)

[51] The Respondent also excepted to the ALJ's determination that Rodriguez was not interviewed about any of the incidents resulting in his termination, without providing any explanation for this exception. See Respondent's exception no. 13. However, Rodriguez provided undisputed testimony that he was never interviewed about any alleged threats to co-workers, racial harassment of a co-worker, or insubordination.

The Respondent concedes that Hernandez was a union activist but asserts that there is no link between his termination and his union activity because he was "no more active than numerous other employees against whom no disciplinary action was taken." However, as the ALJ noted, there is no basis in law for the proposition that an employer must act against all union supporters to show that its action against a particular union supporter violates the Act. (ALJD 45:42-43.) See *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964) ("discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents"); *McKee Electric Co.*, 349 NLRB 463, 465 fn. 9 (2007); *Lucky Cab Co.*, 360 NLRB 271, 275 (2014).

In Hernandez's case, extensive evidence supports the ALJ's finding that Hernandez was specifically targeted due to his union support and activity, as the Respondent seized upon an anti-union employee's complaint that Hernandez "is telling new people that if they are going to vote, to vote for the union." (ALJD 38:23-26.) The Respondent also does not dispute the ALJ's findings that Matheu provided inconsistent testimony regarding how he gathered the information he used to support Hernandez's termination, and that Matheu's own hearsay notes inexplicably differed from employee Vargas's notes regarding Hernandez's activity. (ALJD 37:10-38:21.) Moreover, Vargas's failure to testify regarding his notes warrants an adverse inference.[52] As the ALJ further noted, the Respondent's shifting explanations lack substantiation and are indicative of pretext, and the Respondent's disparate treatment of Hernandez is evidence of his unlawful termination. (ALJD 38:28-39:10.) The Respondent's exceptions to the ALJ's determination that Hernandez was unlawfully terminated should therefore be rejected.

2. Refusal to Hire and Consider for Re-Hire Pedro Hernandez, Fanor Zamora, and Jeremiah Zermeno

[52] *International Automated Machines*, 382 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988) (adverse inference may be drawn when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party). See ALJD 38 fn. 57.

The ALJ properly concluded that the Respondent violated Section 8(a)(3) by refusing to re-hire and consider for re-hire Hernandez, Zamora, and Zermeno. (ALJD 44:17-45:47.) Applying *Wright Line* to the claims alleging discriminatory refusal to re-hire, the ALJ found that it was clear that Hernandez, Zamora, and Zermeno were active union supporters and that the Respondent knew of their support and activity, including their presence at a union meeting in the parking lot the very week that they were terminated. (ALJD 44:22-34 (citing *Wright Line*, *supra*; *Merit Elec. Co., Inc.*, 328 NLRB 212 (1999)).) In fact, the Respondent concedes that it knew about the parking lot meeting but claims that it is "unclear as to which, if any, supervisors were actually observing." However, as the ALJ noted, unrefuted testimony was presented that numerous managers observed the union meeting through the entrance door window and that Narimoto came out to smoke while observing the group of employees. (ALJD 44:28-32.)

The ALJ further properly found that under *FES*, 331 NLRB 9, 12 (2000), the evidence shows that the Respondent violated the Act by refusing to re-hire Hernandez, Zamora, and Zermeno because: (1) the Respondent hired dozens of new temporary employees at the time of the alleged unlawful conduct; (2) Hernandez, Zamora, and Zermeno undisputedly had the experience and training for the open warehouse positions; and (3) anti-union animus contributed to the decision not to re-hire them.[53] (ALJD 44:36-45:47.)

It is undisputed that the Respondent had open and available warehouse positions at the time that Hernandez, Zamora, and Zermeno applied for their former positions, and that the Respondent

[53] The ALJ appropriately applied the elements of a discriminatory refusal-to-hire violation under *FES* in determining that the Respondent violated the Act by refusing to re-hire Hernandez, Zamora, and Zermeno. The ALJ also concluded that the Respondent violated the Act by refusing to *consider* Hernandez, Zamora, and Zermeno for re-hire, although the elements of a discriminatory *refusal-to-consider* violation differ from a *refusal-to-hire* violation. See *FES*, 331 NLRB at 12, 15. The ALJ's remedial order for the refusal-to-hire violations of instatement to the positions to which Hernandez, Zamora, and Zermeno applied is appropriate and subsumes the remedy for *refusal-to-consider* violations. Id. at 12, 15. See also *Greenbrier Rail Services*, 364 NLRB No. 30, slip op. at 3-5 (2016) (applying *FES* test in cases where an employer refuses to re-hire its former employees).

hired at least 21 new temporary warehouse workers in November 2017 alone. (ALJD 16:19-20.) It is also undisputed that Hernandez, Zamora, and Zermeno were qualified for the warehouse worker positions. (ALJD 45:22-23.) Finally, as the ALJ noted, the Respondent's anti-union animus is well-documented. In particular, the evidence that Hernandez, Zamora, and Zermeno were not re-hired because of their union support and activity is supported by the November 2017 hirings of Mack, Vargas, and McLoughlin, three employees known to be against the Union. In fact, employees Mack, Vargas, and McLoughlin were the *only* warehouse workers to be rolled over from Randstad to other staffing agencies in order for the Respondent to retain them as employees at the Los Angeles facility. (ALJD 45:24-26.) In addition, the Respondent failed to explain why Fujimoto forwarded an inquiry concerning Zamora's job application with the Respondent to anti-union labor consultant Hinkle. (ALJD 45:26-28.)

Furthermore, with respect to Zermeno, the Respondent's only justification for failing to re-hire him is that when he was terminated, he expressed his frustration by stating that he should have taken another "fucking job" and that this was "bullshit," to no one in particular. (ALJD 45:34-37.) As the ALJ found, given that Zermeno had just lost his job, the failure to re-hire him based solely on these stray comments in this context does not withstand basic scrutiny. (ALJD 45:37-38.) And the Respondent provided no justification at all for its refusal to re-hire Zamora.

Accordingly, the ALJ's decision finding that the Respondent violated the Act by refusing to re-hire and consider for re-hire Hernandez, Zamora, and Zermeno should be upheld, and the Respondent's exceptions should be rejected.

G. Remedial Order

The Respondent failed to except to the ALJ's remedial order for full reinstatement or instatement of Hernandez, Zermeno, and Zamora to their former positions, and any such

exceptions to the order should therefore be rejected on that basis. (ALJD 96:25-29, 96:39-47.) See NLRB Rules and Regulations Section 102.46(a)(1). The Respondent nevertheless argues in its exceptions brief that should the Board uphold the ALJ's decision, the Respondent should only be ordered to reinstate Hernandez, Zermeno, and Zamora if they apply through a temporary agency and that their status should remain as temporary employees. (R. Br. 17.)

The Respondent's remedial order request is premature. The issue before the ALJ was whether the Respondent unlawfully refused to re-hire and consider for re-hire Hernandez, Zamora, and Zermeno. Based on the evidence presented, the ALJ appropriately found that the Respondent discriminated against Hernandez, Zamora, and Zermeno because of their union activities.[54]

V. CONCLUSION

Based on the record evidence and the facts and arguments set forth above, the General Counsel respectfully requests that the Board overrule the Respondent's exceptions.

Dated: March 13, 2020

Respectfully submitted,

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[54] Whether the Respondent should be required to hire Hernandez, Zamora, and Zermeno as direct employees of the Respondent or as "temporary" employees through a staffing agency is not an issue that was litigated before the ALJ, as the only issue was whether the Respondent refused to re-hire them and consider them for re-hire. Thus, whether the Respondent should be required to employ Hernandez, Zamora, and Zermeno directly or through a staffing agency should be addressed, if necessary, in a compliance hearing, where the parties will have an opportunity to fully elicit evidence as to the appropriate remedy in this matter, including evidence as to the Respondent's practice of converting staffing agency employees to direct positions with the Respondent after a certain period of time.

STATEMENT OF SERVICE

I hereby certify that a copy of **General Counsel's Answering Brief to the Respondent's Exceptions to the Administrative Law Judge's Decision** in Cases 21-CA-207463, 21-CA-208128, 21-CA-209337, 21-CA-213978, 21-CA-219153, 21-CA-212285, and 21-RC-204759 have been submitted by E-Filing to the Executive Secretary of the National Labor Relations Board, Washington, D.C., on March 13, 2020. The following parties have been served with a copy of the same documents by e-mail:

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DATED at Los Angeles, California, this 13th day of March, 2020.