

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

<p>NESTLÉ USA, INC.</p> <p style="text-align: center;">and</p> <p>TOU VANG, an Individual</p>	<p style="text-align: center;">Case 18-CA-231008</p>
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**ANSWERING BRIEF TO THE NATIONAL LABOR RELATIONS BOARD ON BEHALF
OF THE GENERAL COUNSEL**

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Renée M. Medved, Counsel for the General Counsel, respectfully submits this Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge Charles J. Muhl (the ALJ).

I. INTRODUCTION¹

On March 12, 2020, the ALJ issued his decision in this matter, finding that Nestlé USA, Inc. (Respondent) violated Section 8(a)(1) by coercively instructing Charging Party Tou Vang not to discuss workplace investigations; suspending Vang on May 10 due to his protected concerted activity; interrogating Vang on May 16; and discharging Vang on May 21 in response to his protected concerted activity.² The ALJ's detailed decision shows that he carefully considered all the evidence. His findings are comprehensive and even-handed. In reaching the conclusion that Respondent violated the Act, the ALJ's analysis shows that he properly considered and applied appropriate Board precedent. As a result, the ALJ's decision and order should be upheld in full by the Board.

Respondent excepts to many substantive portions of the ALJ's decision.³ Nearly all of Respondent's exceptions are premised upon its bizarre assertion that Vang invented his line coordinator's racist use of the racist slur "monkey" as part of an

¹ The ALJ's decision will be referred to as (ALJD ____); Respondent's Brief in Support of Exceptions to the Decision of the Administrative Law Judge will be referred to as (R. Br. ____); General Counsel's Exhibits will be referred to as (G.C. Ex. ____); Respondent's Exhibits will be referred to as (R. Ex. ____); Transcript citations will be referred to by page number and line number as (Tr. __:__), unless the transcript cite covers multiple pages.

² All dates are in 2018 unless otherwise noted.

³ Any omission or failure to specifically respond to any factual statement or legal argument raised by Respondent in its Exceptions or Brief in Support should not be interpreted as an admission, concession or agreement on the part of the General Counsel.

elaborate scheme to have his line coordinator fired and take his job. (R. Br. 2, 5-6, 8, 15, 22, 27, 28, 33, et al.). Respondent's theory is based solely upon its own unfounded speculation. In its argument in support of its exceptions, Respondent misconstrues the actual record, ignoring the weight of the evidence. For this reason, when considering factual assertions made by Respondent, General Counsel urges the Board to carefully look at the underlying record, just as the ALJ did.

This Answering Brief will first review the uncontested chronology of events, focusing on those areas where Respondent has mischaracterized the evidence in its exceptions. Next, the Brief will describe why the ALJ's credibility resolutions were appropriate. Finally, the Brief will describe why the ALJ's legal conclusions should be upheld in their entirety by the Board.

II. SUMMARY OF FACTS

1. Respondent and Vang Background

Respondent operates a production facility in Little Chute, Wisconsin where it produces and distributes frozen pizzas and employs approximately 1,000 employees. (Tr. 26:2-10)(G.C. Ex. 1(e)). Vang worked for Respondent since February 2, 2010, with no prior discipline prior to his suspension and termination discussed below. (Tr. 394:7-9). Vang worked as product support and was assigned to production line five on third shift. (Tr. 26-27). In that position, he worked under line coordinator Jack Lee and Lee's back-up line coordinator, See Yang. (Tr. 27-29).

2. Vang learns of Lee's racist language from employee Chong Thao.

A few months prior to February, Vang overheard employee Chong Thao tell other employees in the breakroom that Lee had referred to three African American employees

as monkeys, stating he had put three monkeys in the bin area and they could not do it.⁴ (Tr. 44-47).

Shortly before submitting the petitions discussed below, Vang confirmed with Thao what he had overheard a few months before—that Thao had heard Lee refer to African American employees working on bins as “monkeys.” Thao confirmed this and told Vang that Lee made the comment to a group of employees. (Tr. 44-47). Vang’s testimony about his conversations with Thao is *uncontested*.⁵

3. Vang initiates two employee petitions about both Lee and Yang.

In February, Vang drafted *two* petitions regarding employee complaints about line coordinator Lee and back-up line coordinator See Yang. (G.C. Ex. 2-3)(Tr. 29, 36). The petitions addressed Lee and Yang’s abusive behavior towards employees on the production line, among other complaints. There is no dispute that the issues raised in these petitions were work-related and shared by Vang’s coworkers. (G.C. Ex. 2, 3). Eight employees, including Vang, signed the Lee petition. There was no reference to the racist monkey remark on the Lee petition since the petition was never intended to be an exhaustive list of employee complaints, but rather a jumping off point to spur an investigation by Respondent.⁶

⁴ Bins refers to a specific work area where employees must retrieve pizzas that have been placed into the bins by the conveyor when the cartoner machine goes down. Employees assigned to this area have to remove the pizzas from the bins and get them back on the line when the machine starts running again. (Tr. 45:15-23).

⁵ As will be described in Section II, 17, Vang’s testimony as to Thao’s report is bolstered by evidence obtained by Respondent in its belated investigation into the matter.

⁶ The very first line states: “This is a petition *to investigate Jack Lee*, line coordinator from Assembly Line 5 for abuse of power and disrespecting fellow coworkers.” (G.C. Ex. 2, emphasis added).

4. On February 7, Vang speaks to Xe Xiong about the Lee petition.

On February 7, Vang spoke to pepperoni operator Xe Xiong about the Lee petition, but she declined to sign. (Tr. 41-42). Vang asked Xiong to sign the petition because he personally witnessed Lee yelling at Xiong and she complained about this to Vang. (Tr. 42:1-9). During his conversation with Xiong about the Lee petition, Xiong (who is Hmong) urged Vang to forgive Lee for what he had done and asked Vang not to petition against another Hmong person, suggesting instead that he petition against team leader Donna Tarkowski for being a racist.⁷ (Tr. 44:9-14; 88:2-7). Xiong told Vang that if Lee were fired, she would have a hard time communicating with team leader Anthony Burke, as Xiong speaks limited English. (Tr. 44:15-20; 368:10-12). Both Vang and Xiong speak Hmong. (Tr. 25:17-18; 42:23-25). The ALJ found that Vang told Xiong that if enough people signed the petition then Lee would be fired and he would become their boss. (ALJD 4, fn. 9). Vang testified he told Xiong he would consider putting in for Lee's job to help allay Xiong's concern and help his coworkers. (Tr. 47:5-19).

5. On February 8, Vang submits two petitions to Human Resources.

On February 8, Vang submitted the two petitions to Respondent by placing the petitions in Human Resources Manager Holly Rajchel's mailbox. (Tr. 50:1-16). Respondent knew that both petitions had been initiated by Vang as he later called and spoke to Human Resources Representative Neil Scullion about the status of the petitions. (Tr. 51-52). Later in the afternoon on February 8, Vang met with Scullion and Production Supervisor Jon Balakrishnan. Scullion asked Vang why he did not bring the

⁷ Support for the ALJ's credibility resolution as it relates to this comment by Xiong will be addressed in Section III, A.

issues addressed in the petitions to his supervisor (Balakrishnan) first. (Tr. 55:11-16).

Vang explained he felt that Lee and Balakrishnan were too close.

6. On February 12, Vang reports to Respondent that he learned from employee Chong Thao that Lee used the word “monkey” to refer to black employees.

On February 12, Human Resources Representative Neil Scullion and Production Supervisor Ben Schwartz called Vang into a meeting in the front conference room. (Tr. 55-56). Vang was the *sole* witness to testify about this meeting. Vang brought his notes about Lee and Yang into the meeting. (Tr. 59:6-23; 61:7-20)(G.C. Exs. 4, 51). Vang’s note about Lee included the following statements:

Was eating lunch one night, heard Chong Thao mention that Jack said he put three monkeys on bins and they can’t even do it.

Chong Thao said one time Jack grabbed him by the collar angrily and shook him.

(G.C. Ex. 4). As evidenced by the note which Vang turned into Respondent, Vang *never* claimed to have heard Lee use this racist language firsthand. During the meeting, Vang reviewed his notes about Lee with Scullion and Schwartz. (Tr. 56:16-17). Vang told Scullion and Schwartz that he had overheard employee Chong Thao tell coworkers that Lee *referred to African American employees* working in the bin area as monkeys. (Tr. 56:19-23). Vang also described a complaint about Lee refusing to let employees go on break and that Lee’s yelling had caused an employee to quit. (Tr. 56-57). Vang turned in his handwritten notes about Lee to Respondent during this meeting. (G.C. Ex. 4)(Tr. 59:8-9).

Later in the meeting, Scullion informed Vang that Human Resources Generalist Stacy Sipiorski wanted to know why he did the petition. (Tr. 57:20-24). Vang explained it

was because of the concerns he had just shared. (Tr. 58:1-2). Scullion then directed Vang to write down a statement about why he did the petition. (Tr. 58:12-17). Vang wrote he felt it was “the right thing to do.” (G.C. Ex. 5).

In support of its exceptions, Respondent makes the repeated assertion that Vang invented the racist connotation to the historically racist slur “monkey” *only after* Respondent concluded its initial investigation and failed to terminate Lee. This assertion is factually disproven by Vang’s *uncontroverted* testimony described above.

Respondent did not call its own supervisors, Scullion or Schwartz, to testify about this February 12 meeting. For this reason, Respondent’s exceptions which rely on the premise that Vang manufactured the racist application of the word “monkey” only after Respondent failed to terminate Lee, must be rejected.

7. Employees corroborate the complaints in the petitions to Respondent, but Respondent does nothing to investigate Lee’s racist language.

From February 9 to 12, Respondent gathered written statements from employees that signed the Lee and Yang petitions.⁸ With regards to the Lee petition, employee statements corroborate Lee’s hostile style of leadership, among other concerns. In those statements, employees describe with specific detail incidents of Lee repeatedly yelling at them, cursing at them, threatening them with write-ups and calling them names, like “stupid idiot,” while working on the production line. (G.C. Exs. 11, 12, 23, 24, 25, 26, 27, 28, 29).

⁸ There is no evidence that anything came of the Yang petition. The issues with Lee were generally the focus of future conversations about employee complaints between Vang and various Respondent supervisors, as described below.

During its investigation, Respondent obtained three statements from employee Chong Thao, who had told Vang about Lee's racist language. (G.C. Exs. 24, 26, 29). The last of these statements is dated February 14 and appears to be in follow-up to Vang's report two days earlier that Lee had grabbed Thao by the shirt. (G.C. Ex. 29). However, there is no evidence that Respondent followed up with Thao or any other employee about the racist monkey remark at this time.⁹

8. Lee denies any wrongdoing and Respondent returns him from suspension with a counseling.

On February 9, Scullion obtained Lee's statement in response to the petitions and placed him on suspension pending investigation. (G.C. Ex. 22)(Tr. 294:9-11). In his statement, Lee denies ever putting his team down. (G.C. Ex. 22). On February 16, Respondent brought Lee back from suspension and issued him a verbal warning for being disrespectful to his coworkers. (Tr. 291-292)(G.C. Ex. 31, R. Ex. 13).

9. On February 21, Respondent meets with employees that signed the Lee petition and dupes them with a sign-in sheet.

On February 21, Human Resources Generalist Sipiorski and Production Supervisor Balakrishnan held a meeting with employees that signed the petition about Lee.¹⁰ (Tr. 64-65). The meeting began with Sipiorski asking employees to sign a Nestlé

⁹ As will be discussed below in Section II, 14-17, it was only *after* Respondent learned that Vang had spoken to black employees about the comment that Respondent decided to investigate the issue.

¹⁰ As noted by the ALJ, Vang's description of the meeting is largely uncontroverted. Sipiorski's testimony about the meeting was limited to why she held the meeting and the sign-in sheet prank. (Tr. 294-298; 381-382). Respondent never called Balakrishnan to testify about the meeting. Employee Ashley Schmitt's recollection of the meeting was limited, but her testimony corroborated Vang's more detailed recollection. (Tr. 173-176). The ALJ properly credited Vang's account since it was the only detailed account of this meeting.

sign-in sheet, which is customarily used for meetings at Respondent. (Tr. 403-404)(G.C. Ex. 50). Sipiorski informed employees that Lee would be returning to work and that he would be coached, but withheld any details about Respondent's findings as to the merits of the employees' complaints.¹¹ (Tr. 65:14-17; 381-382). Sipiorski then asked employees why they supported the petition when they didn't agree to everything on the petition when it could jeopardize Lee's employment. (Tr. 65-66). Vang replied that even if not everyone agreed to everything listed on the petition, it did not make the petition invalid and that they were coming together to bring forward their concerns about Lee. (Tr. 65-66). Despite there being *no* evidence that employees did not understand the petition, Sipiorski chastised employees by telling them they should understand what they were signing as they had jeopardized Lee's employment with the petition. (Tr. 174:5-10; 297-298). Sipiorski then pointed out that at the bottom of the sign-in sheet in small font it stated: "By signing this sign in sheet, I agree to wear an [sic] unicorn suit and bake cookies for my line." (G.C. Ex. 50) (Tr. 66:4-13; 298:5-9). Employees were understandably upset over being tricked by Sipiorski. (Tr. 298:10-14). Respondent's meanspirited sign-in sheet prank is even more outrageous given that many of the petition-signers spoke English as a second language.¹² Vang told Sipiorski that this was

¹¹ Sipiorski's vague testimony that she informed employees their concerns were valid is completely contradicted by her comments and conduct during the meeting in which she accused employees of not understanding what they were signing. (Tr. 295:12-21, 297-298). There is *no* evidence that Sipiorski informed employees at this meeting that Lee's suspension was *unpaid*. When asked what she told employees during this meeting about Lee's suspension, Sipiorski testified Respondent doesn't give details about disciplinary actions to other employees. (Tr. 381-382).

¹² Respondent asserts that the ALJ mischaracterized the sign-in sheet as a "joke." A "joke" is a mild word to describe the demeaning prank Sipiorski played on employees who had signed the petition.

why no one wanted to speak up. (Tr. 66:4-7). Vang continued to bring up complaints about Lee during this meeting and asked that Respondent recognize that the petition-signers worked hard for Respondent. (Tr. 66:15-25; 175:7-15). Sipiorski told employees that if they had anything new, to stop by her office. (Tr. 67:18-22). As the employees walked out, Balakrishnan commented that the employees looked “down.” (Tr. 67:18-22).

10. On March 1, Vang meets with Plant Manager Marcus Brenneman and raises Human Resource’s mishandling of the Lee petition.

Employees, including Vang, were upset with Sipiorski’s handling of the meeting. (Tr. 68:4-8; 298:12-14). On March 1, Vang met with Plant Manager Marcus Brenneman in his office. During this meeting, Vang described his and other employees’ complaints about Lee and gave him a copy of the Lee petition. (Tr. 70-71). Among other issues he described, Vang *for the second time* explained that he had heard from employee Chong Thao that Lee had referred to black employees as “monkeys.” (Tr. 70-71). Additionally, Vang shared employees’ frustration with the way Sipiorski made fun of employees using the fine print on the sign-in sheet. (Tr. 73:22-25). Brenneman replied that he would look into the matter when he was back in the plant a week later. (Tr. 74:8-12).

Brenneman reviewed the prior investigation with Sipiorski and Human Resource Manager Rajchel, but conducted no further investigation. (Tr. 299-301). Brenneman, Sipiorski and Rajchel determined that the original investigation and its results stood. (Tr. 300-301).

11. On March 7, Vang raises Respondent’s mishandling of the petitions directly with Sipiorski.

On March 7, Sipiorski approached Vang while on the production floor and informed Vang that she had been sent by Brenneman to see how employees were

doing. (Tr. 75:4-16). Vang replied that it was too soon to tell how Lee was doing. (Tr. 75:15-20). Vang told Sipiorski she did not care about the employees that signed the petition and that she had made a big joke about them wearing unicorn costumes and baking cookies. (Tr. 75:21-25). Sipiorski apologized and said it was Rajchel's idea. (Tr. 76:1-4). Vang raised that Sipiorski herself had not personally spoken with any of the employees who signed the petition. (Tr. 76-77). Sipiorski informed Vang that Respondent had relooked at the investigation, but that everything stands and urged him to come forward should there be any "new concerns."¹³ (Tr. 301-302).

12. On April 9, Human Resource Manager Rajchel Refers to Vang as "complex."

Approximately a month after Sipiorski's conversation with Vang on the production floor and a month before his suspension, Human Resource Manager Rajchel sent an email to one of Respondent's human resources recruiters, in response to Vang claiming he was owed an additional \$500 for referring an employee to Respondent. Rajchel wrote: "If [Vang] gives you any issues, please let me know. He can be (trying to be PC) complex." (G.C. Ex. 56). At the time of this email, Vang had butted heads with Respondent's Human Resources department by going above their heads and complaining directly to Plant Manager Brenneman, as well as directly confronting Sipiorski about her offensive treatment of the Lee petition-signers. As the ALJ found, this email was indicative that Rajchel's actual feelings towards Vang were "less favorable." (ALJD 27:24-26). There is no other plausible connotation supported by the

¹³ Sipiorski instructed employees to bring *new* complaints both in her conversation with Vang on March 7 and during her February 21 meeting with the petition-signers. Clearly, her openness to only *new* complaints was indicative of her desire to close the book on any issues she believed had already been dealt with by Respondent.

record. Rajchel was present for the hearing, but Respondent did not call her to testify about this comment. (Tr. 8-9).

13. In April and May, Vang speaks with black employees about Lee's racist comment and Human Resource's lack of investigation.

Disappointed by Human Resources' response to the petition, Vang continued to raise issues about Lee with his coworkers with the hopes of spurring action by Respondent. Sometime in the beginning of April, Vang spoke to black employee Victor Onyango about the Lee petition including the comment he had heard from Chong Thao—that Lee had referred to black employees as “monkeys.” (Tr. 77-78). Vang informed Onyango that Human Resources had not investigated that allegation based on hearing from employee Thao that Respondent had not spoken to him about the comment.¹⁴ (Tr. 78-79). Onyango expressed disbelief that Respondent would not have investigated such a claim. (Tr. 79:8-9). Vang's testimony about his conversation with Onyango is uncontested, as Onyango did not testify.

Following his conversation with Onyango, around April 18, Vang spoke with black employee Masomo Rugama.¹⁵ During his conversation with Rugama, Vang explained why he circulated the Lee petition, including that he had heard from another employee that Lee had referred to African Americans working in the bin area as “three monkeys.” (Tr. 79-80). In reply, Rugama stated that he believed that Lee had been referring to him and two other black employees, explaining that he and two other black employees had

¹⁴ Vang's understanding was correct, as there are no notes or employee statements other than his own about the racist comment until May. Respondent's exceptions based on its argument that it had investigated the comment prior to May have no basis in the evidence.

¹⁵ The ALJ's proper crediting of Vang as it relates to his conversations with Rugama will be addressed in Section III, B.

been running margarita pizzas on a very hectic day with a lot of jams. (Tr. 81:10-18).

Rugama informed Vang that had he known about this remark, he would have signed the petition. (Tr. 523:17-21).

Around May 4 or 5, Vang spoke to Onyango again and shared that Rugama believed that Lee had used the racist slur in reference to him (Rugama). (Tr. 83:7-16). Shortly after that conversation, around May 6 or 7, Vang spoke with Rugama again in the cartoner's room. During that conversation, he asked Rugama how he was doing and told him he did not like the discriminatory comments from Lee. (Tr. 84:15-18). Rugama did not reply. (Tr. 84:20-21).

14. On May 9, Tou Vang and Sydney Vang meet with Production Supervisor Justin Preisler.

On May 9, Tou Vang and his brother, Sydney Vang, met with Production Supervisor Justin Preisler and Business Unit Manager Jon Balakrishnan. Vang was the primary spokesperson during the meeting. (Tr. 477:1-3). The Vang brothers brought up that back-up line coordinator Chong Vue had moved Sydney Vang to another line out of jealousy over Sydney's relationship with employee Ashley Schmitt and that this impacted the line's overall performance. (Tr. 85-87). Vang raised that he felt this was also done in retaliation for the February employee petition about Lee. (Tr. 87:4-12). Vang then described his conversation with Xe Xiong about the February petition and how Xiong believed that a petition should be circulated against Team Leader Donna Tarkowski, who he stated Xiong claimed was racist. Preisler replied that he would investigate that allegation. (Tr. 88:2-13). Vang explained that he had heard from Chong Thao that Lee had referred to African Americans as monkeys and asked why Human Resources had not investigated that claim. (Tr. 89:1-7). Vang told Preisler and

Balakrishnan that he had spoken to employee Rugama about the remark and Rugama thought the comment may have been in reference to him. (Tr. 89:9:-24). Preisler replied he was going to speak to Human Resources about the matter. (Tr. 89-90). Vang credibly denied being given any directive not to speak with other employees about the meeting, which is consistent with the written statement he provided to Respondent even before his termination. (Tr. 90:10-12) (G.C. Ex. 9).¹⁶

That same day, following his meeting with Preisler and Balakrishnan, Vang saw Rugama returning from break. He told Rugama he had spoken with Preisler about the discriminatory monkey comment and that Human Resources may come talk to him about.¹⁷ (Tr. 90-91).

15. On May 10, Respondent responds to the issues reported by Vang by suspending Tou Vang.

On May 10, Preisler informed Sipiorski about his meeting with the Vang brothers and provided her with his notes of the meeting. (Tr. 304-305). Sipiorski also received a statement from Chong Vue, one of the individuals who Vang and Sydney had complained of in their meeting the day before. That statement contained various

¹⁶ The ALJ properly discredited Preisler's testimony that he told Vang "I just ask that you don't go out there and rock the boat, just let us do our job, let us investigate." (Tr. 480:19-20). This directive is not reflected in either version of Preisler's contemporaneous handwritten notes nor in the detailed transcription of his handwritten notes, which he prepared less than 12 hours later at Sipiorski's direction. (G.C. Exs. 43, 44) (Tr. 516-517). Respondent did not call Balakrishnan to corroborate this directive. Furthermore, as the ALJ found, even if Preisler said, "don't rock the boat" or "don't ruffle feathers," neither comment constituted a clear instruction to Vang to not discuss the meeting or any potential investigation with other employees. Additionally, this directive would be unlawfully overly broad as it would prohibit *any* protected concerted activity and would be proof of Respondent's hostility towards Section 7 activity.

¹⁷ For reasons discussed in Section III, B., the ALJ properly credited Vang's account of this conversation.

complaints about Tou and Sydney Vang dating back from February 21 and running through May 8. (R. Ex. 19) (Tr. 308-309). The May 8 entry states that the Vang brothers were still mad over the “Jack [Lee] situation” and “looking at us to see the 1st thing we do wrong to report us.” (R. Ex. 19). Sipiorski testified that she was “concerned” by this and interpreted that sentence to mean that both Vang and Sydney “weren’t happy with the outcome from the earlier investigation.” (Tr. 309: 15-18). On this same date, Sipiorski also reviewed a statement from team leader Anthony Burke, describing how, in Sipiorski’s own words, “Sydney and Tou [Vang] not being happy with the outcome of the original investigation and that they were going to be watching them like hawks.” (Tr. 317:1-21)(R. Ex. 20). Neither written statement makes any reference to Vang inventing or falsifying *any* claim against Lee. Rather, the statements support that Vang was not alone in his ongoing dissatisfaction over Human Resource’s response to employees’ complaints about Lee.

Finally, on that same date, Sipiorski reviewed an email from Lee reporting that Vang “confronted Masomo [Rugama]” in the cartoner room, apparently reporting what he had heard thirdhand from employee John Janke who had spoken to Rugama.¹⁸ (R. Ex. 30.)(Tr. 323-324). Lee describes a conversation between Vang and Rugama, matching that of Vang and Rugama’s first conversation about the matter in April, not the

¹⁸ Respondent cannot rely on the contents of this email or any other statement of employees or supervisors who were not called to testify for the truth of the assertions contained in these statements. (R. Exs. 11, 17, 19, 20, 25, 29, 30). These statements were objected to on the basis of hearsay and accepted only for the limited purpose of showing that the email or statement was provided and reviewed by Respondent. Please refer to the limitation discussion at Tr. 334-337. General Counsel’s hearsay objections to these documents are documented in the record and the ALJ admitted the documents subject to the limits discussed on the record.

conversation Vang had with Rugama on May 9. Sipiorski testified that she decided to suspend Vang based on this email.¹⁹ (Tr. 324-325).

Before meeting with *any* other witnesses, Preisler and Scullion met with Rugama based on reports that Vang had spoken with him. (Tr. 481-483). Initially, Rugama refused to provide a written statement and conditioned his responses on Respondent's representatives agreeing not to take notes. (G.C. Ex. 32). Scullion questioned him about whether Vang had spoken to him the night before. (Tr. 485:15-21). Preisler's notes state Rugama "acknowledged that Tou had confronted him the night of 5/9 about an employee investigation regarding Jack Lee." (G.C. Ex. 32). Preisler's notes reflect *no* further details about what Vang allegedly said to Rugama.²⁰ (G.C. Ex. 32).

Before any further investigation, Respondent suspended Vang based on his conversation with Rugama the night before. (Tr. 486:2-10). Scullion and Preisler met with Vang in the conference room. (Tr. 91-92). When Vang arrived, Preisler asked him if he had gone in to the cartoner's room to speak with employee Rugama after their meeting. Vang denied doing so, since his conversation with Rugama did not occur in the cartoner's room. (Tr. 92:3-11). Scullion replied that Vang was being suspended for talking to Rugama in the cartoner's room, which Vang again denied. (Tr. 92:3-11).

Scullion asked Vang to write a statement as to whether he went in the cartoner's room,

¹⁹ While Sipiorski was uncertain as to who was suspended first—Vang or Lee (Tr. 324:16-23), Preisler's contemporaneous notes reflect Vang was suspended before Lee. (G.C. Ex. 32). Preisler was present for both of the meetings held to inform each employee of their suspensions. Sipiorski was not.

²⁰ While Preisler used the word "confront" to describe the interaction, Rugama, in the statement he later provided to Respondent, did not. He simply states: "I met with Tou while he was driving and he told me that Justin [Preisler] might come to ask me about this issue tomorrow." (G.C. Ex. 13).

which Vang prepared. (Tr. 92:3-11)(G.C. Ex. 7). In that statement, Vang describes an earlier conversation with Rugama in production, but denies speaking with Rugama in the cartoner room the day before since he had not done so. (G.C. Ex. 7).

16. On May 10, Scullion directs Vang not to talk with anybody.

After Preisler escorted Vang out of the facility, while Vang was sitting in his car in the parking lot, Scullion called Vang on the phone and told him “we don’t want you to talk to anybody.” (Tr. 95:17-20). Vang’s testimony about this directive is uncontroverted as Scullion was not called to testify by Respondent.

17. Employee Chong Thao corroborates Vang’s claim about Lee’s racist use of the word “monkey.”

On May 10, following Vang’s suspension, Preisler and Scullion met with employee Chong Thao. Preisler testified that Scullion asked Chong Thao to provide a written statement about what he may have heard Lee say *about African employees*. (Tr: 512:4- 14)(G.C. Ex. 32, at page 3). Thao wrote: “I was break at that time Mr. Jack Lee he say the monkey people.” (G.C. Ex. 35).

18. Employee Xe Xiong corroborates Vang’s claim that Xiong told him team leader Donna Tarkowski was racist.

Immediately following their meeting with Chong Thao, Preisler and Schwartz (as Scullion recused himself from the meeting) met with Xe Xiong. Preisler asked Xiong if she stated that Donna Tarkowski was racist. According to Preisler’s testimony, Xiong did *not* deny she made this statement. Rather, she stated she “didn’t recall saying that,” but went on to say that she felt Tarkowski “treated Hmong employees differently than non-Hmong employees” and was harder on Hmong employees than non-Hmong

employees. (Tr. 497:8-13)(G.C. Ex. 32). Xiong declined to provide a written statement. (Tr. 498:1-2).

19. Lee denies making any racist comments “at work.”

Immediately following the meeting with Xiong, Scullion returned. (Tr. 498:17-24). Scullion and Preisler met with Lee. Preisler’s notes reflect that Scullion asked Lee whether he referred to any employees as “monkey people.” (G.C. Ex. 32). According to Preisler, Lee denied doing so, with the qualification that “...he wouldn’t do that at work. He went on to say he might say things like that outside of work, but he would never do it at work, he treats people professionally and respectfully.” (Tr. 499:13-17)(G.C. Ex. 32). Lee provided a written statement to a similar effect, in which he denies referring to anyone as monkeys “at work.” (G.C. Ex. 33).

20. On May 10, Rugama provides a written statement corroborating Vang’s account of their conversations.

Rugama ultimately decided to provide a written statement to Respondent later in the day on May 10. In it, he described how last year, while running Margarita square pizzas, he was working with two other black employees in the “blue bin” area. (G.C. Ex. 13)(Tr. 191-192). He described that they had a lot of jams that day and “somebody told me that Jack [Lee] said that I started become like others but before I was hard worker.” Rugama wrote he had been told by Vang that Lee had said in the break room that he had put three monkeys on bins and they could not make it. As to their May 9 conversation, Rugama wrote: “Last night, around 10pm from my break I met with Tou [Vang] while he was driving and he told me that Justin [Preisler] might come to ask me about this issue tomorrow.” (G.C. Ex. 13). Rugama ended the statement stating he “did

not care what they said that I am monkey, what I know is that I am human.” (G.C. Ex. 13).

21. On May 15, Respondent meets again with Chong Thao.

On May 15, Schwartz and production supervisor Walter Brzoska met with Chong Thao who provided a second statement. In that statement he wrote: “I was break at that Jack Lee on break too I hear he say monkey people. I don’t know who hear that too a lot people break in the breakroom. He say that but I don’t know who he say to.” (G.C. Ex. 41). In an email to Sipiorski on May 16, Brzoska wrote to Sipiorski a description of his conversation with Thao. (G.C. Ex. 38). He states that Thao reported that Lee had come up to them and began venting about “stupid” employees in a particular area that were causing problems with the line and that Thao believed that it was the pack-off area that had created a lot of the frustration that day. According to the email, Thao reported Lee used the words “monkey people” during his venting about the employees.²¹ (G.C. Ex. 38).

22. On May 16, Sipiorski interrogates Vang about his motive and his conversations with other employees.

On May 16, Sipiorski and Preisler met with Vang. (Tr. 97:16-20). As the ALJ found, Sipiorski, Preisler and Vang all testified about this meeting and their testimony was largely consistent with no material conflicts.²² Vang brought a prepared statement,

²¹ Brzoska placed the term “monkey people” in quotations in his email. (G.C. Ex. 38). The term “monkey people” in this email is consistent with Thao’s first written statement about the matter, where he uses this same term in response to Respondent’s question about how Lee had referred to African American employees. (G.C. Ex. 35).

²² Respondent appears to only except to the ALJ’s factual conclusion that Vang said he was not going to tell Sipiorski who all knew about the monkey comment because he did not know. This conclusion is specifically supported by Vang’s testimony. (Tr. 99:11-16).

which he provided to Sipiorski and Preisler. (G.C. Ex. 9)(Tr. 98:21-24). According to Preisler's notes, Vang told them that Human Resources had not investigated the issues when he submitted the original Lee petition. (G.C. Ex. 54). Both Sipiorski's and Preisler's notes reflect that Vang explained that he had spoken to Rugama following his May 9 meeting with Preisler and merely informed Rugama that Preisler may speak with him about the discrimination issue. (G.C. Ex. 54, 55). Vang also told them that Rugama had said that if he had known about the monkey comment, he would have signed the petition. (G.C. Ex. 54, 55)(Tr. 523:17-21). Sipiorski asked Vang multiple times during the meeting if he discussed the monkey comment with any other employees. (Tr. 407:3-25). This is also reflected in Sipiorski's notes of the conversation, portions of which are excerpted verbatim below:

Have you spoken w/ anyone else about Jack [Lee] making monkey comment?

T--Heard it from Chong Thao. After heard it thinking about appealing to corporate. Told it to Marcus when I met w/him.

Stacy—Have you discussed w/anyone other ees the monkey comment

Tou--A lot of people know. Told you about Xe. Thats the last name I am going to give you. One of the reasons he petition.

Stacy—last month did you talk to anyone else about Jack making the monkey comment?

Tou—Didn't have to everyone knows. When I talked to Masomo he said if had known he would have petitioned with me.

...

Stacy--Did you talk to Masomo on the 9th to let him know about Jack comment & Justin might be talking to him.

Tou—yes we had talked earlier

S—So I want to confirm you are stating you didn't talk to anyone else in the last month about the comment Jack made?

Tou—I am not going to talk anymore. Not going to tell you who I talked to.

S—Did you talk to Vic O on B456 about the comments made

T—Yes b/c HR didn't do anything its discrimination I have the right to talk anybody I want.

(G.C. Ex. 55, bold added).

23. On May 16, Respondent obtains a statement from Xe Xiong about her conversation with Vang about the petition.

On May 16, nearly three months after the February petition, Respondent obtained a statement from Xiong stating that she refused to sign the February petition because she did not know what it was about and that Vang told her he wanted a lot of people to sign, so he could get Lee fired and take Lee's position. (R. Ex. 39). This statement was prepared by a Hmong interpreter. (Tr. 437:19-22). The email from the interpreter to Sipiorski contains additional details about Xiong's statements during the meeting. (R. Ex. 38). The email states that Xiong stated that she was told by Vang that "the more signatures that he had, the better of a chance to get Jack Lee fired from his position and that Tou Yia Vang can sign for it." (R. Ex. 38).

24. On May 21, Respondent terminates Vang.

Sipiorski prepared a document summarizing Vang's allegations and the evidence she had reviewed. (Tr. 370-372)(G.C. Ex. 57). She testified she included the most important information related to Vang's termination on this document. (Tr. 421:22-25). The document contains a table with the following rows: date, situation, impact, evidence, next steps, findings, level, and disciplinable. (G.C. Ex. 57). Below the table are notes listing various purported acts of "dishonestly in investigation," with a starred conclusion: "Recommending termination based on unsubstantiated claims and lying during an investigation." (G.C. Ex. 57). Sipiorski reviewed the spreadsheet with Human Resource Manager Rajchel and concluded that Vang was dishonest during their investigation. (Tr. 373-374). Sipiorski testified she and Rajchel ultimately made the decision to terminate Vang. (Tr. 374:17-23).

On May 21, Sipiorski and Preisler met with Vang. Sipiorski told Vang that his claim was found to be false and he refused to cooperate with Respondent. (Tr. 103:5-7). Sipiorski told Vang he was terminated and gave him his termination notice which describes the reason for termination as:

Tou Yia Vang was found to be dishonest when he presented false information and refused to cooperate in the investigation to substantiate his claims. Tou's actions result in termination per the Nestle Employee Handbook.

(G.C. Ex. 10). During her testimony, Sipiorski identified four alleged "situations" warranting Vang's termination for dishonesty: (1) that Vang claimed Xe Xiong stated Donna Tarkowski is racist; (2) that Vang claimed Lee had called a group of three black people monkeys; (3) that Vang claimed Rugama would have signed the petition if he knew about the monkey comment; and (4) that Vang told Rugama and Onyango that Lee had called them monkeys. (G.C. Ex. 57)(Tr. 423-424).

III. THE ALJ'S CREDIBILITY RESOLUTIONS WERE PROPER

Several of Respondent's exceptions are based on the ALJ's credibility resolutions as it relates to Xe Xiong and Masomo Rugama. Under Board law, an administrative law judge can rely on many factors, including the context of the testimony, the demeanor of the witness, the weight of the evidence, established or admitted facts, and probabilities and inferences that can be drawn from the record. *Double D Construction*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Once the ALJ makes a credibility determination, the Board's established policy is not to overrule this determination unless the clear preponderance of *all* the relevant evidence establishes that they are incorrect. See *UPS Supply Chain Solutions, Inc.*,

357 NLRB 1295, 1295 at fn. 2 (2011), citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1950).

A. Xe Xiong

The ALJ properly credited Vang over Xe Xiong as it relates to Xiong having reported to Vang that she felt Donna Tarnowski was racist. Vang credibly testified in detail about his conversation with Xiong in which she declined to sign the petition. In contrast, Xiong flatly denied ever speaking to Vang about Tarkowski. Xiong also denied *ever* having a conversation with anyone at Respondent about whether Tarkowski was racist. (Tr. 438-441). This is contradicted by Respondent's own witness testimony *and* contemporaneous notes of conversations with Xiong about Tarkowski. Preisler testified, consistent with his notes, that Xiong stated she could not *recall* saying Tarkowski was racist, but claimed Tarkowski was harder on Hmong employees. (Tr. 440-441; 497:4-20) (G.C. Ex. 32, page 5; G.C. Ex. 45). Given the weight of the evidence to the contrary, the ALJ properly did not credit Xiong's denial of having spoken with Vang about Tarkowski.

B. Masomo Rugama

The ALJ also properly credited Vang's testimony over that of Rugama with regards to their conversation in April about Lee's racist monkey comment, during which Rugama shared that he believed Lee was referring to him and two other employees and stated he would have signed the petition had he known about the comment. The ALJ details the basis for his credibility finding in his decision, specifically noting that Rugama's written statement, which was provided to Respondent closer to the time of the relevant events, corroborated Vang's version of their conversations. (G.C. Ex. 13). As part of his credibility analysis, the ALJ noted that Rugama appeared more uncertain

about his conversations with Vang when testifying. Respondent's claim that the ALJ's conclusion was attributable to the fact that English is Rugama's second language is ridiculous. As reflected in the transcript, Rugama equivocated *multiple times* about his recollection of events, *repeatedly* referencing the amount of time that had passed and stating he could not remember *multiple times* in response to questions. (Tr. 200-212). Additionally, contrary to Respondent's contention in its brief, Rugama is not a "disinterested" witness. (R. Br. 32). Rather, Rugama is a current employee who was represented by Respondent's counsel both during his affidavit and during the hearing. (Tr 182:8-17; 195:20-25).

IV. ARGUMENT

The ALJ properly found that Vang engaged in protected concerted activity and that Respondent suspended and terminated Vang in retaliation for that activity. The ALJ also found that Respondent's May 10 directive that Vang not speak with anyone and its May 16 interrogation violated Section 8(a)(1). In reaching these conclusions, as evidenced by the decision, the ALJ carefully applied existing Board precedent to the facts, many of which are undisputed. In its exceptions, Respondent's legal arguments are premised on its assertions that Vang's otherwise clearly protected concerted activity was not protected because: (1) Vang was singularly motivated to obtain Lee's line coordinator position; and (2) Vang raised false claims during the course of his protected concerted activity. These arguments were properly rejected by the ALJ.

A. Vang *repeatedly* engaged in protected concerted activity.

The ALJ properly concluded that Vang engaged in protected concerted activity on multiple occasions from February 6 to May 9. (ALJD 16-20). The ALJ's decision

includes a careful and detailed analysis with supporting Board law about each of the occasions he found that Vang had engaged in protected concerted activity. This section will briefly describe why the complaints brought forward by Vang and other employees about Lee were protected by the Act. Next, it will briefly outline Vang's protected concerted activity with appropriate citation to Board precedent.

1. Employee complaints about Lee and Respondent's inept response to their concerns were protected.

By complaining to Respondent about Lee's conduct, employees, including Vang, were seeking to improve their working environment, where they would not be subject to Lee's disrespectful yelling and name-calling. Complaints about individuals creating a hostile work environment have long been considered protected concerted activity. *Ellison Media Co.*, 344 NLRB 1112, 1113 (2005).²³ Respondent maintains a policy against unlawful discrimination, harassment and retaliation which applies to all employees and prohibits "racial slurs." (G.C. Ex. 20). It also maintains what is referred to as the "compass" policy, by which employees must treat one another with respect. (R. Ex. 13, pg. 5). Respondent cannot claim that employee complaints about Lee have no basis in their working conditions, particularly when Lee's conduct violated its own workplace policies.

Vang's complaints about Respondent's belittling treatment of the petition-signers and failure to investigate claims made against Lee are likewise protected. Employee criticism of an employer's mishandling of investigations prompted by employees' protected concerted complaints is protected by the Act. See *Phoenix Transit System*,

²³ See also *Arrow Electric Company*, 323 NLRB 968, 970 (1997), *enfd.* 155 F.3d 762 (6th Cir. 1998); *Avalon-Carver Community Center*, 255 NLRB 1064, 1070 (1981).

337 NLRB 510, 510 (2002) (employee article in union newsletter about employer's failure to address sexual harassment claim constituted protected concerted activity). Furthermore, it is well-established that when employees express group concerns and one individual employee continues to express those concerns on his or her own, the Board will find that the employee was continuing a course of concerted activity. E.g., *JMC Transport*, 272 NLRB 545, 545 at fn. 2 (1984), enf. 776 F.2d 612 (6th Cir. 1985).

2. The ALJ properly found that Vang *repeatedly* engaged in protected concerted activity.

As the ALJ found, Vang *repeatedly* engaged in protected concerted activity in raising the concerns discussed in the section immediately above. Vang's most relevant protected concerted activity is briefly outlined below with applicable citation to Board precedent:²⁴

- **February 2018.** Vang circulates and submits petitions about Lee and Yang's abusive behavior towards employees at work. This conduct is clearly protected concerted activity as employees joined Vang in raising these work-related concerns. See, e.g., *Chipotle Mexican Grill*, 364 NLRB No. 72, slip op. at 1 fn. 3 (2016); *Avalon-Carver Community Center*, 255 NLRB 1064, 1064 fn. 2, 1070–1071 (1981).
- **February 12.** Vang meets with Scullion and Schwartz and raises issues as it relates to both Lee and Yang, including that he had heard from another employee that Lee had used the racist slur "monkey" to refer to black employees.

²⁴ For a more detailed analysis of Vang's protected concerted activity, please refer to the ALJ's lengthy discussion, which includes additional citations to Board precedent. His findings and conclusions should be adopted in their entirety. (ALJD:16-20).

While this was an individual meeting, the issues raised by Vang were obviously an outgrowth of the original protected concerted activity. See, e.g., *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 10 (2018) (individual employee's complaint that supervisor had verbally assaulted him was concerted, in part because it was a logical outgrowth of similar concerns expressed by multiple employees the prior day).

- **March 1.** Vang meets with Plant Manager Brenneman during which he raises the Lee petition and expresses employees' dissatisfaction with Human Resource's handling of the petition. As Vang was raising group complaints during the course of this meeting, he was clearly engaged in protected concerted activity. See, e.g., *Meyers II*, 281 NLRB 882, 887 (1986) (concerted activity includes where an individual employee brings "truly group complaints to management's attention.").
- **April and May.** Vang speaks with employees Onyango and Rugama about Lee's racist language and Respondent's inadequate response. These discussions were protected as employees have a right to discuss discrimination issues in the workplace and their employer's response to those issues. See, e.g., *Phoenix Transit System*, 337 NLRB 510, 510 (2002). Furthermore, in reaching out to Rugama and Onyango, Vang was seeking to obtain their support in seeking that Respondent properly address employees' complaints about Lee. See, e.g., *Meyers II*, 281 NLRB 882, 887 (1986) (protected concerted activity "...encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action.").

- **May 9.** Both Vang and employee Sydney Vang meet with Respondent's managers Balakrishnan and Preisler. Among various other issues raised during the course of this meeting, Vang again reports the racist "monkey" comment and Human Resource's failure to investigate. Vang also informs Respondent that Xiong had reported to him that she felt team leader Tarkowski was racist during the course of this meeting. This was clearly protected concerted activity. See, e.g., *Avery Leasing, Inc.*, 315 NLRB 576, 580 fn. 5 (1994). Following the meeting, Vang informed Rugama that Preisler may speak to him about the monkey comment. Clearly, this was a continuation of his earlier effort to get Rugama to join him in calling upon Respondent to properly investigate Lee. See *Meyers II*, supra.

3. Respondent's assertion that Vang lost the Act's protection because he was selfishly driven to engage in protected concerted activity is not supported by the evidence or Board law.

Throughout its exceptions, Respondent insists that Vang was driven solely to obtain Lee's line coordinator position and therefore his conduct was not for mutual aid or protection. As a preliminary matter, there is no evidence that establishes that Vang was solely driven to obtain Lee's line coordinator position. Rather, the weight of the evidence contradicts Respondent's theory. First, Respondent ignores that Vang circulated *two* petitions involving *two different* individuals, both of which had his coworkers' support. If Vang was merely feigning interest in the complaints of his coworkers to obtain Lee's post, he would have no reason to circulate a separate petition about Yang. Additionally, it is undisputed that there had been *many* postings for line coordinator positions prior to Vang's circulation of these petitions, none of which Vang

had ever applied for, even when he was encouraged to do so by a supervisor. (Tr. 47-48). Line coordinators are chosen by Respondent. (Tr. 49). There is no evidence that Vang had control over who would be selected even if Lee were to be terminated. If Vang was solely motivated to obtain Lee's post, it also does not explain why he shared with Respondent that employee Xiong had complained to him that Tarkowski was racist. Respondent's theory that Vang's sole motivation was to obtain Lee's job is both illogical and without any basis in the evidence.

Furthermore, Respondent's focus on Vang's motive for engaging in protected concerted activity is misplaced. Rather it is Vang's *actual* protected concerted activity, including his "seek[ing] to initiate, induce or prepare for group action," that is the relevant inquiry here, which Respondent does not seriously dispute. *Alstate Maint., LLC*, 367 NLRB No. 68, slip op. at 12 fn. 18 (2019). Even if Respondent could prove that Vang participated in what is obviously protected concerted activity solely because he wanted Lee's job, that would be irrelevant. As the Board recently affirmed, "the *reason why* an employee seeks to initiate, induce, or prepare for group action--whether altruistic or *selfish*--is irrelevant, and in that sense, the standard is objective." *Id.*

4. Vang's protected concerted activity was not "dishonest."

In its exceptions, Respondent repeatedly mischaracterizes Vang's protected concerted activity as: maliciously raising false allegations, dishonesty, fabrication and planting witnesses. (R. Br. 3, 12, 15, 16, 17, 21, 34, 41, 42, 46). The ALJ properly rejected Respondent's mischaracterization, finding there was no evidence that Vang engaged in dishonesty or misconduct. (ALD:26:6-10).

Respondent asserts that Vang invented the racist connotation to the word “monkey” only after Lee was not terminated following an investigation into the February petition. Its theory is based entirely on its own speculation. Respondent cites to *no* evidence that supports its absurd theory. Indeed, its theory is completely refuted by the evidence. Vang testified that he informed Scullion and Schwartz about this comment and its racist application on February 12, *before* Respondent made any decision about Lee in response to the petitions. Vang alone testified about that meeting. Furthermore, as laid out above, Respondent had clear evidence supporting that at the very least, Vang was not lying about having heard about Lee’s racist comment from Chong Thao. The *unrefuted* evidence, presented by *Respondent’s own* notes and witnesses, establishes that Chong Thao informed Respondent that he heard Lee use the words “monkey people” in response to its own open-ended question about what he heard Lee say about African American employees. (Refer to Section II, 17 above).

Likewise, the claim that Vang was dishonest about claiming that Xiong had reported to him that Tarkowski was racist is completely unfounded. As discussed above in the Summary of Facts, Xiong *never* denied having said so and explained to Respondent that she believed Tarkowski was harder on Hmong employees than non-Hmong employees. (Refer to Section II, 18 above).

Moreover, the protected concerted nature of an employee’s complaint to management is not dependent on the merit of such a complaint. *Spinoza, Inc.*, 199 NLRB 525, 525 (1972), *enfd.* 478 F.2d 1401 (5th Cir. 1973), citing *Mushroom Transportation*, 142 NLRB 1150 (1963), *rev’d on other grounds* 330 F.2d 683 (1964). (“Thus, the particular merits of the employees’ complaints are irrelevant to a finding that

the letter was protected.”). The right of an employee to raise complaints with their employer does not depend on either the employer’s or the Board’s judgment of the complaint. Even if *any* of Vang’s allegations were untrue, employee statements in the course of protected concerted activity are protected under the Act unless they are made with *actual* knowledge of their falsity or reckless disregard for the truth. See e.g., *Kvaerner Philadelphia Shipyard, Inc.*, 347 NLRB 390, 392 (2006), citing *Linn v. Plant Guard Workers*, 383 U.S. 53, 61 (1966). Respondent cannot cite to *any* evidence suggesting that Vang did not believe the allegations he was making.

B. The ALJ properly found that Respondent unlawfully terminated Vang under any applicable legal theory.

For reasons set forth in his decision, the ALJ used a hybrid analysis in considering Respondent’s stated reasons for Vang’s termination and properly determined that Respondent unlawfully terminated Vang. Based on the evidence and as described above, the ALJ correctly rejected Respondent’s arguments that Vang was dishonest and had lost the Act’s protection. No matter what framework is applied to the facts of this case, Respondent unlawfully terminated Vang in retaliation for his protected concerted activity. After briefly describing why Respondent cannot rely on Vang’s refusal to cooperate with its investigation as a basis for termination, this section of the brief will briefly address each of the three frameworks referenced by the ALJ and their applicability to this case. It will also address why in applying *any* of the frameworks, the ultimate conclusion would remain the same: Respondent unlawfully terminated Vang in retaliation for his protected concerted activity.

1. Vang’s refusal to cooperate with Respondent’s unlawful interrogation cannot serve as a lawful basis for termination.

Respondent cannot rely on Vang’s refusal to answer questions during its unlawful interrogation. During his meeting with Sipiorski and Preisler on May 16, Vang refused to answer questions about who he had spoken to about Lee’s racist remarks. Respondent seized upon this refusal in order to justify its termination of Vang. Board law is clear that lying, misleading, or remaining silent in response to questions about protected concerted activities is not a lawful basis for imposing disciplines. *Paragon Systems, Inc.*, 362 NLRB 1561, 1565 (2015) (internal citations omitted). Employees are “under no obligation to respond to questions seeking to uncover protected activities.” *Id.* at 1565.²⁵ Respondent cannot rely on Vang’s refusal to answer questions about his protected concerted activity to justify his termination.²⁶

2. Respondent’s termination of Vang is unlawful under the framework applied in *Santa Fe Tortilla*.

The facts of this case closely resemble those of *Santa Fe Tortilla Co.*, 360 NLRB 1139 (2014). In *Santa Fe Tortilla*, the employer terminated two employees who were involved in forming an employee committee, drafting letters to management about work-

²⁵ Also see, e.g., *United Services Automobile Assn.*, 340 NLRB 784, 786 (2003) (finding no obligation to respond truthfully to employer’s questioning that lacked a valid purpose), *enfd.* 387 F.3d 908 (D.C. Cir. 2004); *St. Louis Car Co.*, 108 NLRB 1523, 1525-1526 (1954).

²⁶ Additionally, none of the purported comparable terminations were for a failure to cooperate with an investigation. Rather, employees do not appear to be customarily disciplined in any fashion for refusing to cooperate with an investigation. For instance, Rugama, even after assurances that he was not in trouble, initially refused to provide a written statement and conditioned his responses to Respondent’s questions only if Respondent’s representatives agreed not to take notes. Employee Xiong likewise declined to provide a written statement to Respondent during its investigation on May 10. There is no evidence that either employee was disciplined for their refusals.

related complaints, soliciting signatures for those letters and requesting management meet with the employees. *Id.* at 1139-1140. As discussed above, Vang likewise engaged in a similar array of protected concerted activity including drafting letters to management, soliciting signatures and meeting with management to discuss employee concerns. The employer in *Santa Fe Tortilla* terminated the employees for what it referred to as forgery, intimidating of employees, lying to employees, harassing employees and misrepresenting documents the employees were asking other employees to sign. *Id.* at 1139. Here, Respondent similarly mischaracterizes Vang's protected concerted activity as "dishonesty."

The Board upheld the ALJ's decision that the discharges were unlawful because "[the employer's] asserted grounds [for termination] either referred to protected Section 7 activity—mischaracterized by [the employer] as misconduct—or were factually disproved by the credited record." *Id.* at 1141. The Board found that "the [employer] unlawfully discharged them in direct response to their Section 7 activity." *Id.* (internal citations omitted). The Board found a violation as "neither employee had engaged in any misconduct in the course of protected activity that deprived either employee of protection or would have given the [employer] a plausible reason to discharge [the employee] immediately." *Id.* The same analysis should apply to this case where Respondent's termination of Vang was a direct response to Vang's Section 7 activity.²⁷

²⁷ The Board's decision in *Santa Fe Tortilla*, is consistent with other Board cases which find that a *Wright Line* analysis is not necessary when the adverse action is taken in direct response to protected activity. E.g., *M&M Affordable Plumbing, Inc.*, 362 NLRB 1303 (2015) (Board adopts ALJ's finding of an unlawful discharge where ALJ found that in a "single-motive case, where there is no dispute as to the activity for which discipline was imposed, the dual-motive analysis set forth in *Wright Line* (citation omitted) is not applicable or appropriate."); *Shamrock Foods Co.*, 337 NLRB 915 (2002) (Board finds

The question in this case, as it was in *Santa Fe Tortilla* and similar cases, is solely whether Vang lost protection of the Act to the point that Respondent would have reason to discharge him. As already discussed, there is no evidence that Vang lost protection of the Act.

Respondent terminated Vang in direct response to his protected concerted activity in bringing group concerns forward to management and speaking with other employees about those complaints. Respondent cannot seriously dispute this given the evidence and its own testimony about the reasons for Vang's termination. Sipiorski's spreadsheet and her stated reasons for Vang's termination is riddled with references to Vang's protected concerted activity. (G.C. Ex. 57). Given these uncontested facts and no evidence that Vang ever lost the Act's protection, Respondent must be found to have unlawfully terminated Vang in direct response to his protected concerted activity.

3. Respondent's termination of Vang is unlawful under *Wright Line*.

Under the framework of *Wright Line*, Respondent must be found to have terminated Vang unlawfully. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel has the initial burden to show that the employee's protected

Wright Line analysis inappropriate in a case where employer terminated an employee for soliciting union cards, claiming that an employee "threatened and harassed" other employees when soliciting cards); *Phoenix Transit System*, 337 NLRB 510 (2002) (Board holds *Wright Line* analysis not appropriate in cases which do not turn on the employer's motive, and the only issue is "whether [the employee's] conduct lost the protection of the Act" in case where employee discharged for writing articles in union newsletter concerning employer's handling of sexual harassment complaints); and *Felix Industries, Inc.*, 331 NLRB 144, 146 (2000) (Board holds *Wright Line* is not applicable because "the conduct for which the Respondent discharged [the employee] was protected activity.")

activity was a motivating factor in the employer's action against the employee by showing: (1) the employee's protected activity; (2) respondent's knowledge of that activity; and (3) respondent's animus towards that activity. See, e.g., *Alternative Energy Applications Inc.*, 361 NLRB 1203, 1205 (2014). If the General Counsel meets that initial burden, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. *Wright Line*, supra. However, if the evidence establishes that the reasons given for the employer's actions are pretextual, the employer fails *by definition* to show that it would have taken the same action for those reasons absent the protected conduct. *Horseshoe Bossier City Hotel*, 369 NLRB No. 80, slip op. at 1 fn. 15 (2020) citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

As already discussed above, there is no question that Vang engaged in protected concerted activity and that Respondent had knowledge of that activity. Respondent clearly harbored animosity towards that activity as shown through its actions: accusing employees of not understanding what they were signing when petitioning against Lee; tricking employees that engaged in protected concerted activity into signing a sign-in sheet that demeaned that activity; referring to Vang as "(trying to be PC) complex" around the same time as his ongoing protected concerted activity; suspending Vang because he spoke with another employee about Lee's racist remark; repeatedly mischaracterizing Vang's protected concerted activity; interrogating Vang about his protected concerted activity; and failing to detail the conduct for which Vang was terminated in his termination notice, which is a deviation from its customary practice.

As in *Santa Fe Tortilla*, the Board held that even applying *Wright Line*, it would still find a violation, finding substantial evidence of pretext. 360 NLRB 1139, 1141 (2014). The same rationale should be applied in this case. Respondent's proffered reason—dishonesty—should be discredited as there is *no* evidence that Vang was dishonest, as already explained above. As detailed in the ALJ's decision, Respondent had no reasonable basis to conclude that Vang had engaged in dishonesty. Respondent's termination of Vang for "dishonesty" is clearly pretextual. Because Respondent's reasons for terminating Vang were pretextual, Respondent, *by definition*, cannot be found to have met its *Wright Line* defense. *Horseshoe Bossier City Hotel*, 369 NLRB No. 80, slip op. at 1 fn. 15 (2020).

Even so, Respondent's contention that it routinely terminates employees for dishonesty is not borne out by the facts of this very case. In February, numerous employees complained about Lee's name-calling and disrespect. During the investigation, Lee provided a written statement claiming he never did so. Respondent ultimately issued Lee a verbal warning for his conduct but took *no action* with respect to his dishonest denial of misconduct during its investigation.

4. Even if the *Burnip & Sims* framework applied, Respondent unlawfully terminated Vang.

The *Burnip & Sims* framework applies when an employer has a good-faith, but mistaken belief that the employee engaged in misconduct while engaged in protected activity. *Burnip & Sims*, 379 U.S. 21, 23 (1964). Under *Burnip & Sims*, a violation will still be found if it is shown that the employee was not in fact guilty of the misconduct. *Id.* The evidence in this case supports the ALJ's finding that Respondent did not have a good-faith belief that Vang had engaged in dishonesty. In its Brief, Respondent lists items

which it claims support that it held a good faith belief that Vang engaged in misconduct. (R. Br. 43-44). There are several problems with the items Respondent included in this list. First, it distorts record evidence.²⁸ Second, it specifically and separately lists Vang's unquestionably protected concerted conduct, insinuating that Vang's protected concerted activity gave it a reason to infer that he was engaged in misconduct.²⁹ Finally, none of the items listed by Respondent support that Vang engaged in *misconduct*. As already described above, the evidence that was reviewed by Respondent at the time of its investigation *corroborated* Vang's claims. Since Respondent cannot be found to have had a good faith belief that Vang engaged in misconduct, the *Burnip & Sims* framework should not apply. However, even if the framework in *Burnip & Sims* applied, a violation must still be found since Respondent has failed to prove that Vang was actually guilty of any misconduct.

C. The ALJ properly found that Respondent unlawfully suspended Vang in direct response to his protected concerted activity.

Respondent suspended Vang on May 10 in direct response to his protected concerted activity. Immediately after having confirmed that Vang spoke with Rugama about Lee's racist remark, Respondent suspended Vang. As already discussed above, Vang's discussions with Rugama both about Lee's comment and about having raised the issue with Respondent again was protected activity. The question in this case, as it was in *Santa Fe Tortilla* and other similar cases discussed above, is solely whether

²⁸ For example, Respondent claims that it received a statement that Vang was "looking for any reason" to report Lee to Respondent. The document cited by Respondent contains no such statement. (R. Ex. 19). Many of the other factors listed by Respondent are likewise without factual support or were properly discredited by the ALJ. Please refer to the Summary of Facts section.

²⁹ Such an argument is just further evidence of Respondent's animus towards Vang for his protected concerted activity.

Vang lost protection of the Act to the point that Respondent would have reason to suspend him. 360 NLRB 1139, 1141 (2014). There is no evidence that Vang engaged in misconduct when speaking to Rugama. As such, Respondent's suspension of Vang violates Section 8(a)(1).

D. The ALJ properly concluded Respondent unlawfully interrogated Vang on May 16.

On May 16, Respondent unlawfully interrogated Vang about his protected concerted activity. Respondent's own notes of this conversation reflect that Sipiorski *repeatedly* questioned Vang about his conversations with other employees concerning Lee's racist remarks and his motive for doing so.³⁰ The standard for finding an interrogation unlawful is whether, under all circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985). Under this test, the Board considers various factors to determine the lawfulness of an interrogation, including: (1) any history of employer hostility or discrimination toward Section 7 activity; (2) the nature of the information sought, such as whether the interrogator sought information on which to base taking action against the employee; (3) the identity of the questioner, i.e., status in the managerial hierarchy; (4) the place and method of interrogation, e.g., whether there was an atmosphere of unnatural formality; and (5) the truthfulness of the employee's reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000).³¹ However, these factors are only a guide and should not be formalistically

³⁰ Please refer to the excerpt from Sipiorski's notes above in Section II, 22.

³¹ While it is traditionally applied to union activity, the Board applies the same analysis to interrogations regarding protected concerted activities. See *Samsung Electronics America, Inc.*, 363 NLRB No. 105, slip op. at 3 (2016).

applied to the exclusion of other factors that may be relevant in a given situation. *Id.* at 939.

In this case, as the ALJ found, there is a history of hostility towards employee protected concerted activity. The interrogation took place while Vang was suspended for protected concerted activity. The repeated questions were clearly meant to gather information upon which to base disciplinary action against Vang for his protected concerted activity, namely his speaking with other employees about Lee's racist remarks. Respondent knew Vang had not heard the racist comments directly and Vang had already provided Respondent with the name of the employee that did, who at the time of this questioning had already corroborated the racist remark. Furthermore, the questioning took place in a conference room with upper management. Vang refused to respond to questions since he correctly believed the questioning was not for any legitimate purpose and was instead intended to build a case for his termination. The questioning was not limited or "reasonably tailored." There was no explanation as to why Respondent needed to know who he had spoken to about the racist remarks. Respondent did not provide any assurances that his responses would not result in reprisal against him.

Respondent's justification for this interrogation was that Sipiorski was asking these questions to determine whether Vang had fabricated the racist remark.³² By the time of the interrogation, Respondent already had obtained Chong Thao's statement

³² While the Board recognizes that an employer may question employees about facially valid claims of harassment and threats in the course of protected concerted activity, that line of cases is inapplicable here. There is no evidence of harassment or threats by Vang nor has Respondent *ever* asserted this was the purpose of the questioning.

which corroborated Vang's claim, rendering Respondent's defense nonsensical. The weight of the evidence supports the ALJ's finding that Respondent unlawfully interrogated Vang about his protected concerted activity in violation of Section 8(a)(1).

E. The ALJ properly concluded Respondent's instruction to Vang violated Section 8(a)(1).

On May 10, Human Resources Representative Neil Scullion told Vang immediately following his suspension: "we don't want you to talk to anybody." The evidence supporting this allegation is not in dispute, as Scullion was not called to testify to deny or provide any justification for this directive. The ALJ properly applied *Unique Thrift Store*, 368 NLRB No. 144 (2019), to this directive. The directive had no temporal limit. Nor is the admonition limited to a specific subject matter. There is no evidence establishing whether the directive not to talk to anyone pertained Lee's racist comment, Respondent's investigation into the racist comment, Vang's own suspension, or other work-related complaints which Vang and his brother had raised with management the day before. Because the directive had no temporal or subject matter limitations, the ALJ properly found that the impact on Section 7 rights outweighed any purported business justification.

V. CONCLUSION

Respondent's repeated mischaracterization of Vang's protected concerted activity as "misconduct" simply does not make it so. Respondent's termination of an employee for his persistence in raising protected concerted complaints is unlawful under any theory of this case. For the reasons described above, there is no merit to any of Respondent's exceptions and the Board should adopt the ALJ's recommended findings, conclusions and proposed remedial order in full.

Respectfully submitted this 26th day of May, 2020.

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AFFIDAVIT OF SERVICE

<p>NESTLÉ USA, INC.</p> <p style="text-align: center;">and</p> <p>TOU VANG, an Individual</p>	<p>Case 18-CA-231008</p>
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I hereby certify that copies of **ANSWERING BRIEF TO THE NATIONAL LABOR RELATIONS BOARD ON BEHALF OF THE GENERAL COUNSEL** has been filed electronically with the National Labor Relations Board and sent via email on May 26, 2020, to the following parties on record:

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