

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of:

**UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL UNION**

Charging Party,

v.

BOAR'S HEAD PROVISIONS CO., INC.,

Respondent.

Consolidated Case Numbers:
07-CA-209874; 07-CA-212031

**RESPONDENT BOAR'S HEAD PROVISIONS CO. INC.'S BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE 5

II. PROCEDURAL HISTORY 6

III. PRELIMINARy Statement 7

IV. BRIEF IN SUPPORT OF EXCEPTIONS 7

a. The ALJ Violated Respondent’s Due Process Rights by Permitting the General Counsel to Amend the Complaint After the Close of Testimony and Nearly Five Months After the General Counsel Presented Its Last Witness 7

b. The ALJ Erred in His Finding that the Dress Code Rule Found Unlawful Does Not Apply in Non-Production Areas..... 12

c. The ALJ Erred by Failing to Recognize the Dress Code Rule is Required by Good Manufacturing Practices and Federal Regulations on Food Safety 13

d. The ALJ Erred by Failing to Recognize the “Exterior Garments” Referenced in Rule 2.9 Refers to The Sanitary Frocks Worn Only in Production Areas and Is Clearly Understood by All Boar’s Head Employees..... 14

e. The ALJ Erred by Failing to Acknowledge that No Evidence Was Presented That Employees Have Ever Misunderstood That the Rule Only Applies in Production Areas 15

f. The ALJ Erred by Ignoring Relevant Board Precedent and Refusing to Admit Relevant Evidence and Improperly Credited Valenzuela’s Testimony 16

g. The ALJ Erred by Basing His Conclusion That Apolonia Rios’s Pay Adjustment Was Unlawful on a Fundamental Misunderstanding of the Facts..... 17

h. The ALJ Erred by Ignoring Record Evidence, Incorrectly Concluding Record Evidence Does Not Establish that Maria Mendoza and Guadalupe Rodriguez Have Offices, and Premising Findings on the Mistaken Assumption Mendoza and Rodriguez do Not Have Offices..... 23

i. The ALJ Erred by Improperly Concluding that Maria Mendoza’s Alleged Conversation with Elba Rivas and Other Employees Occurred in a Small Group when Rivas’s Own Testimony Contradicts this Conclusion and Confirms that It Was a Group Meeting 24

j. The ALJ Erred by Ignoring the Contrary Testimony of Rivas to Avoid the Conclusion that Group Meetings are Not Possible on the Line While Production is Running 25

k. The ALJ Erred in Failing to Appropriately Assess the Credibility of Ascension Rios in Finding Him to be a Credible Witness..... 29

i. The ALJ Erred by Not Considering Rios’s Testimony About Alleged Interrogation and Solicitation of Grievances in Finding Him Credible..... 29

ii. The ALJ Erred By Not Considering Rios’s Testimony About Alleged Threats of More Strict Enforcement of Work Rules in Finding Him Credible 30

iii. The Judge Erred by Ignoring Rios’s Admission about His Inability to Recall Information.....	30
l. The ALJ’s Erred by Concluding that Four Security Guards were in the Parking Lot at One Time is Not Supported by Record Evidence.....	31
m. The ALJ Erred by Ignoring Evidence Regarding the Safety Concerns of the Employees Exiting the Parking lot.....	31
n. The ALJ Erred by Ignoring Evidence that Larry Helfant and Other Senior Executives Had an Established Practice of Soliciting Grievances Prior to the Union Campaign	32
o. The ALJ Erred by Concluding that Helfant’s Meetings Were Mandatory.....	35
p. The ALJ Erred by Misapplying the Law Regarding the Use of Suggestion Boxes and that Boar’s Head Lawfully Reminded Employees About the Suggestion Boxes in Use Prior to the Beginning of the 2017 Union Campaign	35
q. The ALJ Erred by Ignoring Substantial Facts Regarding the Development of Respondent’s Vacation and Attendance Policy Leading Him to Improperly Apply the Law to His Misinterpreted Facts.....	37
r. The ALJ Ignored Emails Demonstrating that the Vacation and Attendance Changes Had Been Under Serious Discussion and Were Approved Prior to Boar’s Head Knowledge of the Union Campaign	38
s. The ALJ Ignored Case Law Regarding Improvements that Were Implemented Company-wide Basis and Case Law Providing for Legitimate Reasons for Improvements.	40
t. The ALJ Refused to Allow Relevant Testimony and Misapplied the Law Regarding Alleged Interrogation and Threatening Statements by Guadalupe Rodriguez to Walter Aguilar	46
u. The ALJ Errored in Failing to Conclude that Tools Were Lawfully Provided to Maintenance Employees at The Holland Plant to Correct an Unfair Inconsistency with All Other Boar’s Head Plants.....	51
v. The ALJ Erred by Mistakenly Concluding the Document Entitled “Boar’s Head Brand” Contained an Unlawful Threat of Loss of Benefits.....	53
w. The ALJ Erred by Concluding that the Term “Negotiate Zero to Minimum” or Similar Words Were Ever Spoken in Employee Meetings	56
x. The ALJ Erroneously Credited Witness Walter Aguilar’s Testimony Without Addressing Substantial Internal and Factual Inconsistencies and Inherent Probabilities Factoring Against the Accuracy of His Testimony.....	66
y. The ALJ Erroneously Concluded That Employees Gabriela Esquivel and Abigail Forsten Were Not Present at The Employee Meeting Attended by Walter Aguilar	69
V. CONCLUSION	73

Table of Authorities

Cases

Boar’s Head, 07-CA-209874, 29 (2020).....	24
<i>Bruce Packing Co. v. NLRB</i> , 795 F.3d 18, 23, 24 (D.C. Cir. 2015)	9, 12
<i>Cab Associates</i> , 340 NLRB 1391, 1397 (2003).....	9
<i>Centralia Fireside Health</i> , 233 NLRB 139 (1977).....	41
<i>Conair Corp. v. NLRB</i> , 721 F.2d 1355, 1371 (D.C. Cir. 1983)	9
<i>Consolidated Printers</i> , 305 NLRB 1061, 1064 (1992)	9, 11
<i>Delchamps, Inc.</i> , 588 F. 2d 476; <i>NLRB v. Gotham Indus.</i> , 406 F. 2d 1306 (1st Cir. 1969)	41
<i>Dynacor Plastics and Textiles</i> , 218 NLRB 1404 (1975)	41
<i>Essex Int’l, Inc.</i> , 216 NLRB 575 (1975)	41
<i>Evergreen America Corp.</i> , 348 NLRB 178, 208 (2006)	50
<i>Hayes-Albion Corp., Tiffin Div.</i> , 237 NLRB 20 (1978).....	41
<i>In re Willow Corp.</i> , 244 NLRB 303 (1979)	41
<i>Johnson Technology, Inc.</i> , 345 NLRB 762 (2005)	34
<i>Laborers Local 190 (VP Builders, Inc.)</i> , 355 N.L.R.B. 532, fn.1 (2010)	9
<i>Longview Fibre Paper & Packaging, Inc.</i> , 356 NLRB No. 108 (2011)	34
<i>Mandalay Bay Resort & Casino</i> , 355 NLRB 529, 529 (2010)	34
<i>Medline Industries, Inc.</i> , 218 NLRB 1404 (1975)	41
<i>Nalco Chemical Co.</i> , 163 NLRB 68 (1967).....	41
<i>New York Post Corp.</i> , 283 NLRB 430 (1987)	9
<i>NLRB v. Circo Resorts</i> , 646 F. 2d 403, (9th Cir. 1981), <i>enforcing as modified</i> 244 NLRB 880 (1979)	41
<i>Poultry Packers, Inc.</i> , 237 NLRB 250 (1978)	42
<i>Schulte’s IGA Foodliner</i> , 241 NLRB 855 (1979).....	42
<i>Springfield Jewish Nursing Home for the Aged</i> , 292 NLRB 1266 (1989).....	41
<i>Stagehands Referral Service, LLC</i> , 347 NLRB 1167, 1171	9
<i>TNT Logistics N. Am., Inc.</i> , 345 NLRB 290 (2005).....	34
<i>Town & Country Supermarkets</i> , 244 NLRB 303 (1979)	41
<i>Trinity Services Group, Inc.</i> , 368 NLRB 115, 3 (2019).....	51
<i>Villa Sancta Anna Home for the Aged</i> , 228 NLRB 571 (1977)	41
<i>VT Hackney, Inc.</i> , 367 NLRB No. 15 (2018).....	34
<i>Wal-Mart Stores</i> , 340 NLRB 637, 640 (2003).....	34
<i>Wal-Mart Stores</i> , 348 NLRB 274 (2006).....	41

I. STATEMENT OF THE CASE

Respondent Boar's Head Provisions Co. ("Boar's Head" or the "Company") is the premier provider of delicatessen meats and cheeses in the United States. It has been in business since 1905 and adheres to time honored recipes that call for hand-trimmed meats and the use of spices from all parts of the world. Its products are distributed throughout the United States and are recognized as the very best available to the public.

Boar's Head operates seven facilities in addition to the Holland, Michigan manufacturing plant at issue in this case. The Company has had a long and productive relationship with the United Food and Commercial Workers (UFCW). The Company's facilities in New York, New Jersey, and Virginia have operated for decades with the UFCW as the exclusive representative of their employees. The relationship has always been amicable, with no strikes or labor stoppages, and with the Company's Director of Human Resources, Scott Habermehl, serving for years as an employer trustee on a joint employer-UFCW trust fund.

In addition to its long-standing bargaining relationship at four of its facilities, Boar's Head's non-union facilities have also been confronted with periodic UFCW organizing efforts for many years. The Holland plant specifically has seen organizing efforts since at least 2013. In both 2016 and 2017, Boar's Head responded to the UFCW organizing with a series of employee meetings regarding unions presented by Scott Habermehl. Over the fifteen years or so that Habermehl has been at Boar's Head, he has routinely conducted similar meetings at all of Boar's Head non-union facilities, including the Holland plant, on at least an annual basis. Thus, union organizing was not an unprecedented event for Boar's Head when the UFCW began its annual organizing effort in early August 2017.

The allegations in this matter unfairly and erroneously portray Boar's Head as somehow

inexperienced in labor matters and reactionary by engaging in allegedly unlawful conduct to quell union organizing, which, in reality, had occurred at the Holland plant in each of the prior three years without incident or charge. The evidence demonstrates that Boar's Head acted lawfully throughout, taking routine and permissible actions, and in some cases required actions, under the Act. It did nothing more than continue to address legitimate business concerns, provide its employees with relevant, truthful information, while at the same time acknowledging employees' right to choose or reject union representation.

The preponderance of the evidence discussed herein will demonstrate that Boar's Head acted lawfully.

II. PROCEDURAL HISTORY

This case began with 38 unfair labor practice ("ULP") charges and subparts alleging that Boar's Head violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA" or "Act") by surveilling and creating the impression of surveillance of protected activity, unlawfully soliciting employee grievances, threatening employees, interrogating employees, making unlawful promises, and providing unlawful benefits. Over two full weeks of trial in December 2018 and May 2019, 24 witnesses testified and provided nearly 1,700 pages of testimony. The General Counsel ("GC") withdrew four charges during trial and withdrew an additional seven charges simultaneously with the filing of its brief. The ALJ found in Respondent's favor on a further four charges. Respondent files its exceptions to the ALJ's conclusions on the remaining 23 charges and subparts. *See RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE.*

III. PRELIMINARY STATEMENT

The record in this case reflects a series of failures by the ALJ to acknowledge undeniable record testimony, repeated and critical mischaracterization of testimony, and the erroneous affirmation and reliance upon claimed testimony that appears nowhere in the record. Together they lead to unsupported conclusions of both fact and law that call for the reversal and/or modification of the ALJ's Decision.

The Act states in relevant part, “[i]f upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact” and order appropriate remedial action. 29 U.S.C. 7 § 160(c) (2020). The Administrative Law Judge (“ALJ”) in this case misapplied this standard. As will be demonstrated in detail below, the ALJ improperly applied National Labor Relations Board (“NLRB” or “Board”) precedent, ignored substantial, uncontradicted record evidence, made factual findings unsupported by the record, inconsistently made credibility findings unsupported by the record, deprived Respondent of due process, and repeatedly miscited record testimony leading to erroneous factual and legal conclusions. The ALJ's Decision (“ALJ D.”) made numerous citations to record testimony, in which the cited material simply did not correspond with or support the proposition for which it was cited in the Decision. The ALJ here disregarded the preponderance of the record evidence.

IV. BRIEF IN SUPPORT OF EXCEPTIONS

- a. The ALJ Violated Respondent's Due Process Rights by Permitting the General Counsel to Amend the Complaint After the Close of Testimony and Nearly Five Months After the General Counsel Presented Its Last Witness**

The ALJ found that on four occasions, October 11, 18, 25, and November 16, 2017, Human Resources Business Partner Shannon VanNoy and security personnel surveilled and created the impression of surveillance of employees distributing union materials. (ALJD p. 33 at 30-35). The GC, over Respondent's objection, was permitted to amend its Complaint to allege that Respondent unlawfully surveilled and created the impression of surveillance while employees distributed union materials, in place of the Complaint allegation that Respondent denied employees access to the parking lot to distribute union literature. (Tr. 1660: 13 - 1662: 22). This amendment was improper and violated Respondent's Constitutionally guaranteed right to due process by amending the Complaint after the close of testimony and nearly five months after the GC presented its last witness. (*Id.*; Tr. 742).

Following the close of testimony, the GC's final act on the record was to amend the Complaint from alleging that Respondent "denied its off-duty employees access to parking lots, gates, and other outside non-working areas" to allege Respondent "engage[d] in surveillance and created the impression of surveillance." (Tr. 1659: 24 - 1660: 20). Respondent objected to what amounted to an addition of charges by the GC. (Tr. 1660: 13 - 1662: 22). The ALJ overruled Respondent's objection, reasoning "I think that, first off, it's closely related to other allegations in the case with regard to -- I think there was the one about creating the impression of surveillance in paragraph 17.¹ And also I think we've pretty much heard all the evidence." (Tr. 1661: 14-18). The ALJ's stated theory for allowing the GC's eleventh-hour addition of charges, over Respondent's objection, flies in the face of well-established Board and Circuit Court precedent.

¹ The "paragraph 17" referred to by the ALJ involved a totally disparate set of facts and different individuals from those involved in the amended, parking lot charge. The ALJ found no merit to the separate "paragraph 17" charge.

The “‘critical issue’ with a late amendment to a complaint is not whether there is substantial evidence in the record,” but rather, “whether the company was ‘told before the hearing record closed that the stakes included liability for’ the proposed new charge” and had an “opportunity to fully challenge the charge.” *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 23, 24 (D.C. Cir. 2015) (citing *Conair Corp. v. NLRB*, 721 F.2d 1355, 1371 (D.C. Cir. 1983)). In considering the issue, the Board weighs three factors: “(1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated.” *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1171 (2006) (citing *Cab Associates*, 340 NLRB 1391, 1397 (2003)); see also *Consolidated Printers*, 305 NLRB 1061, 1064 (1992); *New York Post Corp.*, 283 NLRB 430 (1987).

Respondent could not have known that the “stakes” of the case included the surveillance or impression of surveillance charges based on the allegations relating to the distribution of union materials in the parking lot until after testimony closed. (Tr. 1658: 24 - 1660: 20). Immediately after learning the GC changed the stakes, the ALJ denied Respondent the opportunity to respond to the charge. (Tr. 1661: 14-24). This complete lack of notice of the GC’s amendment amounted to trial by ambush. The GC offered no excuse for its late amendment, stating only it “conform[ed] the pleadings to the proof.” (Tr. 1661: 8-13). The surveillance matter has not been fully litigated by any standard.

The GC’s original charge of denial of employee access to the parking lot to distribute union literature, “pursued a theory of violation that required the Respondent only to prove a particular defense,” which is why Respondent only put on a defense against the allegation of denial of access. *Laborers Local 190 (VP Builders, Inc.)*, 355 NLRB 532, fn.1 (2010). The unamended

charge only required Respondent to prove it did not deny or attempt to deny employees access to the parking lot to distribute union literature.

If the GC had provided Respondent notice of the amended charge in time to respond during trial, Respondent would have elicited different and additional testimony from different and additional witnesses. For example, there is testimony that employees sold produce out of their cars in the parking lot and Respondent did not deter or prohibit such activity. (Tr. 1447: 12 - 1448: 5). After establishing through witness testimony that Respondent does not prohibit solicitation and sale of produce in the parking lot to prove that access is not denied to off duty employees, counsel for Respondent did not pursue the matter any further. *Id.* The ALJ, in his decision, seized upon this for the proposition that Respondent monitored the distribution of union literature more closely than Respondent monitored employees selling produce. (ALJD p. 24 at 9-14). If Respondent had known it was defending against a surveillance charge, it would have questioned its witnesses and cross examined the GC's witnesses about the dissimilarity between the manner in which employees distributed union literature, which caused unsafe traffic conditions endangering employees, and employees selling produce, which did not. Respondent would have also established what was and was not "out of the ordinary" sufficient to require guard presence in the parking lot. Respondent would have been able to elicit testimony that there had never previously been any parking lot traffic problem requiring action by security personnel. Respondent would also have provided detailed testimony to demonstrate that management was not "taking note of who is involved in union activities." (ALJD p. 36 at 17-20). Respondent would also have developed testimony that no lists were prepared of who did or did not take flyers, there was no instruction were issued by management to do so, no photographs or videos were retained or used to identify employees, and no incident reports identifying individuals were

made. *Id.* Respondent was improperly denied the knowledge this testimony would be critically relevant as well as the opportunity to fully develop the facts.

Additionally, the GC's witnesses who testified in support of the charge did so in December 2018. (Tr. 128-129, 217-218, 301-302, 408, 456-459, 487, 495-496). Respondent did not begin presenting its case until April 29, 2019. (Tr. 758). This means the GC either deemed Respondent's witnesses more credible than its own witnesses – which raises serious questions about the credibility of the GC's witnesses' testimony regarding alleged surveillance – or the GC knew as of December 2018 that its charge alleging denial of access to the parking lot required amendment, but chose not to do so until May 2019, after testimony had closed, apparently as a litigation tactic designed to gain a strategic advantage. It is significant that the GC did not withdraw seven allegations until after briefs were submitted, which caused Respondent to unnecessarily devote substantial time and energy responding to these allegations. General Counsel Post Hearing Brief, p. 2 fn. 2. Regardless of the GC's motive, the late amendment prejudiced Respondent's ability to pursue relevant testimony to the degree necessary to mount a complete defense, resulting in a denial of due process.

While the GC has wide discretion to amend a complaint, this discretion is nonetheless limited by what is “just.” 29 C.F.R. § 102.17 (2020). The facts surrounding the GC's amendment mirror the facts in *Consolidated Printers, Inc.*, where the Board denied an attempted amendment by the GC after the close of testimony, which the GC described as “an attempt to conform the pleadings to the evidence” on a “matter [that] was fully litigated” that the General Counsel first learned about during trial. *Consolidated Printers*, 305 NLRB 1061 at 1063-64. The Board found, in rejecting the late amendment, “[i]t may not be glibly assumed that Respondent counsel's handling of Respondent's case would have been unchanged had he been aware of the potential

new allegations.” *Id.* at 1064. The Board’s finding dovetails with the D.C. Circuit’s holding that “[w]hen a late amendment deprives an employer of notice and the opportunity to fairly litigate its liability, we will find prejudice warranting reversal **so long as there is even a chance that the company could have successfully defended against the charge.**” *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 24 (D.C. Cir. 2015) (emphasis added). The ALJ’s decision to allow the GC’s late amendment denied Respondent its Constitutionally guaranteed right to due process and the amendment must be rejected as improper.

b. The ALJ Erred in His Finding that the Dress Code Rule Found Unlawful Does Not Apply in Non-Production Areas

The underlying premise for the ALJ’s conclusion that Respondent “failed to demonstrate special circumstances justifying its absolute prohibition on badges and pins in non-production areas” is predicated upon exactly the *opposite* of what the rule provides, and the record confirms, which is that employees are only prohibited from wearing badges and pins in production area. Uncontradicted testimony and documentary evidence clearly established that the dress code rule at issue does *not* apply in non-production areas of the plant. (G.C. Exh. 2, p. 33). Human Resources Business Partner Shannon VanNoy testified without contradiction that the rule prohibiting jewelry, pins and badges does not apply in non-production areas (Tr. 821: 24-25; 826: 16-25). In fact, she specifically testified that it applies only in “food manufacturing, production and food storage areas.” (Tr. 821: 19-20). She further testified that jewelry and similar items are regularly worn by employees on their street clothes in non-production areas such as the lunchroom, locker rooms, common areas and the parking lot. (Tr. 826: 16-25).

Like VanNoy, Scott Habermehl testified, again without contradiction, that Boar’s Head’s Good Manufacturing Practices (GMPs) provide the food safety basis for the rule and states that it is restricted to production areas. (Tr. 81: 5-25); (Resp. Exh. 7, Good Manufacturing Practices at

Section II). Further, he echoed VanNoy's testimony that employees can wear jewelry and similar items in non-production areas. (Tr. 1572: 4-6). The ALJ was incorrect in finding that the rule applies in non-production areas.

c. The ALJ Erred by Failing to Recognize the Dress Code Rule is Required by Good Manufacturing Practices and Federal Regulations on Food Safety

The Boar's Head rule prohibiting jewelry, pins, badges, and similar items on the "exterior garments" worn in production areas is an integral part of the Company's GMPs, in place to ensure food safety. As a manufacturer of meat products for human consumption, Boar's Head must comply with the provisions of 9 CFR Subsection E – Regulatory Requirements Under the Federal Meat Inspection Act and The Poultry Inspection Act. 9 CFR § 416.4(d) and 416.14 (2020). Those regulatory provisions require that food manufacturers implement steps to prevent the adulteration and contamination of products. The GMP policy is designed to comply with those critical food safety requirements. (*See* Resp. Exh. 7 Section I). Respondent's Exhibit 7 Section I "Purpose" section of that policy provides that the purpose is to ensure the food safety of products produced by Boar's Head and to comply with federal, and/or state regulations. *Id.* Section II. "Scope," clearly states that the policy applies to employees and others "in the Michigan Boar's Head production areas and product storage areas." *Id.* at Section II. There is no reference whatsoever to employees in non-production areas anywhere in that policy. Section III. "Definitions," Subsection D, generally lists the jewelry and similar items that are prohibited to be worn in production areas to prevent them from possibly falling into products during processing. *Id.* at Section III. That prohibition is repeated and enforced through the rule at issue here, Section 2.9 in the Class II Offenses listed in the Company employee handbook. (G.C. Exh. 2, p. 33)

d. The ALJ Erred by Failing to Recognize the “Exterior Garments” Referenced in Rule 2.9 Refers to The Sanitary Frocks Worn Only in Production Areas and Is Clearly Understood by All Boar’s Head Employees

In addressing the allegedly unlawful rule regarding the wearing of badges or pins on “exterior garments,” the ALJ properly acknowledged that the prohibition of wearing “unauthorized badges, pins or other items on helmets or exterior garments” **requires special circumstances** related to food safety and to avoid product contamination and “is certainly reasonable and justified.” (ALJD p. 38 at 12-15). Then, contrary to substantial and uncontradicted record evidence, inexplicably and erroneously concluded that Respondent has an “absolute prohibition on badges and pins in non-production areas.” (ALJD p. 38 at 26-27). This is absolutely incorrect. The ALJ failed to consider the documentary evidence and substantial uncontradicted testimony that “exterior garments” in the rule refers only to the white and blue sanitary frocks worn by employees in the production areas. (Res. Exh. 7, Section V, Subsection B.2 and C.2; Res. Exh. 8(a) & (b)). Respondent’s Exhibits 8(a) and (b) are color photographs of the white and blue sanitary frocks depicted in the GMP materials. For food safety reasons, they are worn only while in production areas.

The fact that “exterior garments” referenced in Rule 2.9 only applies to the white and blue frocks worn in production areas was confirmed by VanNoy. (Tr. 822: 16-25; 823: 1-10). Habermehl likewise testified that the dress code rule listed in Class II Offense in 2.9 that refers to “exterior garments” was derived from the “good manufacturing policy and it only applies to production and exposed product storage areas.” (Tr. 80: 20-25; 181: 1-14). Not a single witness contradicted this testimony and did the GC did not offer any testimony or documentary evidence that in any manner controverted the record evidence.

e. The ALJ Erred by Failing to Acknowledge that No Evidence Was Presented That Employees Have Ever Misunderstood That the Rule Only Applies in Production Areas

Shannon VanNoy testified during Voir Dire by the GC that the GMP is provided to employees upon being hired and is reviewed with them each year. (Res. Exh. 7); (Tr. 825: 4-14). That policy, which bans jewelry and similar items, clearly states that it applies “in the Michigan Boar’s Head production areas and product storage areas.” (Res. Exh. 7, II Scope-III. Definitions Subsection D). She further confirmed during that same Voir Dire that she has seen employees wearing jewelry and similar items in the cafeteria and other common areas. (Tr. 826: 16-25). She also testified that during her five-year tenure, no employee has received “any kind of disciplinary action for violating the dress code policy by wearing a metal pin or any similar items in a non-production area. (Tr. 827: 4-10). Furthermore, Habermehl similarly testified that the rule in question, Class II Offenses Section 2.9 rule, has never been the basis for disciplinary action of any employee. (Tr. 1571: 5-20). This is obvious confirmation that employees, through training upon hire and on an annual basis, know that the rule applies *only* to the white and blue sanitary gowns worn in the production areas, and consistently abide by it.

Habermehl had been the Company’s Director of Human Resources over all the plants for over fourteen (14) years at the time of trial. (Tr. 33: 2-8). He also testified that “upon hiring, during on-boarding, there is a very detailed GMP and food safety section.” (Tr. 1571: 21 - 1572: 3). He further explained, consistent with VanNoy’s testimony, that the prohibition against jewelry and similar items in production areas is for food safety and is a “very common practice not only at Boar’s Head but the entire food industry has probably the same exact thing.” (Tr. 1572: 7-22). He also reinforced VanNoy’s testimony that employees *are free to wear jewelry and similar items in non-production areas*. (Tr. 1572: 4-6). Again, no witness for the General

Counsel contradicted VanNoy's or Habermehl's testimony regarding the lack of disciplinary incidents involving the rule nor any of the documentary evidence submitted on Rule 2.9. In addition, there was no employee testimony regarding confusion over what the rule requires.

Thus, the uncontradicted evidence presented at trial fully supports that the dress code rule at issue here applies solely to production areas, is understood and consistently complied with by employees, and constitutes a "special circumstance." Accordingly, the rule does not unlawfully curtail employees Section 7 rights. The ALJ's conclusion that Boar's Head had an "absolute prohibition on badges and pins in non-production areas" is contrary to substantial record testimony and documentary evidence and is clearly incorrect. Tellingly, he cites no testimony or documentary evidence for that erroneous conclusion. (ALJD p. 38 at 24-26).

f. The ALJ Erred by Ignoring Relevant Board Precedent and Refusing to Admit Relevant Evidence and Improperly Credited Valenzuela's Testimony

The ALJ refused to consider relevant evidence regarding possible bias that called into question the credibility of General Counsel witness Rodney Valenzuela. The ALJ specifically ruled that he would not consider evidence that Valenzuela had been fired after he was accused of stealing a phone charger. (Tr. 386: 10 - 387: 8). The ALJ Bench Book cites Federal Rule of Evidence 404 in stating that crimes, wrongs, and other acts can be admissible for proving motive. Judge Jeffrey D. Wedekind, NLRB Division of Judges Bench Book, § 16-404, (January 2019). Moreover, the Bench Book states that a "crime of dishonesty," which would include theft, tends to impugn the credibility of a witness. *Id.* (citing *Sunshine Piping*, 351 NLRB 1371, 1375 (2007)). Even more critical here is the fact that the dishonest act that Valenzuela's engaged in occurred at Respondent's Holland facility and he was fired for that illicit act. (Tr. 386: 10-13). The ALJ's exclusion of evidence pertaining to Valenzuela's credibility was improper. Bench Book, § 16-404 (citing *Sunshine Piping*, 351 NLRB 1371, 1375 (2007)). It raises serious

questions about the extent to which the ALJ credited and relied upon Valenzuela’s biased testimony in reaching his conclusions adverse to Respondent on allegations involving Rurka’s meeting (Complaint para. 7), Helfant’s meetings (Complaint para. 8), and the maintenance tools (Complaint para. 26).

g. The ALJ Erred by Basing His Conclusion That Apolonia Rios’s Pay Adjustment Was Unlawful on a Fundamental Misunderstanding of the Facts

The finding that the September 2017 pay adjustment granted to Apolonia Rios was unlawfully motivated is based on a fundamental misunderstanding of the facts as established by uncontradicted testimony and other record evidence. The first significant factual error, which colored much of the ALJ’s analysis, was that following the review of her demotion and pay reduction, Rios “had been given a new position and wage rate.” (ALJD p. 14 at 9-10). As record support for his conclusion the ALJ cites only page 448 of the Record. A thorough review of that transcript page fails to reveal a single reference to “a new position and wage rate.” Rather, what is repeatedly mentioned is “increase your wages,” “increase your pay,” “new wage rate,” and “the pay increase.” (Tr. 443: 21-24; 448: 12-21; 449: 7-11). Moreover, there is no mention whatsoever of a new position on page 448 or in any other testimony or record evidence. (*See* Tr. 448). Rios herself confirms that fact in her own testimony regarding a pay change but no change in duties. (Tr. 430: 8-13).²

However, substantial record testimony substantiates that what occurred was a justified, if not obligatory, pay adjustment from \$13.70 to \$15.90 per hour in September 2017, to correct a payroll error and compensate Rios at the pay rate she should have received – based on her

² Q. Did your job duties change when they paid -- when your pay changed to 15.90?

A. The work? At work?

Q. Yes. Yes. After you spoke to Larry, and your pay changed, did your job duties change?

A. No. They give me the same work. (Tr. 430: 8-13).

eighteen years of seniority – upon her demotion from “Lead-Manufacturing” to “General Labor” for failure to satisfactorily complete a Performance Improvement Plan (PIP). (Tr. 401: 24 - 402: 3; 405: 14-18; 430: 8-13; 443: 9-11, 21-24; 700: 4-25, 701: 1-13, 702: 8-10; 860: 14-21; 875: 8-25, 876: 1-15). In his discussion, the ALJ references a pay rate of \$14.15, which was apparently used because Rios so testified. (ALJD p. 14 at 11-14). However, both VanNoy and GC Exhibit 17 confirmed that Rios was paid at a rate of \$13.70 upon demotion. (Tr. 697: 21-25; 698: 2-18; GC Exh. 17).

The ALJ focused substantial attention on Rios’ demotion, which occurred almost seven months earlier than her pay adjustment at issue here. (Tr. 403: 4-6) That demotion occurred long before any reported union activity, before any knowledge of Rios’ union support, and most importantly, was not alleged as unlawful in the Complaint. (*Id.*; Tr. 403: 24-25; 441: 5-16) Nonetheless it appears to have significantly impacted the ALJ’s analysis of the pay increase. The ALJ stated:

Critically, the Respondent also failed to explain why Rios was never provided an investigation of her assertion that her demotion was unfair when it occurred in March, while, shortly after the Union campaign started, she was provided with a reinvestigation of the circumstances of her demotion, without explanation.

(ALJD p. 48 at 35-38).

The ALJ’s conclusion about the “reinvestigation” of Rios’s prior demotion contains numerous factual errors that are made evident by the testimony, as well as the content of GC Exhibit 12, Rios’s Demotion Notice. First, the “reinvestigation” was prompted solely by Rios’s request directly to Vice President Helfant on August 29, 2018, when she approached him while he was at the plant meeting with employees. Secondly, it was not a review of the demotion as such, but rather a review of all of the circumstances that resulted in a pay cut of almost \$3. Finally, the reason no additional investigation was

conducted as the result of Rios's objection at the time of the demotion in March 2017 is apparent in GC Exhibit 12, the Notice of Demotion itself. In the second paragraph it notes that as a "Lead," Rios admitted to failing to report an incident that management believed put employees at risk. It was a "purposeful failure to appropriately communicate," one of the two major areas identified as needing improvement on the PIP. (G.C. Exh. 16). In sum, no further investigation was warranted despite Rios's objection. The ALJ failed to consider any of these relevant facts before finding it "critical" that no investigation had occurred and thus the pay adjustment was unlawful. (ALJD p. 48 at 35).

While Rios felt that her demotion to a General Labor position was an injustice, the record demonstrates that the primary concern was her incorrect pay rate after the demotion, given her seniority. (Tr. 401: 24-25, 402: 1-3, 17-23; 443-44: 25, 1-10; 700: 1-25, 701: 22 - 702: 7; 806: 17 - 807: 5; 1628: 1-3). The record contains uncontradicted testimony that, contrary to the ALJ's erroneous conclusion, Rios was not given a new position and remained in a General Labor position. (*Id.*; Tr. 444: 11-15). However, she was given a pay increase to the appropriate rate of \$15.90 per hour, "the highest level of the scale," consistent with her eighteen years of seniority and made whole for the March through August 2017 period in which she was paid at an entry level rate; it was clearly done to get her pay rate corrected. (Tr. 701: 8-21; 860: 14-21; 875: 8-876: 15).

Other than the timing of the pay adjustment as support for the conclusion of unlawfulness, here there was no pending election petition, no claims or evidence of majority support of the union, and no evidence of any kind that the pay correction was in any manner related to Rios's union support. (Tr. 808: 3-5). The ALJ cited *Montgomery Ward & Co.* in support of his conclusion of unlawful motivation. *Montgomery Ward & Co.*, 255 NLRB 126, fn. 6 (1998) enf.

denied on other grounds 914 F.2d 1156 (7th Cir. 1990). The cited footnote eschews the presumption that pay increases granted during an organizing campaign are unlawful in favor of “an inference of improper motivation and interference with employee free choice from all the evidence presented and the Respondent’s failure to establish a legitimate reason for the timing of the increase (emphasis added). *Id.* The ALJ also relies upon *Thorgren Tool & Molding, Inc.* to highlight Rios’s union support as proof of unlawful motivation. *Thorgren Tool & Molding, Inc.* 312 NLRB 628, 632 (1993). Rios and Nelson Langarita were open union supporters. (ALJD p. 47 at 30-31). Each received wage increases in August and September 2017, respectively. Yet the ALJ inexplicably concluded that the pay increase to Langarita was lawful – without valid justification in the record to find that Rios’s was not.

The ALJ cited *Thorgren* for the similarity in treatment of union supporters receiving a wage increase in a union campaign. (ALJD p. 49 at 5-11); *Thorgren Tool & Molding, Inc.* 312 NLRB 628 (1993). However, he failed to note the absence of the other relevant factors identified in that case that bear upon the legality of employer inducements. Specifically, he failed to address that here there were no “offers of money accompanied by an urging to vote a particular way.” *Thorgren Tool & Molding, Inc.* at 632. He also cited no evidence of “increases in pay in the context of repeated reference to the union,” and no “benefits announced before an election calculated to influence the employees’ choice.” *Id.* (citing *NLRB v. Rich's of Plymouth*, 578 F.2d 580 (1st Cir. 1978); *Coronet Instructional Media*, 250 NLRB 940 (1980); *Coca Cola Bottling Co.*, 132 NLRB 481 (1961)). None of those factors were present in the pay correction made in Rios’s case. In fact, Rios testified that the union never came up in the context of her pay correction. (Tr. 447: 15-20; 1628: 11-16). Nothing in the record suggests or implies Rios’s pay

adjustment was in any way related to her union support. There is, however, uncontradicted testimony that the two were unrelated. (Tr. 447: 15-20; 808: 3-5; 1628: 11-16).

In *American Sunroof Corp.*, the Board reversed the ALJ's finding of an unlawful pay increase to an individual employee shortly before a scheduled union election. *American Sunroof Corp.* 248 NLRB 748 (1980). There, the Board found that the employee both requested and believed herself to be entitled to the increase. *Id.* As the Board stated “[m]ost significantly, the record shows that [the employee] herself prompted Respondent to grant her the raise when, having not yet received the expected increase, she questioned her supervisor about it a few days before the election.” *Id.* at 749. While there was obviously no impending election in this case, the record confirms without contradiction that Rios prompted and requested a review of her pay reduction she believed to be in error, given her seniority. (Tr. 443: 21-24; 444: 8-15). Rios made this request directly to Helfant, the second highest executive in the Company. (Tr. 430: 11-23; 444: 11-20; Tr. 699: 10-13, 700: 18-25, 701: 1-18; 806: 17-23; 876: 10-15; 1627: 12-25, 1628: 1-16). Her request in late August 2017 that led to her pay adjustment approximately two weeks later fully explains the timing of the change. (Tr. 403: 7-11, 404: 8-21).

The ALJ also mistakenly reached the conclusion, in opposition to the record evidence, that Rios's failure to satisfactorily complete her PIP, which led to her March 7, 2017 demotion from “Lead” to “General Labor” was reversed (ALJD p. 48 at 26-46). No reversal of Rios's March demotion occurred after VanNoy reviewed all of the circumstances as directed by Helfant. (Tr. 701: 8-18; 860: 9-15). Inexplicably, and contrary to his conclusion that the demotion decision was reversed, the ALJ also found “there was no change in her job duties and she performed the same general labor work.” (ALJD p.14 at 10-11; p. 48 at 20-21).

The ALJ also incorrectly asserts, without reference to any record evidence that Rios, in a meeting with Plant Manager Brad Rurka, VanNoy and Human Resources Coordinator Leah Cochran was “told that she had been given a new position and increased wage rate.” (ALJD p. 48 at 19, 21). While a meeting did occur following VanNoy’s review that meeting was not about a new position. Rather, it was to inform Rios of her upward pay adjustment and retroactive, lump sum payment, based on her seniority, to make up for the entry level pay rate she mistakenly received upon demotion to a General Labor position. (Tr. 404: 15 - 405: 19; 430: 19-24; 860: 9-21; 876: 2-15.)

The ALJ concluded that the timing of Respondent’s action supports the inference of unlawful motivation. (ALJD p. 49 at 5-7). Yet as noted above in *Thorgren*, he failed to address the critical fact that Rios approached Helfant approximately two weeks before the change and specifically requested his help, just as occurred in *Thorgren*. See *Thorgren Tool & Molding, Inc.*, 312 NLRB 628 (1999). Helfant’s concern was addressing the problem of an almost \$3 per hour pay reduction for a long-term employee. (Tr. 702: 1-7; 1627: 12 - 1628: 3). He merely directed VanNoy to investigate the matter. (Tr. 699: 10-25). He never criticized the demotion decision. (Tr. 700: 4-17). The result of VanNoy’s August investigation was not to reverse Rios’s demotion, but rather to increase Rios’s pay to the correct rate which Rios was entitled to given her eighteen years of seniority. She had been incorrectly reduced to the entry level rate of \$13.70 per hour. (Tr. 401: 24 - 402: 3; 430: 8-13; 700: 4 - 701: 13; 702: 8-10).

Despite all this evidence, the ALJ found that the assertion in Respondent’s Brief that what occurred was a correction of a rate of pay error “has absolutely no support in the record.” (ALJD p. 48 at 33-35). The above discussion cites in detail the substantial record testimony supporting that very fact. The ALJ failed to consider the numerous references by both Rios herself and

VanNoy regarding Rios's seniority and entitlement to the "highest [pay] rate in the room." (Tr. 443: 19-24; 444: 11-15; 447: 19-23; 449: 22-25; 450: 1; 700: 18-25; 700: 1-7). However, Rios also complained about having to remain at the adjusted \$15.90 rate for twelve months. (Tr. 404: 15-18, 405: 8-19; 443: 21-24, 444: 11-18; 449:7-25, 450: 1; 700: 18-25, 701: 1-15, 807: 11-25, 808: 1-5). The other, similar cases referenced in Respondent's Brief and distinguished by the ALJ were provided in support of VanNoy's testimony that following the pay correction from the entry level rate of \$13.70 to the appropriate rate of \$15.90, Rios's wages were frozen at that higher level for 12 months, as had been done in prior cases. (ALJD p. 48 at 42-47; p. 48 at 1-3); (Tr. 807: 10-25; 808: 1-2).

The record evidence confirms that just as was the case in the justified change in fellow union supporter Nelson Langarita's job clarification and pay, Respondent provided the pay increase for Rios for a legitimate business reason, in response to and shortly after Rios's request for a review, and the increase was unrelated to her union support. The ALJ's conclusion is erroneous and contrary to the record evidence.

h. The ALJ Erred by Ignoring Record Evidence, Incorrectly Concluding Record Evidence Does Not Establish that Maria Mendoza and Guadalupe Rodriguez Have Offices, and Premising Findings on the Mistaken Assumption Mendoza and Rodriguez do Not Have Offices

The ALJ ignored numerous examples of uncontradicted, record testimony in erroneously concluding that supervisors Maria Mendoza and Guadalupe Rodriguez did not have offices, which therefore supported his finding of coercion in Complaint allegations 6 (a) and (b) and 16 (a) and (b). The ALJ found:

Absent evidence that Rodriguez and Mendoza had an office or other location of authority at the plant, the production floor or area were their locations of authority over the employees, where it is reasonable to believe their questioning

would pressure the employees to feel a duty to respond to those in positions of authority over them.

(ALJD p. 29 at 17-20).

In reaching his conclusion, the ALJ failed to consider six separate references in the transcript to Mendoza, Rodriguez, and all other supervisors having offices. (Tr. 970: 21-25; 1335: 22-25; 1336: 1-11; 1337: 23-25; 1338: 1-8; 1341: 1-8). Based on this erroneous conclusion, the ALJ found that because their area of authority was the production floor, questioning employees there tended to add to the questioning's overall coerciveness. (ALJD p. 29 at 14-24). The Board must reverse the ALJ on these issues to the extent the ALJ relied on faulty assumptions to conclude that the location of the conversations contributed to or enhanced their coerciveness.

i. The ALJ Erred by Improperly Concluding that Maria Mendoza's Alleged Conversation with Elba Rivas and Other Employees Occurred in a Small Group when Rivas's Own Testimony Contradicts this Conclusion and Confirms that It Was a Group Meeting

The ALJ failed to consider the factual impossibility of having a group meeting on the production line while it was operating as alleged in Complaint allegation 16 (a), (b), and (c) (the GC withdrew 16(c)). In his finding that unlawful interrogation occurred on the production floor, the ALJ mischaracterized and ignored contrary testimony to erroneously conclude that Maria Mendoza was only speaking with Elba Rivas and "other nearby employees." (ALJD p. 19 at 10-15). However, Rivas clearly testified that Mendoza was speaking to everyone in a group and there were around 14-18 people on the line. (Tr. 88: 5-14).

When asked whether Mendoza was "speaking to anyone specifically or just to the group," Rivas responded that Mendoza was speaking to "[e]verybody in general." (Tr. 88: 7-14). Rivas stated that this occurred while employees were working on the line. (Tr. 87: 25-4; 92: 15-18).

Rivas testified that some employees responded, and some did not. (Tr. 88: 15-18). She specifically said that Martina Ramirez and Jose Villalobos responded in this alleged *group meeting*. (Tr. 88-89). Contrary to the ALJ's factual findings, Rivas testified repeatedly that it was a group meeting rather than a conversation with those just around her on the production line. (Tr. 87: 25 - 88: 14; ALJD p. 30 at 7-9, fn. 54). Rivas states that Mendoza "was saying that she was convincing *everybody*." (Tr. 90: 6-13).

The ALJ, in reaching his decision, failed to properly consider Rivas's testimony, the GC's only witness on this allegation, by giving little weight to the testimony from multiple witnesses that it was impossible to hold meetings on the line because of the noise while the line operated. (ALJD p. 21 at 3-9). Conversations with one or two employees as was testified to are clearly not "meetings" with "between 14 to 18 employees." As noted above, Rivas repeated five times in her testimony that the statements from Mendoza occurred in a meeting with these 14-18 employees.

j. The ALJ Erred by Ignoring the Contrary Testimony of Rivas to Avoid the Conclusion that Group Meetings are Not Possible on the Line While Production is Running

The holding of a meeting as Rivas alleged to have occurred on the line while production is running is impossible and did not occur. The testimony about the size of the meeting is critical since the ALJ found, contrary to Rivas's own testimony, that the meeting was simply a conversation with a few employees on the line. (ALJD p. 19 at 10-15). The evidence shows that meetings of 14-18 people, as Rivas alleged, are physically impossible on the production line, where she alleged it occurred. (Tr. 87: 25 - 88: 11; 92: 15-18). That raises a serious question regarding her credibility. Furthermore, the ALJ essentially changed Rivas testimony by adopting testimony from the Respondent's witnesses. The result was a fundamental change in the alleged

circumstances of Mendoza's conduct from a meeting to a small conversation. The ALJ stated that:

I find that even though some Respondent witnesses testified that they believed it was not possible to conduct meetings while the production line was operating due to the fact that noise was made by horns and the overhead unit, I provide those assertions little, if any, weight due to the fact that those witnesses acknowledged that it was nevertheless possible to have conversations with employees on the production line when it was running.

(ALJD p. 21 at 3-9). There is a major difference between having a conversation with an employee on the production line and holding a group meeting. That such a meeting occurred is all the more doubtful since employees are required to use hearing protection when the line is operating. (Tr. 887: 23-25; 932: 19-23; 938: 25 - 939: 8; 960: 24 - 961: 6).

Again, as noted above, Rivas testified five times that this was a group meeting. (Tr. 87: 25 - 92: 18). She also testified that 14-18 employees were working on the line at the time of the alleged meeting. (Tr. 88-92)

The ALJ acknowledged that Jose Villalobos denied that Mendoza spoke to him on the beef trim line, but nevertheless found that:

While he [Jose Villalobos] testified that Mendoza did not usually hold meetings with employees on the line when it was running because it was noisy and they had to concentrate on their work, he did acknowledge that it was possible to communicate with others on the line when it was running. (Tr. 932-939). He likewise acknowledged that Rivas worked directly next to him every day on the line. (Tr. 943)

(ALJD p. 20 at 1-6).

The ALJ also stated that:

Mendoza admitted that she was able to briefly speak to employees working on the line and when the line was running. (Tr. 999-1000). Villalobos also acknowledged that it was possible to communicate with other employees on the line when it was running. (Tr. 932-939)

(ALJD p. 21, fn. 43).

Rivas did not claim that it was a brief conversation with a couple of employees. (Tr. 88-92).

The ALJ also cited testimony from Mark Emmons stating “that [although] he did not believe it was possible to conduct a meeting while the production line was running due to the noise, he did acknowledge that it was possible for Mendoza to speak to employees when they were on a break on the line.” (ALJD p. 21, fn.43); (Tr. 888–890, 896). The ALJ again mischaracterized testimony from Respondent’s witnesses and ignored the obvious deficiencies in Rivas’s testimony. Contrary to the ALJ’s speculation that the statements by Mendoza could have occurred during a break, Rivas directly stated that the alleged statements occurred while the line was running, and thus not on a break. (Tr. 87: 25-4; 88: 7-11). There is no evidence or suggestion in the record that the meeting may have occurred during a break.

It is evident the ALJ conflated individual conversations that admittedly can occur, while the production line is operating, when employees are within a foot or so of each other, with a meeting involving 14-18 employees that Rivas alleged to have occurred on the line while production was running. (Tr. 968: 8-18).

The record contains substantial, uncontradicted testimony that the work environment on the Beef Trim line is incredibly loud. (Tr. 887: 23 - 888: 9). It is so loud that in order to speak with more than one or two employees at a time, people must be no more than 1-2 feet apart to hear. (Tr. 938: 23 - 939: 22). A meeting with 15-19 employees, as alleged by Rivas, is physically impossible. (Tr. 966: 10 - 967: 12). The employees on the line are in positions approximately two feet apart, spread over a total area that stretches to about 30 feet in length. (Tr. 887: 12-14;

888: 16 - 889: 2; 959: 15-19). In between the two lines of Beef Trim employees that face each other is a meat conveyer that is approximately 6 to 7 feet wide. (Tr. 887: 19-22; 959: 20-22). Employees are required to wear ear protection at all times because it is “very loud in the area.” (Tr. 887: 23-25) There is noise from the running conveyor belts, a non-curing meat injector in the background, two refrigeration units directly above the employees’ heads that are constantly running, a meat dumper that sounds a loud signal horn when it is in use, and the constant beeping of the material handlers trucks. (Tr. 887: 23 - 888: 9) The employees on the line are also elevated about 5 feet on a platform and are thus even closer to the overhead units. (Tr. 885: 23-25) Mark Emmons, the Assistant Plant Manager over the area, testified that it would not be possible to have a meeting while production is running on the Beef Trim line because the employees are spread out over an area almost 30 feet in length and it is too loud. (Tr. 887: 23-888:21; 888: 16 - 889: 2).

Mendoza testified that the only way to communicate with someone on the line, is to call the person down off the line and speak with them on the production floor. (Tr. 968: 8-11) She testified that even then, due to the noise, she needs to be about a foot away to have a conversation with an employee. (Tr. 968: 8-18).

The record evidence demonstrates that having the group meeting as Rivas alleged could not and did not occur. The ALJ’s attempt to bolster Rivas’s problematic testimony by speculating that the meeting could have occurred on a break or in small conversations when an employee is about a foot away, is contrary to the record evidence. Further, it is an improper attempt to revise Rivas’s testimony to support a “meeting” that did not occur. The allegations in paragraph 16 should be dismissed based on the substantial testimony supporting the impossibility that the

events occurred, and the ALJ's inexplicable willingness to alter the unambiguous testimony of Rivas and mischaracterize other testimony to support his conclusion.

k. The ALJ Erred in Failing to Appropriately Assess the Credibility of Ascension Rios in Finding Him to be a Credible Witness

The main issue regarding Ascension Rios and Maria Mendoza's alleged conversations with him is whether these incidents occurred at all. Thus, Rios's credibility is critical to reaching a proper determination. The ALJ failed to consider one of the most salient points regarding his testimony: at the briefing stage, the General Counsel withdrew several of the allegations of threats and interrogation for which Rios was the sole General Counsel witness at trial.

The General Counsel withdrew an allegation that Mendoza allegedly threatened employees that workplace rules would be enforced more strictly, as well as an allegation that she solicited complaints and grievances on or about December 24, 2017. Rios was the sole General Counsel witness that testified to these events.

The withdrawal of these allegations strongly suggests that Rios was not credible and the GC knew it. The ALJ makes no mention whatsoever of the withdrawal of the allegations in reaching credibility determinations.

i. The ALJ Erred by Not Considering Rios's Testimony About Alleged Interrogation and Solicitation of Grievances in Finding Him Credible

In regard to the withdrawn allegation in paragraph 19 of the Complaint, Rios stated:

She [(Mendoza)] took me to the office, and she was waiting for another person at the office, but that person was not there at that time. [Mendoza said,] [w]ell, the other person is not here but I can give you the interview here. I would just like to ask you, how do you feel in our company? And she told me how do you feel here on the Company? I told her good.

(Tr. 275: 7-12). Rios further testified that Mendoza asked him how he viewed her as a manager. (Tr. 275: 13-22). Finally, Rios claimed that he told Mendoza that "I noticed was

that you guys don't communicate well with the workers. And you don't have good communication with us because the communication established is no good, then the workers do not want to make a comment because they cannot get any reference back.” (Tr. 277: 1-5).

Most concerning about Rios’s testimony is that he testified that he could not remember whether the union was even discussed in the incident that is alleged in paragraph 19. (Tr. 289: 8-22). Yet, the Complaint allegation was that he was “interrogated” about his union sympathies.

ii. The ALJ Erred By Not Considering Rios’s Testimony About Alleged Threats of More Strict Enforcement of Work Rules in Finding Him Credible

Rios also testified regarding the withdrawn allegation in paragraph 18(b) of the Complaint alleging threats about enforcing workplace rules more strictly if the union was voted in. He said that Mendoza told him “about the Union coming in, and if we have a fault or commit something, and the Union was there and they could fire us.” (Tr. 285: 13-16). The ALJ again made no mention of the effect of the withdrawal of the allegation on Rios’s credibility on the instant allegation.

iii. The Judge Erred by Ignoring Rios’s Admission about His Inability to Recall Information

Finally, Rios’s own testimony raises questions about his credibility. When asked if he had participated in his own alleged “meeting,” he stated “No, it's impossible for me to remember everything.” (Tr. 289: 14).

At the very least, the ALJ’s willingness to credit Rios when his testimony was obviously insufficient to support the withdrawn allegations demonstrates an inexplicable inconsistency and raises doubts about the credibility of Rios elsewhere. For this reason, the ALJ improperly

credited Rios's testimony over that of Mendoza in the allegations related to paragraph 18 of the Complaint.

l. The ALJ's Erred by Concluding that Four Security Guards were in the Parking Lot at One Time is Not Supported by Record Evidence

In reaching his finding of unlawful surveillance, the ALJ concluded that there was at one time four security guards in the parking lot near the employees who were handing out Union literature. (Tr. 303, 422, 489, 1352.); (ALJD p. 22 at 23-26).

The ALJ's citations to the record do not support that conclusion nor is there any other record evidence that four guards were in the parking lot at any point in time. The ALJ references the record at transcript pages 303 and 422, but that testimony only references *one* security guard. (Tr. 303: 1-22; 422: 2-22). Page 489 of the transcript does not reference four guards, but rather *three* security guards. Tr. (489: 24 – 490: 1. Transcript page 1352 only mentions that *two* guards were coming on duty and *two* were ending their shift. It says nothing about *four* guards being in the parking lot on duty at the same time. (Tr. 1352: 1-25). In fact, it references two guards "taking turns" to go into the parking lot. (Tr. 1352: 23-25; 1372: 18-25). The ALJ's reference to four security guards in the parking lot is one more example of clear error and misstatement of the facts.

m. The ALJ Erred by Ignoring Evidence Regarding the Safety Concerns of the Employees Exiting the Parking lot

The ALJ failed to consider evidence demonstrating that the "out of the ordinary" circumstances standard used to conclude that Boar's Head's activity in the parking lot was unlawful was misapplied. The ALJ ignored testimony from employees regarding the legitimate safety concerns over moving vehicles that necessitated that security guards and others be in the parking lot. Employee Jorge Torres testified that on one occasion a person stood in front of his

mirror to make him stop his car and that he “could have run the person over....” (Tr. 1194: 16-25). Gabriella Esquivel also testified that one person passing out fliers “got so close to my -- to my truck and grabbed the rear mirror to -- for me to stop to give me the paper.” (Tr. 1398: 1-3). She testified that she was scared that she “was going to hit that person.” (Tr. 1398: 7-8).

Moreover, the Company received numerous complaints from employees that individuals were stepping in front of vehicles as they were entering and leaving the parking lot on October 11th. (Tr. 770: 2-5). Shannon VanNoy received a dozen or so reports through phone calls or face-to-face interactions with employees that came into HR to complain about the cars getting backed up. (Tr. 770: 8-18). The backup and gridlock of cars continued on at least the following three days that the union distributed leaflets in the parking lot. (Tr. 1445: 6-12).

There was no record evidence of anything similar happening within the parking lot requiring the presence of security prior to these incidents. Thus, it was the blocking of vehicles that was out of the ordinary, not the necessary presence of security staff to control the safe exiting of employee vehicles.

n. The ALJ Erred by Ignoring Evidence that Larry Helfant and Other Senior Executives Had an Established Practice of Soliciting Grievances Prior to the Union Campaign

Contrary to the ALJ’s conclusion, which was without citation to the record, Senior Vice President of Sales and Operation, Larry Helfant had previously solicited grievances and employee concerns by meeting with employees in groups and walking the plant floor to speak with employees individually. Helfant stated that he visited the facility at Holland every couple of months or about six times a year. (Tr. 1615: 7-16). This fact was confirmed by other witnesses and was uncontradicted.

Visiting corporate executives such as Helfant routinely walk the production areas and interact

with the employees to solicit their concerns. (Tr. 786: 17 - 787: 1; 1039: 21 - 1042: 3; 1517: 6 - 1519: 6). More on point regarding the specific allegation, corporate executives, including Helfant, Senior Vice President Jeff Szymanski, and Habermehl, all routinely spent time on the floor talking with employees about their concerns *prior to August 2017*. (Tr. 792: 2-21; Tr. 1395: 9-18).

In fact, Jorge Torres, an hourly employee, confirmed that top management comes to the Holland facility every quarter or so. (Tr. 1202: 14-15). Contrary to the ALJ's conclusion, Torres's failure to recall Helfant specifically is not evidence that he had not come to the facility before. Torres simply did not recall whether he had seen Helfant previously. (Tr. 1202: 16-17).

Helfant testified without hesitation that he has routinely solicited grievances in a variety of ways prior to the beginning of the August 2017 Union campaign. Helfant stated that he has had group meetings prior to August 2017. (Tr. 1635: 20 - 1636: 13). This testimony is uncontradicted. Questions were welcome at these meetings. (Tr. 1638: 8-12). Helfant's meetings, as with his conversations individually or with small groups of employees, are essentially an open forum (Tr. 1639: 9-15; 1634: 6-14). As with other open forums at the company that he has held, Helfant specifically stated that "I don't promise anything in an open forum like that. I don't, you know, it's just a management team there to decipher what needs to get done and when it needs to get done. I'm not there to make the decision. Otherwise, I don't need my management team there, right. So, I'm there to just listen." (Tr. 1640: 9-15). Helfant's testimony is unambiguous that in open forums, such as those held at the Holland plant, he does not make promises. It also demonstrates that contrary to the ALJ's erroneous conclusion, he has previously conducted such open forum meetings with employees.

Suffice it to say that an employer with a past practice of soliciting grievances may continue

to do so during a union campaign. *Johnson Technology, Inc.*, 345 NLRB 762 (2005) (citing *Wal-Mart Stores*, 340 NLRB 637, 640 (2003)). “An employer may rebut the inference of an implied promise by . . . establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by [showing] . . . that the statements at issue were not promises.” *VT Hackney, Inc.*, 367 NLRB 15, 21 (2018); (citing *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529 (2010)). Here, the ALJ ignored the uncontradicted testimony and case precedent.

The Board has frequently held that the employer can also resolve employee grievances. See *Longview Fibre Paper & Packaging, Inc.*, 356 NLRB 108 (2011) (no violation during an ongoing union organizing campaign where the employer implemented a change to workplace schedules as a result of a brainstorming meeting consistent with past practice); *TNT Logistics N. Am., Inc.*, 345 NLRB 290 (2005) (no violation during ongoing union organizing campaign where employer had past practice of soliciting grievances through an “open door” policy); *Johnson Tech Inc.*, 345 NLRB 762 (2005) (no violation where employer had a past practice of soliciting grievances and management representative asked a single coercive question). The Board found in *Radio Broadcasting Co.* that an employer’s statement that they would “look into it,” referring to increased health coverage, when an employee asked about improved health benefits was not a promise as there was no other evidence that the employer promised or even discussed increased health care benefits. *Radio Broadcasting Co.*, 277 NLRB 1112 (1985).

Ascension Rios, a GC witness, testified that Helfant said that “the only thing he had to say was being looking into it, that he did not come to fulfill all the promises but he was to check all the complaints that were made.” (Tr. 270: 21-23). As Helfant testified regarding his purpose in meeting with employees on August 29, 2017, he was there to listen to their concerns. (Tr. 1619 : 1-5; 1637: 15-19). This was not a change in response to union organizing: such organizing by the

UFCW had occurred every year since 2013. Just as most progressive employers, to maintain a productive workplace, keep morale high, and retain qualified employees, Boar's Head regularly seeks feedback and ways to improve from its employees. These efforts were undertaken long before any union organizing by UFCW began at the facility and was on-going in prior years while the Union was organizing. Helfant's discussions with employees was consistent with what had been done before as he himself testified. (Tr. 1616: 15-24; 1617: 3-25; 1633: 19-21; 1634: 6-8; 1635: 20-25). Not a single witness contradicted that these historical efforts to seek out employee feedback and solicit concerns have existed for years.

o. The ALJ Erred by Concluding that Helfant's Meetings Were Mandatory

The ALJ references the meetings that Helfant had as "mandatory meetings," but there is no record evidence that these specific meetings were in fact mandatory. ALJ D. 12 at line 15-19. The testimony that the ALJ cited (Tr. 447, 1619, 1637) does not contain a single reference to Helfant's meetings being mandatory, and Respondent is unable to point to any record testimony confirming their mandatory nature.

p. The ALJ Erred by Misapplying the Law Regarding the Use of Suggestion Boxes and that Boar's Head Lawfully Reminded Employees About the Suggestion Boxes in Use Prior to the Beginning of the 2017 Union Campaign

The ALJ misapplied the law regarding the Respondent's handout reminding employees about using suggestion boxes that were already available at the Company. The Board has consistently found that it is not unlawful for an employer to remind employees of already instituted ways that it may solicit grievances.

The permissibility of employers to solicit grievances has been frequently confirmed in Board precedent. One case involved an employer that gave a speech in which the company reminded employees of the employer's existing "open door policy whereby the employees are

encouraged to take up any problems that they may have relating to their employment with their supervisor” or with higher management, and stated that “Management sincerely wants to know what its employees are thinking and feeling because it feels that the comments and questions of the employees serve as guideposts.” *Butler Shoes New York, Inc.*, 263 NLRB 1031, 1033 (1982). The Board found that the employer ““announced no new policy and did not imply that its response to grievances would change. Accordingly, it acted lawfully.” *Id.* (citing *Chester Valley, Inc.*, 251 NLRB 1435, 1447-48 (1980)). “The Board has found that it is not an unlawful solicitation of grievances merely to remind employees of an existing open-door policy if there is no implication that the response to grievances will change.” *In re PYA/Monarch, Inc.*, 275 NLRB 1194, 1196 (1985).

The reminder to use suggestion boxes is the same or a similar practice to that noted in the employer’s speech in *Butler*. The undisputed evidence demonstrates that Boar’s Head has had suggestion boxes at its facility for years, well in advance of August 2017. Jorge Torres testified that the suggestion box had been at the company for more than 12 years. (Tr. 1189: 7-11). Gabriela Esquivel, another hourly employee, also testified that the suggestion box has been at the company since she started working there in 2004; the company even had three or four of them. (Tr. 1394: 13-21). VanNoy also confirmed that the Company has had suggestion boxes for many years. (Tr. 790: 15-20). There is no record evidence that Boar’s Head did not have suggestion boxes at its facility for years prior to the UFCW’s organizing. Reminding employees to use a suggestion box as a method that it had previously used to solicit grievances and concerns is not a violation of the Act.

In addition, the changes and clarification of policies listed in GC Exh. 7, “Explanation of Changes,” were distributed to *all* the Boar’s Head non-unionized plants at exactly the same time.

(Tr. 801-802). Thus, the policy changes reflected in GC Exhibit 7 are lawful under the established precedent of *Nalco* and related cases cited in below in Section s. *Infra Section s.*

Moreover, and contrary to the ALJ's assertion, the Company often announces policy changes through handouts or similar forms of communication. The employee handbook that was submitted into evidence as GC-2 has an acknowledgment page where employees acknowledge that they received a copy of the handbook. The handbook is obvious proof that written notice of employee rules is given to employees. The Company also has a bulletin board where documents would be posted (Tr. 727: 11). which is another way that the Company announces rules and policy changes. As at any other company, policy changes are announced to the Boar's Head employees through a variety of ways. The Board should overturn the ALJ's decision regarding this allegation as contrary to the record evidence.

q. The ALJ Erred by Ignoring Substantial Facts Regarding the Development of Respondent's Vacation and Attendance Policy Leading Him to Improperly Apply the Law to His Misinterpreted Facts

The ALJ made three critical errors in considering the facts and applying the law regarding the change to the vacation and attendance policies. First, the ALJ ignored a series of relevant emails that were introduced demonstrating that the proposed change was initiated long before the union organizing campaign began and not after, as he erroneously concluded. Second, he ignored uncontroverted testimony regarding the cost of not revising the vacation and attendance policies to address the turnover that they caused. Third, and most significantly, the ALJ also ignored uncontradicted record evidence that the changes were implemented at all non-unionized facilities at the same time for the same reason and were thus permissible under *Nalco* and related cases. The ALJ ignored evidence that the Company would have taken the same action had the union not been present.

i. The ALJ Ignored Emails Demonstrating that the Vacation and Attendance Changes Had Been Under Serious Discussion and Were Approved Prior to Boar’s Head Knowledge of the Union Campaign

The ALJ ignored the numerous emails and testimony regarding when the plan to implement changes to the vacation and attendance policies began. The ALJ stated in his opinion, “After knowledge of the Union campaign, the Respondent also began revisiting the possibility of changing its attendance and vacation policies.” (R. Exh. 12.) (emphasis added) ALJ D. 44 at line 6 and 7. The ALJ also concluded that the decision to increase vacation benefits was not made “... until well after the union’s organizing campaign started at its facility.” ALJ D. 46 at lines 36 and 37. This is false. The record evidence completely negates the ALJ’s assertion that “... the sudden interest in improving working conditions was directly related to unionization.” ALJ D. 44 at line 8. There is nothing “sudden” about a process that began, at a minimum, six months earlier. The evidence that was presented at trial demonstrates that the changes to the vacation and the attendance policies began months before the Company learned about union organizing at the Holland facility, as noted in the very exhibit that the ALJ cited in his decision. Respondent’s exhibit 12(a)-(r).

As the emails and related testimony confirm, significant efforts by Habermehl and the individual non-union plant Human Resources managers to affect needed changes in the vacation policy had not succeeded in 2015 and 2016. Habermehl began again in early 2017 discussing proposed changes with senior management. That Habermehl renewed the effort to get approval for vacation and attendance policy is confirmed by an email to VanNoy, the HR Business Partner in Holland Michigan, on February 10, 2017 regarding vacation for first year employees. (Res. Exh. 12(j)(1)). In this email, Habermehl stated that he was meeting with one of the owners of the company regarding the issue. (Res. Exh. 12(g)(1)(2)). Habermehl also went further than in past

attempts to revise the vacation policy by requesting that the HR Business Partners at all the company's non-union facilities gather data on their local market to determine whether the company was competitive with other companies in the benefits that it offered. (Tr. 1547: 3-8; Res. Exhs. 12(m)(1-2), (a)(1-5)) Habermehl intended to use the information to present to senior management the benefits of providing vacation time to first year employees to be competitive in a difficult hiring market. (Tr. 1547: 11-24).

Habermehl also worked with the cost accountants in the early months of 2017 to obtain new cost estimates on changing the vacation policy. *Id.* Colin van Antwerp, Senior Manager, Total Rewards for Boar's Head, found that the total cost of adding vacation for first year employees would be \$288,252. (Res. Exhs. 12(p)(1-2))

Significantly, a couple of months prior to July 17, 2017, Mike Martella, Respondent's President, instructed Habermehl to expand the vacation policy changes to all facilities and explore adding more days to employees that have worked at the company for longer than one year. (Res. Exh. 12(o); Tr. 1548: 14-20). On July 17th, Habermehl emailed Vice President Jeff Szymanski about a proposal regarding a first-year vacation program he and Helfant had submitted to "Mike and Bob" earlier (Company President and one of the owners, respectively). (Tr. 1565: 4-24; Res. Exhs. 12(o), (q) (1-4)) Habermehl, testified as follows regarding these events:

Q. And then when do you recall making a more I guess detailed proposal regarding additional vacation in 2017?

A. That was July 17th.

Q. And was that submitted to senior management?

A. Yes, it was.

Q. What kind of response did you get in July, if any?

A. I didn't hear anything back in July.

Q. What steps did you take to try and get information?

A. So on August 8th, I sent a meeting invite, with a note on it, saying I wanted to follow up about the proposal I gave you back a couple of weeks ago, and I

scheduled a meeting for August 10th, to discuss it. And that's in the emails as well.

Q. That was one of the emails you pointed out yesterday?

A. Yes.

Q. Okay. And it was on August 9th that you first heard about union organizing at the Holland plant?

A. Yes.

(Tr. 1565: 4-24).

The July submission of a vacation proposal and that August 8th e-mail regarding the proposal are of major significance in the context of the GC's Complaint allegation and the ALJ's erroneous conclusion. (Res. Exhs. 12(o), (q) (1-4)) Both unquestionably confirm that the change to the vacation policy was in process before any information regarding union activity at the Holland plant had been reported. (Res. Exhs. 12(o), (q) (1-4)) Habermehl credibly testified that he first heard about the union organizing in 2017 in a telephone call with Leah Cochran on the morning of August 9th. (Tr. 1565: 19-21) It is confirmed by e-mails of the same date. (G.C. Exh. 3). Mr. Habermehl further testified that the change to the vacation and attendance policies would have been made even if the Union was not organizing at the time. (Tr. 1568: 18-24). The ALJ's conclusion that Respondent began revisiting changing the attendance and vacation policies after knowledge of the union's organizing campaign is simply wrong. The vacation proposal was in the final stages of approval before Boar's Head had any knowledge of union organizing at the Holland plant as the preponderance of the evidence confirms. (Tr. 1565: 22-24)

ii. The ALJ Ignored Case Law Regarding Improvements that Were Implemented Company-wide Basis and Case Law Providing for Legitimate Reasons for Improvements.

The ALJ ignored Board precedent that a company-wide change during a union organizing campaign is permissible. The ALJ also ignored compelling evidence about the economic

conditions that existed in 2017 that prompted the change to the Company's vacation and attendance policy.

The Board has consistently found that when a company makes improvements in terms and conditions of employment on a company-wide basis in the midst of a union organizing campaign, as here, there is no violation of Section 8(a)(1). *Dynacor Plastics and Textiles*, 218 NLRB 1404 (1975); *Nalco Chemical Co.*, 163 NLRB 68 (1967). Where it was not established that the employer's motive was related to any protected activities, there was no violation of the Act. For example, in *Wal-Mart Stores, Inc.*, the Board found that the employer did not violate the NLRA by giving employee wage increases where the increase was given one month before the union filed a representation petition, and it was not established that the employer's motive in granting the wage increase was related to any protected activities. *Wal-Mart Stores*, 348 NLRB 274 (2006). In addition, among the other factors that the Board has considered in cases of benefit improvements during an organizing campaign are: (1) whether the benefit changes apply to other employer facilities or to employees not involved in the organizing campaign; and (2) whether the benefit improvements were essential to remain competitive with other employers in the same industry regarding the attrition and retention of a stable workforce. *Town & Country Supermarkets*, 244 NLRB 303 (1979), *enfd.*, 666 F. 2d 1294 (10th Cir. 1981); *Hayes-Albion Corp., Tiffin Div.*, 237 NLRB 20 (1978); *Centralia Fireside Health*, 233 NLRB 139 (1977); *Villa Sancta Anna Home for the Aged*, 228 NLRB 571 (1977); *Medline Industries, Inc.*, 218 NLRB 1404 (1975); *Essex Int'l, Inc.*, 216 NLRB 575 (1975); *NLRB v. Circo Resorts*, 646 F. 2d 403, (9th Cir. 1981), *enforcing as modified* 244 NLRB 880 (1979); *Delchamps, Inc.*, 588 F. 2d 476; *NLRB v. Gotham Indus.*, 406 F. 2d 1306 (1st Cir. 1969); *Springfield Jewish Nursing Home for the Aged*, 292 NLRB 1266 (1989); *In re Wilhow Corp.*, 244 NLRB 303 (1979); *Schulte's IGA*

Foodliner, 241 NLRB 855 (1979); *Poultry Packers, Inc.*, 237 NLRB 250 (1978). The Board has long held that an employer's legal duty in deciding whether to grant benefits to employees is to act as it would have if the union were not present. *Red's Express*, 268 NLRB 1154, 1155 (1984).

Here, Boar's Head vacation and absence policy changes clearly satisfy these factors. It is evident from the record evidence that Boar's Head's goal was to improve the ability to hire and retain employees in one of the most competitive markets in years. Boar's Head was focused on attracting applicants and retaining first year employees, those employees most likely to leave. (Tr. 1531: 16-24; Tr. 1539: 6-10).

The record evidence established that the changes made to the vacation and absence policies on October 1, 2017 were the culmination of over two years of analysis and efforts by Boar's Head to address two very critical and related company-wide concerns. Those two concerns were escalating employee turnover and the increasingly difficult ability to hire employees. The policies at issue were inextricably intertwined and were changed on the same date at all non-union Boar's Head facilities, including the Holland plant. (Tr. 1577: 15-22; 1579: 9-19; 1630: 11-15).

Boar's Head did not change the vacation and attendance policies to discourage union activity at the Holland plant as the ALJ erroneously concluded. As the record evidence demonstrates, the changes were part of a corporate-wide effort to deal with significant turnover and hiring problems at all its plants. (Tr. 1530: 9-12). For example, turnover at the Boar's Head Groverport, Ohio plant in 2016 was 77%, and in 2017 it grew to 111%. (Tr. 1560: 5-7) In Holland turnover was 31%. (Tr. 1560: 11-19). For all nonunion facilities there was a 100% increase in turnover between 2013 and 2017. (Tr. 1560: 13-16). Boar's Head calculates the cost of losing an employee at approximately \$6,500, which is approximately 20% of their annual

wage. (Tr. 1560: 23-25). The total cost of turnover in 2015 was \$4.4 million, in 2016 it was \$6.2 million, and by 2017 it had reached to \$7.6 million, an increase of over \$3 million in 3 years. (Tr. 1561: 1-3) In 2013, 2014, and 2015 the company gave a \$.20 per hour wage increase each year. (Tr. 1559: 8-11). In an effort to stem the turnover and help the hiring effort, in 2016 the company gave a \$.30 per hour increase, which was a 50% higher increase than in prior years. (Tr. 1559: 7-12). In 2017 the wage increase was raised to \$.45 per hour. *Id.* Unfortunately, granting greater pay increases did not help with the turnover as senior management had hoped. (Tr. 1559: 20-22). The ALJ ignored the uncontradicted evidence regarding the business's turnover, the escalating costs involved and the need to change policies that contributed to the problem.

In 2015, Boar's Head made a change in the attendance policy that applied at all of its non-union locations. The change involved the point system for attendance violations. The change, increasing the number of perfect attendance days from 30 to 60 before a point drops off, was unpopular, and prompted critical employee comments at all of the plants. (Tr. 803: 3 - 805: 10; 1582: 14-19). The attendance policy was the number one reason for turnover. (Tr. 805: 17-22). The change from 30 to 60 days resulted in an increasing number of first year employees "pointing out," that is, they accumulated too many absence points and were therefore terminated. (Tr. 805: 17-19). Employees in their first year of employment would accumulate excessive absence points for taking time off since no vacation was available, and many were ultimately terminated. (Tr. 805: 5-10, 17-22). After the change to the attendance policy the turnover rate at all the plants began to climb. (Tr. 1560: 13-16). While all the plants had a turnover problem, it was particularly acute at the Groveport, Ohio facility. (Tr. 803: 18-23; 1540: 13-15). The turnover problem was compounded by the increasingly tight labor market, especially in the Groveport area where there is a concentration of large employers. Hiring sufficient replacement

employees had become increasingly difficult despite significant wage increases in 2016 and 2017.

The lack of vacation for first year employees, as well as its effect on turnover became a major issue for the Human Resource staff in 2015. (Tr. 1531: 6-14). The lack of first year vacation was especially challenging in trying to hire the highly sought-after maintenance mechanics. (Tr. 1531: 16-24). As noted above, giving larger wage increases did not stem the loss of employees or improve hiring. (Tr. 1539: 6-10). Vacation time and attendance went hand in hand, since first year employees were willing to be assessed attendance points in order to take time off. The two issues were in reality, a single issue. (Tr. 1064: 1-4). Compounding the problem was the fact that many other employers in the same markets were offering vacation during the first year of employment. (Tr. 1064: 1-4).

Under the vacation upgrade approved by corporate, the question of what additional vacation should be provided to employees with more than one year of service caused the final parameters of the approved vacation changes to be delayed. (Tr. 1568: 25 - 1569: 21). Consistent with upper management's approval to expand the vacation policy, the consensus view was that at least some additional vacation days must be offered to employees tenured longer than one year, as well. *Id.* By the first week of September 2017 the final details on vacation days for both first year and several groups of more senior employees were complete. (Tr. 1569: 25 - 1570: 1). Because of the company-wide import, the changes were personally announced by corporate executives simultaneously at all plants on September 15, 2017. (Tr. 1577: 15-22; 1579: 9-19; 1630: 11-15) The vacation changes, along with the attendance policy change from 60-days back to 30-days for a point to drop off, were to become effective on October 1, 2017. (Tr. 806: 9-12; 850: 17-19). Because a critical company-wide problem was being addressed, the changes to the vacation and

attendance policies would have occurred *irrespective* of the union organizing at the Holland plant in August 2017. (Tr. 1568: 21-24) This problem was being considered long before the specific changes for other than first year employees were finally completed. The high turnover costs and the competitive disadvantage in hiring were the *sole* reasons for the changes.

Uncontradicted record evidence establishes that Respondent first became aware of UFCW organizing on August 9, 2017, **after vacation changes had been approved and were being finalized**. Thus, the conclusion that union organizing precipitated the policy change ignores the uncontradicted record.

Similarly, any assertion that the attendance policy was changed to discourage union activity is also without merit as the uncontradicted record evidence confirms. As noted, the lack of first year vacation time was inextricably intertwined with the number of days for the removal of attendance points. The lack of one triggered the abuse of the other, resulting in employees “pointing out” and changing one without the other would render either single change ineffective in addressing the problems. Just as the lack of first year vacation time had affected all locations, so too had the 2015 change in the attendance policy. They were viewed as a single issue. (Tr. 1063: 21 - 1064: 6). Changing the attendance policy was essentially decided at the same time as the vacation changes. All that remained were the final adjustments to the vacation change for employees with more than one year of employment. The changes that became effective at all non-unionized plants on October 1, 2017 were an integral part of the effort to address a multi-million-dollar turnover cost to Respondent as a whole, and unrelated to union activity. (Tr. 1561: 1-3)

r. The ALJ Refused to Allow Relevant Testimony and Misapplied the Law Regarding Alleged Interrogation and Threatening Statements by Guadalupe Rodriguez to Walter Aguilar

The ALJ found that Supervisor Guadalupe Rodriguez unlawfully interrogated and threatened Walter Aguilar in August 2017 by approaching Aguilar on the line – something Rodriguez does every day as a frontline, production supervisor – to inquire why Aguilar, who was an open union supporter, desired a union. (ALJD p. 30 at 28-30). The conversation lasted approximately 20 to 25 minutes according to Aguilar, and four to six minutes according to Rodriguez (Tr. 168 11-15; 906: 24 – 907: 1). Aguilar initially testified “[Rodriguez] only approached me and he told me that what was the point of having a union.” (Tr. 119). Aguilar replied to eliminate “the negligence and abuse.” (Tr. 119: 14-19). Aguilar testified that Rodriguez responded that he would not recommend a union based on his prior experiences working in a unionized workplace because the union only defends employees who do not want to work, only wants employees’ dues money, employees could potentially lose perks such as bonuses or picnics, and Aguilar and other employees would ultimately come to regret joining the union. (Tr. 119: 20 – 120: 5) Finally, after completing the retelling of his version of events, Aguilar responded to the GC’s leading question “[w]as there any discussion about negotiations or benefits?” by stating “[o]h, yes, yes. Yes, that if the Union was in force, they will negotiate from zero to minimum.”³ *T.M.I.*, 306 NLRB 499 (1992); (Tr. 120: 6-8). On cross examination, when asked to “[t]ell us everything that you can remember” about the conversation, Aguilar replied “[w]hat I remember the most is that we talk about the Union. We talked about other things, but I did not memorize anything that we were talking about.” (Tr. 169: 14-18). Then, when asked one more time to “[t]ell us again

³ Elsewhere in the record, the ALJ sustained the leading objection to the following, similar exchange:

Q. Did he say anything about negotiations?

12 MR. ALANIZ: Your Honor, objection. Leading.

13 JUDGE RANDAZZO: Sustained. (Tr. 263: 11-13)

what you do remember he said regarding the Union,” Aguilar stated Rodriguez asked him “why you guys want the Union” and that Rodriguez:

recommended that the Union was not good because he worked before with the Union, because the Union only represented people who did not want to work. And also, that the Union promises a lot of things before they get into any workplace, but once they were in the workplace, they didn't fulfill any of the promises. And that he did not recommend the Union. He also told me that if the Union ever came into the workplace, we will feel sorry because that was no good.

(Tr. 169: 23 - 170: 15). Aguilar made no mention of the phrase “negotiate from zero to minimum” or anything similar on cross examination, although he was asked twice to recount everything that Rodriguez said, and did so. *Id.* Aguilar also stated he did not remember anything else from the conversation, which he remembers lasting at least 20 minutes. (Tr. 120: 9-11). Aguilar soon after then testified, on cross examination, that Rodriguez spoke about other things, but he could not remember about what “because that was a long time ago.” (Tr. 169 19-22).

To assess the lawfulness of questions posed to an employee regarding his or her union views, the Board applies the test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *affd. sub nom. HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The *Rossmore* test evaluates the totality of the circumstances in each case and looks at numerous factors including those set out in *Bourne v. NLRB*, which the court described as “fairly severe standards”: (1) the background, i.e., whether there is a history of hostility or discrimination against union activity; (2) the nature of the information sought; (3) the identity of the interrogator, most importantly, his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). The Board also considers whether the interrogated employees are open and active union supporters. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1183 (2011); *Gardner Engineering*, 313 NLRB 755, 755 (1994), *enfd. as modified on other grounds*

Cir. 1997); *Blue Flash Express*, 109 NLRB 591 (1954). These factors “are not to be mechanically applied,” they represent “some areas of inquiry” for consideration in evaluating an interrogation's legality. *Rossmore House*, 269 NLRB 1176, fn. 20. The Board looks at the totality of the circumstances to determine “whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employees' rights under the Act.” *Oklahoma City Collection*, 263 NLRB 79, 81 (1982), enfd. mem. 679 F.2d 900 (9th Cir. 1982). Looking at the totality of the circumstances it is clear Rodriguez did not unlawfully interrogate Aguilar, contrary to the ALJ’s misapplication of the Board’s precedent.

First, Respondent has no history of union hostility. Nor does Rodriguez have such a history. Rodriguez’s only union history involves his lawful statements based on his experiences with contract negotiations as a former employee-member of a union. (Tr. 907: 18-23; 119: 20 - 120: 5). The ALJ without legal or factual support inaccurately classified these as “threats.” (ALJD p. 29 at 34-36). More correctly, Rodriguez stated the reality that things may be lost or gained in negotiations based upon his own, firsthand experience in a unionized workplace. (Tr. 905: 23-25, 906: 1-3; 907: 18-23).

Second, Rodriguez sought no information beyond an inquiry into Aguilar’s reasoning for supporting the union drive. (Tr. 902: 7-11). Rodriguez did not insistently probe into the identity of other union supporters, the content or location of union meetings, seek information to be used as a basis for discipline, threaten Aguilar with discipline, or any other information that has been found highly indicative of coercion under Board precedent.(Tr. 902-903); *See Bozzuto's Inc. v. NLRB*, 927 F.3d 672, 687 (2d Cir. 2019). Rodriguez had worked alongside Aguilar for many years and was simply curious about Aguilar’s reasoning in favor of the union. (Tr. 902: 7-11) They engaged in friendly conversation on a daily basis, both before and after this incident. (Tr.

908: 10-12; Tr. 166: 9-13). Aguilar did not act in concert with any member of Respondent's management and did not relate his conversation to anybody else, management or otherwise. (Tr. 902: 12-23).

Third, Rodriguez was the frontline supervisor of Respondent's packaging and boxing area and served in this capacity as Aguilar's direct supervisor. (Tr. 898: 15 - 899: 6) He also frequently worked alongside those employees during the workday. (Tr. 899: 12-22). The great weight of Board precedent holds that a low-level supervisory role, such as that of Rodriguez, weighs against a finding of coercion. *See e.g. Johnston Fire Services, LLC*, 367 NLRB 49, slip op. at 9 (2019); *Vista Del Sol Health Services, Inc. dba Vista Del Sol Healthcare*, 363 NLRB 135, slip op. at 17 (2016); *Salon/Spa at Boro, Inc.*, 356 NLRB 444, 459 (2010); *Boulder City Hosp., Inc.*, 355 NLRB 1247, 1255 (2009). Indeed, *Rossmore* itself recognized that a production supervisor such as Rodriguez discussing union matters with an employee carries little risk of coercion "[b]ecause production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts." *Rossmore House* at 1177 (quoting *Graham Architectural Products*, 697 F.2d 534 at 541). Aguilar and Rodriguez had known one another for about a decade and had always been on friendly terms. (Tr. 165: 2-9). However, the ALJ found the concededly friendly nature of their conversation to be irrelevant, which defies logic given the Board's "totality of the circumstances" test. (ALJD p. 30 at 9-12). Surely the nature of the conversation – whether friendly or hostile – constitutes part of the "totality of the circumstances" and therefore holds at least some relevance. In sum, the ALJ misconstrued Rodriguez's low-level position in Respondent's hierarchy partially based on the mistaken assumption he had no office (discussed immediately below), which was therefore indicative of an elevated risk of coercion.

Fourth, Rodriguez was working with Aguilar on the line, as Rodriguez did daily with many of the employees he supervised. (Tr. 899: 12 – 900: 11). The ALJ found that because the production floor is where Rodriguez had authority, this “would pressure the employees to feel a duty to respond” in the absence of “evidence that Rodriguez and Mendoza had an office.” (ALJD p. 29 at 14-24). Notably, the ALJ ignored numerous instances in the record noting that Rodriguez, like all other supervisors, had an office. *Id.*; (Tr. 970: 21-25; 1335: 22 – 1336: 11; 1337: 23-25; 1338: 1-8; 1341: 1-8). The ALJ’s mistaken assumption that Rodriguez had no office, his reliance on inapposite case law,⁴ and his ignoring of the weight of relevant Board precedent caused him to reach the mistaken conclusion that Rodriguez’s routine act of speaking with Aguilar on the production floor was evidence of coercion.⁵ (ALJD p. 29 at 20-21). The ALJ’s misapplication of law to both mistakenly assumed facts and the record facts is plain.

Finally, Aguilar openly and honestly responded to Rodriguez’s questions. (Tr. 170: 1-15). The ALJ did not address Aguilar’s open and honest responses. Moreover, he was an open union supporter, which the Board considers “highly significant.” (ALJD p. 29 at 32-34); (Tr. 170: 16-23); *Camaco Lorain Mfg. Plant*, 1182 (2011); *see e.g., Connecticut Humane Society*, 358 NLRB 187, 218 (2012); *Boulder City Hospital*, 355 NLRB 1247, 1255 (2010); *Evergreen America Corp.*, 348 NLRB 178, 208 (2006).

None of the factors Board precedent has long held indicate a coercive interrogation suggest coercion here, contrary to the ALJ’s finding. Similar to the Board’s recent decision in *Trinity*

⁴The ALJD cited *Camaco Lorain Manufacturing Plant*, 356 NLRB 1182 (2011) and *Central Valley Meat Co.*, 346 NLRB 1078 (2006) for the proposition that the Board has found a supervisor’s questioning on a production floor to be coercive. Beyond the location of questioning, though, the events in these cases bear no resemblance to Aguilar and Rodriguez’s conversation. In *Camaco*, employees who were not open union supporters were questioned about the time, place, and content of union meetings. *Camaco*, 356 NLRB 1182 at 1182-83. In *Central Valley*, the department foreman questioned an employee “How are your meetings? Where are they held at? What do they talk about?” and offered to assist the employee if compensation was the issue. *Central Valley*, 346 NLRB 1078 at 1080.

⁵ The ALJ does not find the location tended to increase the coerciveness of the conversation, but only that “[t]he Board has found interrogations under similar circumstances to be coercive and unlawful.” (ALJD p. 29 at 20-21).

Services Group, Inc., “[n]o reasonable employee in [Aguilar’s] place would have taken [Rodriguez’s] isolated and casual question as coercive” and uncontradicted “negative comments about the union . . . were lawful expressions of opinion” based upon Rodriguez’s previous experience as an employee-member of a union. *Trinity Services Group, Inc.*, 368 NLRB 115, slip op. at 3 (2019).

s. The ALJ Errored in Failing to Conclude that Tools Were Lawfully Provided to Maintenance Employees at The Holland Plant to Correct an Unfair Inconsistency with All Other Boar’s Head Plants

The ALJ’s conclusion that Respondent had “not met its burden of showing that the timing of the [providing hand tools to mechanics free of charge] was based on reasons other than the union organizing effort.” (ALJD p. 47 at 2-3). Contrary to this conclusion, the record demonstrates that Respondent changed the policy for a legitimate business reason, almost immediately upon becoming aware of the unfair and inconsistent treatment of the Holland mechanics, compared with those at o Respondent’s other facilities. The change was unrelated to the union organizing and the GC failed to present any evidence, other than timing, to contradict that fact.

The ALJ’s analysis never acknowledges that until August 9, 2017 Boar’s Head was unaware that the only company facility not paying for mechanics tools was the Holland plant. (Tr. 42: 12-23, 43: 8-11; 1525: 18-25, 1526: 1-8; 1528: 1-9). Habermehl testified that upon discovering the inconsistency, that same day, he personally contacted other facilities and instructed Facilities Director Guy Yando to check with all other facilities to determine whether there was in fact an inconsistency. (Tr. 65: 17 - 66: 7, Res. Exh. 11(a)). The following morning, August 10, 2017, after being informed of the tool policy inconsistency at the Holland plant, Vice President of Sales and Operations Larry Helfant sent an e-mail to Habermehl instructing him to ensure that all plants were consistent in providing tools to mechanics free of charge. (Res. Exh. 11(b)(1)).

Helfant also instructed Habermehl to give the Holland mechanics the option to be reimbursed for their tools or own their own tools. (Res. Exh. 11(b)(1); Tr. 1527: 18-24).

The ALJ incorrectly concluded, without record citation, that the Holland plant mechanics were required to pay for their PPE. (ALJD p. 43 at 36). That was never the case, and there is no record evidence to support that conclusion. The discovery of the failure to pay for tools at the Holland plant prompted a full review of exactly what was being supplied to employees at each facility. (Res. Exh. 11(c)-(e); Tr. 1527: 4-14). As Habermehl testified, “we wanted to get a list and make sure we’re consistent at all of our facilities.” (Tr. 1527: 4-11). This review underscores the legitimate business reason for the change in the tool policy at the Holland plant, and contradicts the conclusion that the timing was related to union organizing.

Habermehl testified that Helfant was concerned that providing different supplies to employees at different plants would cause the employees who travel from plant-to-plant to feel they were being treated differently. (Tr. 1526: 11 - 1528: 9). When asked if he knew why the Holland plant mechanics had not been provided tools, Habermehl responded:

A. I believe when they opened Holland, the rationale we got back they opened Holland in 1999 and I believe - - or ‘97, and when they asked the maintenance employees when they started up, they said we don’t want the company to buy us tools because we want better tools. We want our own. So they just didn’t do it. But we didn’t - - nobody knew that as far as the current management team.”

(Tr. 1528: 3-9).

The fact that management was unaware of the inconsistency is confirmed by Chief Human Resources Officer Frank Carzo’s August 14, 2017 email to Habermehl asking why the discrepancy existed. (Res. Exh. 11(c)). Respondent’s sole reason for changing the tool policy was to align the policy at the Holland plant with the rest of Boar’s Head facilities. *Id.*

The ALJ relied upon both the timing and, from his perspective, the lack of a reason for the policy change. (*See* ALJD p. 46-47). As the testimony and documentary evidence discussed above unequivocally demonstrate, Respondent's well-documented business reason for the change to the tool policy and its timing were unrelated to any union organizing.

The ALJ acknowledged that Habermehl made inquiries to other facilities regarding their tool policies, but the ALJ does not address the significance of the emails in Respondent's Exhibits 11(b)(1)-(e) or the testimony explaining the reason for the change. The correction of the Holland mechanics tool policy was directed by senior management within 24 hours of being made aware of the inconsistency with other plants. (Res. Exh. 11(b)(1)). Habermehl also testified that it was unrelated to the union organizing. (Tr. 1529: 22-25). Habermehl further testified the change was made to assure that all Boar's Head facilities had the same policy regarding tools and supplies. (Tr. 1530: 1-4). Habermehl's testimony is corroborated by emails between himself, Helfant, Yondo, and numerous of Respondent's employees located in Respondent's facilities throughout the country. (Res. Exhs. 11(b)(1)-(e)). Despite this plentiful record evidence, the ALJ failed to mention the Company's lawful, business justification, much less recognize its validity. In fact, just as with the change to Apolonia Rios's pay to properly compensate her consistent with her seniority following her demotion, had the change to correct the disparate treatment of the Holland mechanics regarding paid tools not been made, it would likely have provided a sufficient basis for a charge of discriminatory treatment in violation of Sections 8(a)(3) and (1).

t. The ALJ Erred by Mistakenly Concluding the Document Entitled "Boar's Head Brand" Contained an Unlawful Threat of Loss of Benefits

The Complaint at paragraph 10 alleges that Respondent threatened employees with loss of benefits, in a flyer, by telling them that negotiations would start from scratch. (G.C. Exh. 6). There is a threshold problem with that allegation since nowhere in GC's Exhibit 6 is there any

mention of “bargaining from scratch,” “starting from scratch,” or any phrase using the word “scratch.” *Id.* The ALJ, however, ignored the Complaint allegation and cited the last three lines of the flyer, which included the phrase “negotiated starting with zero or the minimum allowed by law.” (G.C. Exh. 6); (ALJD p. 9, at 16-17). The analysis of the use of the term is included in the ALJ’s discussion of the alleged use of that same term by Scott Habermehl in “at least one meeting with employees.” (ALJD p. 8 at 25-27). The ALJ uses a single phrase that appears in one line of the flyer to support his conclusion that Habermehl must have spoken those words in the meeting. (*See* ALJD p. 26 at 39). The ALJ conflates Shannon VanNoy’s affirmative answer to a general question about whether the contents of the entire flyer were “an accurate reflection and summation of the statements made by Habermehl in his meetings.” *Id.* He makes that statement despite Respondent’s Brief’s explanation that VanNoy confused GC’s Exhibit 6 and GC’s Exhibit 7, both of which were discussed at that point in her testimony and both were in front of her as she was testifying. (Tr. 854: 1-14).

Of much more significance, however, is the fact that VanNoy credibly testified that Habermehl never used the term “bargain from scratch” or “zero to minimum” or anything similar in any of his presentations. (Tr. 795: 2-6; 796: 15-18). VanNoy’s specific denials negate the conclusion that her generalized testimony about GC Exhibit 6 accurately summarizing Habermehl’s presentations confirms that Habermehl actually said anything contained in GC Exhibit 6 in any of his presentations.

The ALJ focuses substantial attention on how statements by employers such as “bargaining from scratch” violate Section 8(a)(1), despite the fact that he concluded that the evidence did not support that term having been used. (ALJD p. 7 at 30-31; p. 26 at 42-45; p. 27 at 1-14). More to the point, he stated the following:

On the other hand, such statements do not constitute a violation of the Act when the employer's other communications makes clear that any reduction in wages or benefits will occur only as a result of **the normal give and take of negotiations**. *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980) citing *TRW United Greenfield Division*, 245 NLRB 1135(1979); *Stumpf Motors Co., Inc.*, 208 NLRB 431 (1974); *BP Amico Chemical*, 351 NLRB 614, 617-618 (2007) (statements regarding loss of existing benefits are evaluated in terms of whether they are more reasonably construed as a result of union selection verses a "possible outcome of good-faith bargaining")

(ALJD p. 26 at 47; p. 27 at 1-7) (emphasis added).

The ALJ's decision failed to consider the full and repeated description of the bargaining process used by Habermehl in his meetings. (*See e.g.* Tr. 57: 3-8; 74: 16; 793: 20-25; 1068: 22-25; 1069: 1-6; 1124: 7-14; 1594: 3 – 1595: 7). Uncontradicted testimony throughout the record establishes that Habermehl clearly described the "give and take of negotiations" at every employee meeting. (*See e.g.* Tr. 57: 3-8; 74: 1-6; 795: 20 - 796: 12; 1068: 22-25; 1069: 1-6; 1124: 7-14; 1158: 6-24). As he and others testified, each time he covered negotiations, Habermehl presented the hypothetical situation where the union might propose a high wage, such as \$50 per hour, and the company could respond with a proposal of minimum wage, and through negotiations the parties would meet at some point in the middle. (Tr. 57: 3-8; 74: 1-6; 795: 20-25; 1068: 22-25; 1069: 1-6; 1124: 7-14). His description was simultaneously depicted by his hand gestures with one hand held high and the other low, and bringing them together as he described meeting in the middle through negotiations. (Tr. 74: 3-6; 1404: 10-14). No witness for the GC contradicted this testimony. In addition, Habermehl specifically denied that he ever said negotiations would start from the "minimum wage," "scratch," or anything similar. (Tr. 74: 18-24). Nor did he use the words alleged as unlawful in GC Exhibit 6, which is corroborated by the testimony of numerous witnesses. (Tr. 1066: 6-17; 1068: 4-15; 1122: 16 - 1123: 20.; 1158: 11-18; 1184: 14-22; 1185: 20-23; 1388: 15-23).

Notwithstanding the ALJ's erroneous conclusion that the last line of GC Exhibit 6 read in context is threatening, Habermehl clearly told employees at every meeting that any loss or addition to existing benefits would come through the give and take of negotiations. (Tr. 74: 3-6; 796: 19-23). Habermehl's description of negotiations as a give and take framed the employees' understanding about what might occur in bargaining if a union came in – not one line of a flyer about which not a single GC witness testified. Habermehl's repeated descriptions of the uncertain, give and take of negotiations contextualized the flyer's description of negotiations, and the ALJ failed to consider this contextualization.

u. The ALJ Erred by Concluding that the Term “Negotiate Zero to Minimum” or Similar Words Were Ever Spoken in Employee Meetings

The ALJ made a concerted but ultimately unsuccessful attempt to distinguish testimony from Shannon VanNoy and Rodolfo Rodriguez denying that statements such as “bargain from scratch” or “zero to minimum” were made during Scott Habermehl's meetings. VanNoy and Rodriguez were present at all of Habermehl's meetings and the ALJ could not in good conscience discredit their testimony. The ALJ concluded that Habermehl “in at least one meeting with employees, stated that if the Union came in, negotiations start at ‘zero to the minimum.’” (ALJD p. 8 at 25-27). In reaching that conclusion, the ALJ relied upon the testimony of union supporters Walter Aguilar and Apolonia Rios. (ALJD p. 6 at 41-46). In the process, he blithely dismissed Aguilar's contradictory testimony that he heard at least one of three different phrases: “bargain from scratch,” “could negotiate from zero to fifteen,” and/or “negotiations would start from zero or the minimum.” (ALJD p. 8, fn. 14). The ALJ went so far as to find Aguilar testified *inaccurately* that he heard “bargain from scratch,” but found this was an “honest mistake,” without providing any basis for that conclusion. *Id.* Eight other witnesses testified that none of those statements were ever made, including five employees that are fluent in Spanish (two

employees who translated the presentation from English to Spanish, and three others who were fluent in Spanish). (Tr. 795: 20-25; 1066: 6-17; 1068: 4-15; 1122: 16-1123: 20; 1158: 11-18; 1184: 14-22; 1185: 20-23; 1388: 15-23; 1227: 5-12; 74: 1-6; 1503: 1-9; 1509: 1 - 1510 : 5). The ALJ also failed to mention the critical fact that Rios admitted to leaving early from the meeting she attended. (Tr. 452: 16-19; 454: 6-8). Rios’s admission significantly diminishes her credibility because substantial, uncontradicted testimony confirms that the discussion of negotiations, during which Habermehl is alleged to have spoken the unlawful phrase, occurred at the end of his 45 to 50-minute presentation. (Tr. 795: 10-15; 853: 23-25; 53: 7-9; 793: 23-24; 1121: 3-5; 1225: 23-25). This raises obvious doubt about the inherent probability that Rios would have even been present at the point in the meeting when the alleged phrase would have been used. Instead, the ALJ does not address this substantial obstacle to Rios’s ability to credibly testify on this matter.

Aguilar testified that he attended Habermehl’s 6:30 am meeting on August 21, 2017. (Tr. 115: 8-9). He testified that in describing contract negotiations, Habermehl stated that if the union came in, the company would “bargain from scratch.” (Tr. 150: 23-25; 151: 1-7). He also testified that Habermehl said “zero to 15.” (Tr. 150: 20-22). Finally, he further testified that Habermehl said bargaining would start at “zero to the minimum.” (Tr. 117: 20-24). The ALJ credited the above testimony during the GC’s direct examination, but dismissed as “an honest mistake” his contradictory testimony, on two different occasions in his cross examination, that Habermehl said that they would “bargain from scratch” and that he heard these words translated to Spanish. (ALJD p. 8, fn. 14); (Tr. 150: 23-25, 151: 1-7). That testimony is as follows:

- Q. Aguilar, did Habermehl ever use the words “bargain from scratch”?
- A. Yes
- Q. So you heard him say “bargain from scratch”?

A. Yes, because that was what the translator said: that if the union came in, that was the risk.

(Tr. 150: 23 - 151: 3). However, Aguilar went on to contradict himself one more time and deny that Habermehl or any manager ever used the word “scratch.” (Tr. 154: 24-25; 155: 1-2). As Respondent has contended throughout and addresses in detail herein, bargain or start from scratch were never spoken or translated at any employee meeting.

In addition to Aguilar’s contradictory testimony as to what words were allegedly used by Habermehl, Aguilar’s testimony as to what if anything he actually heard is highly suspect. He stated on cross examination that he understands only “some words” in English, and therefore listened to Habermehl’s presentation in the translated Spanish version. (Tr. 147: 13-23). Yet he testified that he specifically heard “bargain from scratch” translated into Spanish. (Tr. 150: 23-25, 151: 1-7). The ALJ found that “the evidence does not establish that Habermehl used the exact phrase ‘bargain from scratch.’” (ALJD p. 7 at 30-31). Aguilar also testified in his direct examination that Habermehl said “they will negotiate from zero to minimum.” (Tr. 120: 6-8). However, both translators for the meetings testified that neither of those phrases were spoken by Habermehl and therefore they did not translate them. (Tr. 1122: 16-25; 1123: 10-20; 1227: 5-12; 1228: 25 – 1230: 2).

Habermehl made the same presentation at each of the five employee meetings in English. (Tr. 54: 15-19) Senior Human Resources Coordinator Vicente Nunez translated it to Spanish at the 6:30 am meeting on August 21, 2017, the meeting Aguilar attended. (ALJD p. 6 at 8-14, 42.) The four other meetings were translated by Human Resources Associate Rodolfo Rodriguez. *Id.* Rodriguez was present at the 6:30 am meeting attended by Aguilar but did not translate. (Tr. 1224: 16-24; 1225: 13-15). Shannon VanNoy, present at all of the meetings in their entirety,

testified that Habermehl never said, “bargain from scratch” or “zero to minimum.” (Tr. 794: 9-15; 795: 1-6)

At the time of trial, Habermehl had almost twenty-five years of industrial relations experience, most of them dealing with unions and union organizing. (Tr. 60: 18-19). He had made the same presentation over 100 times to Boar’s Head employees in Holland and other facilities. (Tr. 1494: 21-24). He denied ever using the terms “bargain from scratch” or “zero to minimum” at any employee presentation and there are no such words in his PowerPoint presentation. (Tr. 74: 11-24; G.C. Exh. 27). Nevertheless, the ALJ chose not to credit Habermehl. (ALJD p. 8 at 22-23). He stated that part of Habermehl’s testimony was “contradictory.” (*Id.* at 13, fn. 16). The ALJ found that Habermehl contradicted his sworn affidavit by denying he said that Respondent would start negotiations by proposing minimum wage. *Id.* The ALJ’s finding is directly contradicted by the record. (Tr. 73: 5- 74: 24).

Habermehl never said that Respondent would start negotiations by proposing the minimum wage. He testified that in describing the give and take of negotiations, at each meeting, he used a hypothetical situation where the union might propose a very high wage such as \$50 per hour, and the Company might respond with a low proposal of minimum wage and they would then negotiate to something in the middle. (Tr. 74: 1-24). He explicitly testified “**I never said, ever, that we would start *without any other context* from minimum wage, scratch, or anything else.**” (Tr. 74: 22-24) (emphasis added). His testimony was confirmed by that of seven other witnesses, three of whom were hourly employees. (Tr. 795: 17 - 796: 12; 1068: 22 - 1069: 21; 1123: 25 - 1124: 22; 1158: 6-10; 1184: 6-22; 1230: 3-25). Habermehl’s statement was not unlawful and it is not a contradiction of his affidavit testimony despite the ALJ’s erroneous assertion. *Hendrickson USA, LLC v. NLRB*, 932 F.3d 465, 472 (6th Cir. 2019) (finding even the

phrase “bargain from scratch” “lawful when the company makes clear that it is warning employees about the natural give and take of the bargaining process, in order to counter the idea that unionization will automatically increase compensation. *Hendrickson USA, LLC v. NLRB*, 932 F.3d 465, 472 (6th Cir. 2019). (finding even the phrase “bargain from scratch” “lawful when the company makes clear that it is warning employees about the natural give and take of the bargaining process, in order to counter the idea that unionization will automatically increase compensation.”); *see also Coach & Equip. Sales Corp.*, 228 NLRB 440, 440-41 (1977).

As previously noted, Rodriguez was also present at all five meetings and served as translator during the last four. (Tr. 1227: 5-12). He similarly testified that those words were never spoken by Habermehl. (Tr. 1229: 15-19). Rodriguez credibly testified that he would not have known how to translate “bargain from scratch” because the term does not exist in Spanish and he did not know what the English phrase meant until he began preparing for trial in this matter. (Tr. 1229: 1-14). He further testified that Habermehl never said the words “zero to minimum.” (Tr. 1229: 15-19). Rodriguez translated verbatim every word of the presentation. (Tr. 1226: 10-14).

The impossibility of translating “bargain from scratch” or “start from scratch” to Spanish is evident in the lengthy, on-the-record discussion between the ALJ and counsel for both sides during trial. (Tr. 150: 23 - 155: 1). Despite not crediting testimony that bargain or start from scratch was ever said, the ALJ nonetheless stretched the testimony to find that “zero to minimum” was used in at least one meeting. However, neither phrase was ever spoken by Habermehl or translated to Spanish in his employee meetings. Vincente Nunez similarly denied that either “bargain from scratch” or “zero to minimum” were spoken or that he translated them. (Tr. 1122: 16 - 1123: 14; 1140: 10-16). The ALJ did not credit Nunez’s denial, finding without analysis, he “was unsure of himself.” (ALJD p. 8, fn. 17) Nevertheless, to the extent he used that

description to find Nunez lacked credibility, it should be noted that after the testimony on a Complaint allegation of an unlawful promise of benefits involving a conversation between Nunez and employee Norma Chacon, the GC *withdrew the allegation*. GC's Post Hearing Brief to the ALJ at p. 2 fn. 2. Apparently, Nunez was credible in his denial that such a promise had been made to Chacon, but the ALJ chose not to comment on that matter.

The ALJ further misconstrued Nunez's testimony by incorrectly stating that Nunez mentioned "that Habermehl said bargaining would start at minimum wage." (ALJD p. 8, fn. 17). In fact, Nunez's testimony states the opposite of what the ALJ asserts. (Tr. 1125: 11-16). The ALJ cited the record at pages 1124 and 1125 to support this incorrect conclusion. (ALJD p. 8, fn. 17). Nunez specifically denied in this testimony that Habermehl said bargaining would start at the minimum wage. (Tr. 1125: 11-16). However, in addition to Nunez's specific denial that Habermehl said bargaining would start at minimum wage, Nunez's testimony cited by the ALJ also states that Habermehl used the term "minimum wage" only in describing a hypothetical situation where the union might propose a \$50 per hour wage and the company might respond with a "minimum wage" proposal, and they would then negotiate to some point in the middle, but no one knows what will happen. (Tr. 1125: 11-16; 1124: 4-15; 74: 1-24). Nunez, like numerous other witnesses, testified that while giving that explanation, Habermehl used hand gestures, with one hand held high and the other held low, in describing the contrasting proposals, and brought his hands together as he described the negotiation process of meeting in the middle. (Tr. 1124: 15-25). VanNoy and Rodolfo Rodriguez also confirmed this description of the process, both mentioning the use of the hand gestures. (Tr. 74: 1-24; 796: 3-14; 1230: 12-25).

Leah Cochran, a former Boar's Head Human Resources employee, who testified under subpoena, also denied that Habermehl ever said "bargain from scratch" or "zero" or that either of

these terms were translated to Spanish at any of the “two or three” meetings that she attended. (Tr. 1065: 15-17; 1066: 6-17; 1068: 4-15). Cochran is fluent in Spanish, has a college degree in Spanish, and while at Boar’s Head did both written and verbal translations. (Tr. 1034: 4; 1035: 4-18; Tr. 106: 7-13). Some of her critical testimony is as follows:

Q. Do you recall whether Scott used the term minimum wage during the course of the investigation -- of the presentation?

A. Yeah. So part of the explanation that he gives for contract negotiations is he gives the example and always uses his hands, and says the Union might suggest or start with \$50 an hour and Boar's Head could propose minimum wage. And you bargain and negotiate, and bargain and negotiate until you meet in the middle. And you could get more or you could get less. Nobody knows. Nobody can predict the future.

Q. And in your experience has he always used those same hand gestures in making that –

A. Yes.

Q. -- description?

A. Yes.

Q. And going in the presentation, did he say that Boar's Head would propose the minimum wage if the Union came in?

A. No.

Q. Did he say that current wages would be reduced to the minimum wage if the Union came in?

A. No.

Q. Did he say that employee benefits would be taken away or reduced if the Union came in?

A. No. He always says you could get more or you could get less. Nobody can predict the future.

(Tr. 1068: 22 - 1069: 21).

The ALJ did not discredit any of Cochran’s testimony, but he attempted to dismiss her clear contradiction of Aguilar’s testimony about the alleged words by concluding that “she did not specify which meetings she attended.” (ALJD p. 7 at 21-22). Thus, her testimony stands uncontradicted in all respects.

Employees Abigail Forsten, Gabriela Esquivel, and Jorge Torres all also denied that “bargain from scratch” or “zero to minimum” were ever used in the meetings they attended. (Tr. 1163: 5-

16; 1388: 15-23, 1389: 1-21; 1185: 19-23). As addressed in Section y of this Brief, contrary to the ALJ's conclusion, Abigail Forsten and Gabriela Esquivel both attended the same meeting as Aguilar. *Infra Section y*.

The ALJ made no mention whatsoever of the hand gestures, nor of the testimony confirming them, in Habermehl's description of the give and take of negotiations. Nor did he mention the credible testimony of the numerous witnesses who testified that Habermehl used the hand gestures to describe the negotiation process in the meetings they attended.

Critically, at no point in his decision did the ALJ find that VanNoy or Rodolfo Rodriguez were not credible. As noted, VanNoy testified that she attended all of Habermehl's meetings. (Tr. 794: 9-15). She testified that at each meeting Habermehl made the same statements and used the same hand gestures (Tr. 796: 3-12). Most importantly, she testified that he did not say that negotiations would "start from zero" at any of the meetings. (Tr. 795: 2-6). Nevertheless, the ALJ attempted to dismiss her testimony not by finding that it lacked credibility, but rather by making the irrelevant, non sequitur that "she does not speak Spanish." (ALJD p. 7 at 21). Habermehl spoke *only in English* that was translated to Spanish in the meetings. (Tr. 53: 12-13). Furthermore, while the word "zero" was never spoken at any of the meetings, that word is the same in English and Spanish. Irrespective of that fact, the ALJ's attempt to dismiss her testimony because she could not understand the Spanish translation fails, and further underscores the lack of veracity of Aguilar's and Rios' testimony, upon which the ALJ relied for his conclusion.

The ALJ acknowledged in his decision that Rodriguez was present at the first meeting, the 6:30 AM meeting attended by Aguilar. (ALJD p. 7 at 25). Just as with VanNoy, the ALJ did not find that Rodriguez's testimony was not credible. *Id.* Rather, the ALJ mischaracterized his testimony as supporting the fact that the allegedly unlawful phrase was used by Habermehl. (*Id.*

at 24-28). The ALJ stated that Rodriguez “alluded to hearing Habermehl mention statements similar to bargaining ‘from zero to minimum’, testifying that at some point Habermehl mentioned a ‘blank piece of paper’ when talking about negotiations.” (*Id.* at 25-28). The ALJ cited transcript pages 1223, 1224, and 1250 to support this conclusion. (*Id.* at 27-28) A careful review of those pages confirms that Rodriguez made no “allusion” to the phrase “zero to minimum” in any of his testimony on pages 1223, 1224, 1250, or anywhere else in the record. (*See* Tr. 1223-24, 1250).

Contrary to the ALJ’s assertion, the testimony on page 1223 involves Rodriguez’s knowledge of the speed of the line in the Boxing department, his contradiction of Aguilar’s testimony that employees on the Boxing production line were being injured because of the speed of the line, and whether he served as translator at Habermehl’s meeting. (Tr. 1223) The testimony on page 1224 deals with the number of employee meetings held and which meetings Rodriguez translated. (Tr. 1223-24). There is no testimony regarding what was said at the meetings. More importantly, there is not a single reference or allusion to the phrase “zero to minimum” or anything similar on either of those transcript pages. *Id.* The ALJ’s claim is unsupported by the record testimony he cites and another example of his reliance on claimed testimony that is non-existent.

Rodriguez’s testimony on page 1250 deals not with Habermehl’s meetings, but rather with meetings held by Larry Helfant. (*See* Tr. 1250). In his testimony, Rodriguez denies that Helfant said “negotiation would start from scratch.” (Tr. 1250: 11-16). That allegation was withdrawn by the GC. (GC’s Post Hearing Brief to the ALJ at fn. 2). The effect of that withdrawal in supporting Rodriguez’s credibility is not addressed by the ALJ. Additionally, Rodriguez testified that Habermehl used the term “minimum wage” in the same hypothetical example of

negotiations, including the hand gestures, testified to by Habermehl, VanNoy, Cochran, Nunez, and Gabriela Esquivel. (Tr. 1230: 3-19; 1068: 22-25; 1069: 1-21; 1124: 3-19; 1389: 3-12).

The ALJ characterized Rodriguez's testimony that Habermehl mentioned a "blank piece of paper" in a misleading manner. (ALJD p. 7 at 24-25). The full context in which these words were used in Rodriguez testimony is as follows:

Q. Did he say anything about contract negotiations? What happens in contract negotiations?

A. I remember him saying it's a blank piece of paper. So, you can get more or less. You never know.

(Tr. 1250: 17-20).

While the Board has held that such statements as "bargaining will start from a blank piece of paper" or "zero" violates Section 8(a)(1), it is so only where employees could reasonably believe that their current benefits or pay will be lost and can only be regained through negotiations.

Woodbury Partners, LLC, 352 NLRB 1072, 1074 (2008). The ALJ did not and could not claim what Habermehl said regarding negotiations was confirmation that such losses would automatically occur if the union came in. There is an abundance of uncontradicted testimony that Habermehl did not ever say that pay or benefits would be lost or that the employees would go to the minimum wage. (Tr. 1123: 18-20; 1231: 1-5) The record clearly demonstrates he did say that in negotiations "you never know what is going to happen," "you may get more," "you may get less," words to that effect. (Tr. 796: 19-23; 1197: 1-6; 74: 3-6; 795: 20-25; 1068: 22 - 1069: 6; 1124: 7-14.

The record confirms that Habermehl's employee meetings lasted somewhere between 45 minutes and one hour with most witnesses testifying they lasted 45 minutes. (Tr. 53: 7-9; 793: 23-24; 1121: 3-5; 1225: 23-25). Habermehl testified that his comments on negotiations came at the end of the presentation. (Tr. 1503: 24 - 1504: 8; 1594: 3-7). Shannon VanNoy testified that

the discussion of negotiations occurred in the last few minutes of the meeting. (Tr. 795: 7-12, 853: 23-25). Rodolfo Rodriguez testified that the negotiations portion of the meeting lasted 2 to 4 minutes and was at the end of the program. (Tr. 1227: 13-24). Nunez testified that Habermehl followed the PowerPoint as he was speaking. (Tr. 1141: 10-20; G.C. Exh. 27). The PowerPoint presentation itself confirms that the only slides that deal with union promises (negotiations) are slides 21 and 22, English and Spanish respectively, out of a 25-slide presentation. Habermehl testified that it was after slide 20 in the presentation when he discussed negotiations. (Tr. 1594: 8-15). The uncontradicted evidence therefore confirms that Habermehl's two to four-minute discussion of negotiations came near the end of his 45 to 50-minute presentation.

That fact is significant as it relates to Rios's testimony that she heard the alleged phrase. On cross examination, after several attempts to deflect the question about her full attendance at Habermehl's meeting, Rios was shown her affidavit. (Tr. 452: 6-19) In it, she confirmed that she left the meeting early for an appointment, as she finally admitted. (Tr. 452: 6-19, 453: 23-5; 454: 6-9). This fact raises serious questions regarding her testimony. Rios testified that Habermehl said "we will start at zero." (Tr. 395: 7-9). Those are not the same words that Aguilar alleges he heard in any of his three versions or that were alleged in the Complaint. In his rush to find that the words "zero to minimum" were spoken by Habermehl, the ALJ failed to even mention these critical discrepancies bearing on Rios's credibility, much less explain them away.

v. The ALJ Erroneously Credited Witness Walter Aguilar's Testimony Without Addressing Substantial Internal and Factual Inconsistencies and Inherent Probabilities Factoring Against the Accuracy of His Testimony

The ALJ found that the GC's witness, "[Walter] Aguilar appeared to be truthful and honest in his demeanor, and he testified consistently." (ALJD p. 8 at 1-2; p. 10 at 16-20). However, Aguilar's testimony is riddled with internal inconsistencies and faulty memory. He remembers

facts not included in his sworn affidavit months later at hearing, and the ALJ made findings directly contrary to Aguilar's testimony without addressing the discrepancies with that credited testimony. "[T]he weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole" should guide credibility determinations. *Hills and Dales General Hospital*, 260 NLRB 611, 615 (2014). Here, the ALJ strayed from this Board precedent.

Aguilar testified that during one of a series of five meetings held by Habermehl, that Habermehl stated alternately "on entering the workplace, that [the union] will be negotiating from zero to the minimum, and that a lot of benefits will be lost -- could be lost"; "the only thing that he said was that if the Union came in, they could negotiate from zero to 15, that was it"; and that Habermehl used the phrase "bargain from scratch" (Tr. 117: 22-24; 150: 20-22; 150: 23 - 151: 3). Aguilar quickly, though, reversed himself to say that neither Habermehl, nor any other manager or supervisor, ever used the word "scratch." (Tr. 154: 24 - 155: 2). The ALJ found that Habermehl never used "bargain from scratch" and arbitrarily dismissed Aguilar's direct self-contradiction by stating "I find that any assertion by Aguilar that the term 'bargain from scratch' was used in that meeting is attributed to being an honest mistake because he did not testify in a way that conveyed a willingness to deceive or a desire to be dishonest." (ALJD p. 8, fn. 14).

The ALJ's crediting of contradictory testimony is troubling on its face, but even more so in light of the fact that "start from scratch" was used in the GC's complaint initiating the case and Aguilar swore in his affidavit during the investigation to hearing the phrase . (Tr. 152: 10-20); GC Complaint para. 5(a)). The ALJ's analysis ignores these inconsistencies with Aguilar's testimony, affidavit, and the GC's Complaint, and ignores Board precedent holding that Aguilar's flawed testimony should not be credited. *Hills and Dales General Hospital* at 615.

Much of Aguilar's testimony contradicts other parts of his testimony, adds to his affidavit, conflicts with the ALJ's finding, and much of his testimony is inherently improbable given the conflicting testimony of numerous other witnesses and Aguilar's admittedly limited memory.

In addition to this inconsistent testimony, Aguilar also admits that he does not remember most of Habermehl's meeting, a second meeting he attended held by Larry Helfant, most of a conversation with his direct supervisor Guadalupe Rodriguez, or the events surrounding the distribution of union literature in the parking lot. (Tr. 118: 1-12; 149: 3-6; 125: 6-17; 169: 11-22; 183: 18 – 184: 5). Aguilar admits he does not remember well the majority of the events on which he provided testimony.⁶ *Id.* Aguilar first stated that more than half of Habermehl's 45-minute meeting addressed the issue of negotiations, but again quickly reversed himself to say “[t]hat was really fast,” and that Habermehl only made a single statement about negotiations. (Tr. 150: 9-22). Aguilar also testified that he passed out flyers in the parking lot every day that any employees passed out flyers, and that every day security told them to leave, but, again, soon after reverses himself to say that on the last day, security did not come out at all. (Tr. 225: 13-18; 227: 1-19). Similarly, Aguilar's testimony in support of the original allegation of denial of access must have been considered not credible by the GC since they chose to drop the allegation. GC's Post Hearing Brief to the ALJ at p. 2 fn. 2. In support of that original allegation, Aguilar testified four separate times that guards were telling employees every day “that we should get out of there, that we were not allowed to do it. (Tr. 128: 7-17; 131: 6-12; 211: 16-21; 212: 16-19). Despite the ALJ's finding that Respondent's security unlawfully surveilled employees distributing union literature in the parking lot **every day** it was alleged in the GC's Complaint, including the last

⁶ The ALJ faults numerous Respondent witnesses on this ground but does not once address Aguilar's or any of the GC's witnesses' deficiencies of memory with similar skepticism. (ALJD p. 8 at 13-18; p. 7 at 15-17; p. 10 fn. 19; p. 12 at 18-19; p. 12-13 at 43, 1-3; p. 20 fn. 40).

day, the ALJ made no attempt in his decision to address this discrepancy between Aguilar's fully credited testimony, nor the effect of the withdrawn original allegation on which he was a key witness. (ALJD p. 34 at 16-29). Further, although he did not recall Assistant Plant Manager Mark Emmons coming onto the parking lot during employees' distribution of union materials in his affidavit, three months later at trial Aguilar remembered Emmons being there. (Tr. 183: 18 - 184: 5).

Finally, in recounting the circumstances surrounding Respondent issuing discipline to Aguilar for encouraging a work slowdown, Aguilar responded: "Q. Did you tell any employees to slow down production? A. No. Q. What was the purpose of the comments you were making to your fellow workers? A. That they not work as fast in order for them not to injure themselves. (Tr. 250: 7-12). Aguilar capped off this exchange by again reversing his testimony that he had never complained to his supervisor or management regarding line speed or related injuries in the following admission: "[y]es, I talk to them, but nothing get done." (Tr. 160: 17-20; 255: 7-11). Findings based on Aguilar's contradictory, inconsistent, and improbable testimony must be reversed to the extent those findings rely on portions of his testimony that lack credibility.

w. The ALJ Erroneously Concluded That Employees Gabriela Esquivel and Abigail Forsten Were Not Present at The Employee Meeting Attended by Walter Aguilar

In one more clearly erroneous conclusion that is contradicted by the record evidence, the ALJ dismissed employee testimony that was at odds with that of Aguilar. He did so by finding that most of these employees did not attend the same meeting as Aguilar. (ALJD p. 7 at 11). Hourly employees Gabriela Esquivel and Abigail Forsten both testified that they attended the early morning, 6:30am meeting which the ALJ states was attended by Aguilar. (ALJD p. 6 at 42). The ALJ acknowledged that Forsten "denied hearing Habermehl say that negotiations would start

from scratch or zero” but did not credit her testimony contradicting Aguilar because “she did not specify which meeting she attended”. (ALJD p. 7 at 13-15). He also noted that “Gabriela Esquivel denied that Habermehl said bargaining would start from scratch or zero” but again failed to credit the testimony solely because “she did not indicate whether she attended the same meeting as Aguilar”. (ALJD p. 7 at 15-17).

Contrary to the ALJ’s claim, Esquivel testified as follows:

Q. Were you present at a meeting in August of 2017 at which Scott Habermehl spoke to employees.

A. Yes

Q. At what time of the day was that meeting?

A. Around 6:00, 6:30am

Q. Do you know what shifts were present for that meeting with you?

A. I don’t know. Part of the first and part of the third shift.

(Tr. 1387: 4-12). In addition to testifying that he attended the 6:30am meeting, Aguilar also confirmed as Esquivel testified, that the meeting included first and third shift employees. (Tr. 115: 4-9).

Employee Abigail Forsten also testified on cross-examination by the GC that she attended that same early morning employee meeting.

Q. All right. So the meeting that you testified about attending in August 2017, that was run by Scott Habermehl, what time was that meeting if you can recall?

A. I want to say it was probably around 7:00 am.

Q. Okay, and what shift do you work?

A. First

(Tr. 1166: 2-7).

Any possible claim by GC that it may have been a later meeting because of her response “around 7:00 am” is belied by the fact that each meeting lasted between 45 and 50 minutes. (Tr. 793: 23-24; 1121: 3-5; 1225: 23-25). No 7:00 am meeting could have occurred, so it could only have been the 6:30 am meeting she attended.

The ALJ's failure to take notice of this record testimony which clearly contradicts his erroneous conclusion that neither witness specified which meeting they attended is inexplicable.

In the case of Esquivel's testimony, the ALJ also stated, again contrary to the record evidence, "that she did not recall much about what happened in the meeting she attended." (ALJD p. 7 at 17-18). He cites transcript pages 1387-1390 in support of that conclusion. A thorough review of those transcript pages reveals that, contrary to the ALJ's assertion, Esquivel gave specific details not only of what occurred at that August 2017 meeting, but also what was said at a similar meeting that she attended in 2016. She also testified in detail about Habermehl's description of the negotiations process and his use of hand gestures to illustrate it. (Tr. 1389: 5-12). She further, and even more significantly, testified that Spanish is her primary language, but understands some English and that neither of the phrases "negotiations will start from zero" or "negotiations will start from scratch" were translated at the meeting. (Tr. 1389: 13-21). She confirmed this during the GC's cross examination in the following testimony:

Q. Okay. The term "start from scratch" is that a term that you would hear frequently in the Spanish language?

A. It's not very typical, but I have heard it before.

Q. And what did - - what do you understand that term to mean?

A. To start from the bottom. To me that's how I understand it.

Q. Okay. And that's how you understand it in August of 2017?

A. If I had heard that, that's how I would have heard that, understood that

(Tr. 1401: 4-14) (emphasis added).

During re-cross examination, apparently in an unsuccessful effort to undermine her obviously damaging testimony, the GC had the following exchange with Esquivel after a number of questions about any contact or meetings with the Boar's Head attorneys before testifying:

Q. Because they're on the same side as the Company and you're on the same side as the Company.

A. I'm not on the side of the Company. I am talking about what I think about what happened, what I have heard.

Q. You were against the Union is that right?

A. I'm not against or in favor.

(Tr. 1412: 18-23). No more clear evidence of lack of bias that might affect her credibility could be presented.

Employee Abigail Forsten, as noted previously, was quite clear in both her direct examination as well as cross examination that Habermehl did not say either "bargain from scratch" or "negotiations will start from zero". (Tr. 1158: 11-18).

Q. Would you have remembered if Scott had said that negotiations would start from scratch?

A. Yeah, I would remember that.

Q. Why would you remember that?

A. It would upset the employees to start from zero

(Tr. 1158: 19-24).

Finally, employee Jorge Torres, who testified in English and additionally speaks Spanish, also testified that Habermehl did not use the words "negotiations will start from scratch" or "negotiations will start from zero" at any time during the presentation that Torres attended. (Tr. 1184: 14-22; 1185: 11-13). He further confirmed that he did not hear either of those terms translated to Spanish in the meeting. (Tr. 1185: 11-23). The ALJ acknowledged that Torres denied that Habermehl said, "negotiations would start from scratch or zero." (ALJD p. 7, at 11-13). However, the ALJ relied upon the fact that Torres attended the afternoon employee meeting and not the same 6:30 am meeting attended by Aguilar. Nonetheless, his testimony further confirms the uncontradicted testimony of VanNoy, Rodolfo Rodriguez, and several others that those words were not used in any employee meeting.

In testifying about the words used by Habermehl in talking about negotiations Torres stated:

Q. Would you have remembered if he had said either that negotiations would start from zero or negotiations would start from scratch?

A. Yes.

Q. Why would you remember that?

A. I've been there for more than 12 years. I would have been worried if I had to go back to zero or the minimum wage.

(Tr. 1185: 3-10). The numerous examples of testimony contradicting Mr. Aguilar fully confirm that Mr. Habermehl never spoke the words found unlawful by the ALJ. The conclusions of fact and law regarding the allegation in the Complaint should be reversed.

V. CONCLUSION

Based upon the foregoing, Boar's Head respectfully requests that the Board find that the preponderance of the evidence supports Respondent's exceptions to the ALJ's Decision, vacate and reverse the Decision, and/or modify the ALJ's findings, conclusions of law, and recommended Remedy, recommended Order, and recommended Notice, accordingly.

**UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL UNION**

Charging Party,

v.

BOAR'S HEAD PROVISIONS CO., INC.,

Respondent.

Consolidated Case Numbers:
07-CA-209874; 07-CA-212031

CERTIFICATE OF SERVICE

The undersigned, on behalf of Respondent, Boar's Head Provisions Co., Inc. (Boar's Head), filed and sent a true and correct copy of Respondent Boar's Head Provisions Co. Inc.'s Brief in Support of Its Exceptions to the Decision of the Administrative Law Judge, e-filed this day, June 11, 2020, in the NLRB Office of Executive Secretary/Board, and to the parties by email at the addresses set forth below:

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