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**MEMORANDUM* OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(FEBRUARY 2, 2022)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WISMETTAC ASIAN FOODS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 20-73768

NLRB Nos. 21-CA-207463,
21-CA-208128, 21-CA-209337, 21-CA-213978,
21-CA-219153, 21-CA-212285

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

WISMETTAC ASIAN FOODS, INC.,

Respondent.

No. 21-70142

NLRB Nos. 21-CA-207463,
21-CA-208128, 21-CA-209337, 21-CA-213978
21-CA-219153, 21-CA-212285

On Petition for Review of an Order of the
National Labor Relations Board

Submitted January 13, 2022**

Before: GOULD, BENNETT,
and R. NELSON, Circuit Judges.

Wismettac Asian Foods, Inc. (“WLA”) petitions for review of the National Labor Relations Board’s (“NLRB” or “the Board”) decision that WLA violated §§ 8(a)(1), 8(a)(3) of the National Labor Relations Act (“NLRA”).¹ We have jurisdiction under 29 U.S.C. § 160 and affirm. We also hold that the Board is entitled to summary enforcement of the finding that WLA violated § 8(a)(1) by promising compensation for rejecting the union. Because the parties are familiar with the facts, we do not recount them here, except as necessary to provide context to our ruling.

“Decisions of the NLRB will be upheld on appeal if the findings of fact are supported by substantial

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

¹ 29 U.S.C. §§ 158(a)(1), 158(a)(3).

evidence and if the agency correctly applied the law.” *Loc. Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008). “[W]e may not ‘displace the NLRB’s choice between two fairly conflicting views, even though [we] would justifiably have made a different choice had the matter been before [us] de novo.’” *Sever v. NLRB*, 231 F.3d 1156, 1164 (9th Cir. 2000) (first alteration added) (citations omitted).

1. The Administrative Law Judge (“ALJ”) found that WLA violated §§ 8(a)(1), 8(a)(3) by demoting Ruben Munoz, terminating Pedro Hernandez, and suspending and terminating Alberto Rodriguez. “To establish an unfair labor practice, the [NLRB] must show an unlawful motivation either to discourage union membership or to interfere with the exercise of protected rights.” *NLRB v. Nevis Indus., Inc.*, 647 F.2d 905, 909 (9th Cir. 1981). If the Board makes this showing, “the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.” *United Nurses Ass’ns of Cal. v. NLRB*, 871 F.3d 767, 778–79 (9th Cir. 2017) (citations and quotation marks omitted).

The ALJ’s finding that WLA’s adverse actions against Munoz, Hernandez, and Rodriguez violated §§ 8(a)(1), 8(a)(3) was supported by substantial evidence. WLA knew of the three employees’ support for the union. WLA indicated hostility toward the union; for example, manager Frank Matheu said that “under no condition[] would he allow . . . the Union to come into the company.” Matheu conceded that at least one allegation in a written warning against Munoz was false and that he did not know of at least one stated reason for Rodriguez’s dismissal. WLA’s stated reasons for firing Hernandez were unsubstantiated and shifted.

Matheu told Hernandez that he was let go because his contract expired and gave no other reason, but Matheu testified before the ALJ that Hernandez was fired due to unsubstantiated claims of creating a hostile work environment. This evidence provides substantial support for the ALJ's findings. *See Healthcare Emps. Union, Local 399 v. NLRB*, 463 F.3d 909, 922 (9th Cir. 2006) ("[A] flimsy or unsupported explanation may affirmatively suggest that the employer has seized upon a pretext to mask an anti-union motivation." (alteration in original) (quoting *NLRB v. Dillon Stores*, 643 F.2d 687, 693 (10th Cir. 1981))).

2. The ALJ found that WLA violated §§ 8(a)(1), 8(a)(3) by refusing to re-hire Hernandez, Fanor Zamora, and Jeremiah Zermenio. Refusing to hire an applicant because of his union activities is an unfair labor practice. *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1362 (9th Cir. 2011) (citing *FES, a Div. of Thermo Power*, 331 N.L.R.B. 9, 12 (2000)). In determining if an employer refused to hire an applicant due to union activities, the Board applies the motivation test from *Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), as stated in *FES*:

(1) that the [employer] was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

FES, 331 N.L.R.B. at 6 (footnotes omitted) (citing *Wright Line*, 251 N.L.R.B. at 1083). If the Board “meets this *prima facie* burden, thus creating an inference that union animus was a motivating factor in the decision to hire, the employer must . . . demonstrate that it would have made the same decision in the absence of the discriminatees’ union affiliation.” *Blaylock Elec. v. NLRB*, 121 F.3d 1230, 1233 (9th Cir. 1997) (citation omitted).

As to the first *FES* factor, WLA made at least 21 new hires in warehouse positions after Hernandez, Zamora, and Zermenio applied. As to the second *FES* factor, Hernandez, Zamora, and Zermenio applied for the positions they had worked in before their dismissal. As to the third *FES* factor, WLA knew or likely knew that these employees supported the union. WLA many times showed hostility toward the union. And a finding of unfair labor practices does not require an employer to discriminate against every known employee who supports the union.

3. The ALJ’s finding that WLA violated § 8(a)(1) by soliciting employees to revoke union authorizations is supported by substantial evidence. *See NLRB v. Deutsch Co., Metal Components Div.*, 445 F.2d 902, 906 (9th Cir. 1971). WLA mailed employees a letter explaining how to revoke authorization with a sample revocation letter attached. WLA held meetings in which sample revocation forms were distributed, and its labor consultant told workers in those meetings that “the Union is not going to win” the election. The consultant testified that WLA wanted to explain “how can [employees] get rid of this union? How can [employees] retrieve [their] union authorization card . . . because [employees are] tired of this?” But there is

no evidence that any employee ever inquired with WLA about revoking union authorization.

There is also substantial evidence of a coercive environment. Following the union's recognition request, WLA stationed armed security guards at the entrance to the warehouse. The day before the first union election, WLA held a mandatory meeting at which armed security guards stood in front of the door. At the meeting, Matheu said that "under no condition[] would [Matheu] allow . . . the Union to come into the company."

4. As WLA does not dispute that it violated § 8 (a)(1) by promising to compensate workers for rejecting the union, the Board is entitled to summary enforcement of this portion of its order. *See Gardner Mech. Servs., Inc. v. NLRB*, 115 F.3d 636, 643 n.2 (9th Cir. 1997). The other findings that the Board claims were uncontested (addressed above) were contested.

AFFIRMED.

**NLRB BOARD DECISION, ORDER, AND
ORDER REMANDING BY CHAIRMAN RING
AND MEMBERS KAPLAN AND EMANUEL
(OCTOBER 14, 2020)**

NATIONAL LABOR RELATIONS BOARD,
WASHINGTON, D.C. 20570

WISMETTAC ASIAN FOODS, INC.

and

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 630

and

ROLANDO LOPEZ

Cases: 21-CA-207463, 21-CA-208128,
21-CA-209337, 21-CA-213978, 21-CA-219153,
and 21-CA-212285

On August 30, 2019, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. In addition, the General Counsel filed limited cross-exceptions with supporting argument.¹

¹ On November 22, 2019, the Board granted the General Counsel's unopposed motion to sever Case 21-RC-204759 from the above-captioned cases and remand it to the Regional Director. The

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and

case caption has been amended to reflect the severance of the representation case.

2 The Respondent has excepted to some of the judge's credibility determinations. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has excepted to the judge's finding that it violated Sec. 8(a)(3) and (1) by issuing Alberto Rodriguez a written warning on December 21, 2017. However, the Respondent does not state in either its exceptions or brief in support of any grounds on which the judge's purportedly erroneous finding should be reversed. Therefore, in accordance with Sec. 102.46 (a)(1)(ii) of the Board's Rules and Regulations, we shall disregard this exception. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

We adopt the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by refusing to consider for rehire and refusing to rehire discriminates Pedro Hernandez, Fanor Zamora, and Jeremiah Zermenio. We leave to the compliance stage of this proceeding the determination of whether the Respondent is required to rehire these discriminatees directly, as opposed to through a temporary employment agency.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by refusing to consider for rehire and refusing to rehire Jeremiah Zermenio, we recognize that Zermenio used profanity during the meeting at which the Respondent announced that the staffing agency Ranstad was terminating

its contract with the Respondent. However, once the General Counsel met his initial burden of proof under *Wright Line*, the Respondent had to do more than merely articulate a legitimate reason for its actions against Zermenio in order to meet its defense burden. *See Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Rather, it had to establish that it would have taken the same actions absent Zermenio's union activity. *See, e.g., Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). We find that the Respondent failed to make this showing.

In affirming the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by discharging, demoting, or otherwise disciplining Ruben Munoz, Alberto Rodriguez, and Pedro Hernandez, we do not rely on the Respondent's use of labor consultants to investigate the discriminatees' alleged misconduct. Instead, we rely on the other evidence cited by the judge, including that the Respondent departed from its standard investigatory practices and failed to conduct a full and fair investigation of the alleged misconduct, including by failing to interview the discriminates or their immediate supervisors.

Contrary to our colleague, we affirm the judge's finding that the Respondent violated Sec. 8(a)(1) by soliciting employees to revoke their union authorization cards in March 2018. In determining whether an employer's assistance is unlawful, the appropriate inquiry is "whether the Respondent's conduct constitutes more than ministerial aid." *Times-Herald, Inc.*, 253 NLRB 524 (1980). "[A]n employer may lawfully inform employees of their right to revoke their authorization cards . . . as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." *Mariposa Press*, 273 NLRB 528, 529 (1984). In other words, the actions to inform employees of their right to revoke their authorization cards must be taken in circumstances devoid of coercion. *See, e.g., Mueller Energy Services*, 333 NLRB 262, 262 fn. 1 (2001). In the present case, the Respondent's distribution of information letters and sample revocation forms took place while challenges and objections were pending with respect to a second

election, which recently culminated with the certification of the Union's representative status. *Wismettac Asian Foods, Inc.*, 21-RC-204759 (unpublished order, Sept. 4, 2020). Consequently, employees would reasonably view the Respondent's actions as a coercive attempt to undermine the results of that election and to invalidate the Union's representative status at a time when no challenge to that status could be raised. Our colleague is correct that employees have the right to revoke their authorization cards after the election, although any such revocation cannot undo the election vote. The issue presented here, however, is whether an employer can offer unsolicited information about revocation after a Board election. We find that it cannot do so. *See, e.g., Adair Standish Corp.*, 290 NLRB 317, 318 (1988), enfd. in relevant part 912 F.2d 854, 860 (6th Cir. 1990) (finding that the employer's notice that directed employees to their supervisors to obtain forms to revoke their authorization cards was unlawful where, among other things, the notice was posted "immediately after the [u]nion's election victory that the [r]espondent vehemently opposed"). Further, our colleague is mistaken in contending that the Respondent could lawfully do what it did because the election outcome was not finally determined until much later. Its actions reasonably tended to preempt the electoral process and prospectively interfere with the Union's customary irrebuttable status as unit employees' exclusive bargaining representative for a year following certification. Moreover, if the final result had been a vote against union representation, the need to provide information about revocation of union authorization cards would be moot.

Member Emanuel would reverse the judge's finding that the Respondent violated Sec. 8(a)(1) by informing employees of their right to revoke their union authorization cards and providing employees with sample revocation forms. An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance or otherwise creates a situation in which employees would tend to feel peril in refraining from such revocation. *R. L. White Co.*, 262 NLRB 575, 576 (1982). Here, there is no evidence that the Respondent attempted to

ascertain whether employees revoked their authorization cards. Nor is there any evidence that the Respondent threatened or coerced employees to revoke their cards. Moreover, the aid rendered by the Respondent, supplying information and sample revocation forms, constituted mere ministerial assistance. *See, e.g., Ernst Home Centers, Inc.*, 308 NLRB 848, 848 (1992); *Mariposa Press, supra*, 273 NLRB at 529–530. Member Emanuel recognizes that the Respondent committed other unfair labor practices. However, these violations, while serious, did not create an atmosphere where employees would tend to feel peril in refraining from revoking their authorization cards. There is no link between the violations and the card signing process, and most of the violations were remote in time. Furthermore, in its letter informing employees of their right to revoke their authorization cards, the Respondent assured employees that the decision was their “individual choice” and that there would be “no adverse job consequences” whether or not they revoked their cards. *See Mariposa Press, supra*, 273 NLRB at 530. *See also AdvancePierre Foods, Inc.*, 366 NLRB No. 133, slip op. at 4 fn. 9 (2018) (Member Emanuel, dissenting in part), enfd. 966 F.3d 813 (D.C. Cir. 2020).

Unlike his colleagues, Member Emanuel would not find the Respondent’s conduct unlawful based on its timing, shortly after the second election. Under Sec. 7, the employees retained the right to revoke their authorization cards after the election and the Respondent did no more than truthfully inform them of that right using language that was factually and legally accurate, in response to the employees’ inquiries. At the time the Respondent did so, moreover, the outcome of the election was unknown. There were pending objections and 54 determinative challenged ballots. The objections and challenges were not resolved, and the Union’s representative status was not determined, until more than 2 years after the Respondent apprised the employees of their right to revoke their authorization cards. In these circumstances, Member Emanuel does not agree with his colleagues that employees would reasonably view the Respondent’s actions “as a coercive attempt to undermine the results of that election and to invalidate the Union’s representative status at a time when no challenge to that status could be raised.” The majority’s reliance on *Adair, supra*, 290 NLRB at

conclusions and to adopt the recommended Order as modified and set forth in full below.³

The complaint alleged, and the judge found, that the Respondent violated Section 8(a)(1) of the Act by issuing Rolando Lopez a verbal counseling on December 5, 2017. In so finding, the judge relied on the four-factor *Atlantic Steel*⁴ test in concluding that the Respondent failed to show that Lopez lost the Act's protection when he voiced employees' concerns during a safety meeting. However, after the issuance

318, is misplaced. In *Adair*, the Board relied on two factors that are not present in this case. First, the Board found that the employer "put[] employees 'in the limelight and on the spot' in a manner inconsistent with their basic Section 7 right freely to choose whether to engage in or refrain from union activities" by directing them to their supervisors to request revocation forms. *Id.* Second, the Board found that the coercive impact of the employer's conduct "was not mitigated by any employer assurances against reprisals for failing to request a form." *Id.* In Member Emanuel's view, these factual differences provide significant grounds for distinguishing *Adair* from the present case. Accordingly, Member Emanuel would dismiss this allegation of the complaint.

³ The General Counsel's limited cross-exceptions noted certain inadvertent errors in the judge's conclusions of law, remedy and recommended order. We correct these inadvertent errors, which do not affect the disposition of this case.

We have amended the judge's conclusions of law consistent with our findings herein. We have also amended the remedy and modified the judge's recommended Order consistent with our legal conclusions herein, to conform to the Board's standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We have substituted a new notice to conform to the Order as modified.

⁴ *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

of the judge's decision, the Board decided *General Motors LLC*, 369 NLRB No. 127 (2020). There, the Board held that it would no longer apply the four-factor *Atlantic Steel* test to determine whether employers have unlawfully discharged or otherwise disciplined employees who allegedly engaged in abusive conduct in connection with activity protected by Section 7 of the Act. The Board held that it will now analyze these cases under the Board's *Wright Line* standard, and it decided to apply the standard retroactively to all pending cases. Because the parties have not had an opportunity to address how *Wright Line* applies to this Section 8(a)(1) allegation, we will sever and remand this allegation (set forth in paragraph 7 of the complaint) to the judge for further proceedings consistent with this decision, including reopening the record, if necessary, to allow the parties to introduce evidence relevant to an analysis of the allegation under *Wright Line*.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for paragraph 2 of the judge's conclusions of law.

By disciplining, demoting and changing the work shift of Ruben Munoz, disciplining, suspending and terminating Alberto Rodriguez, terminating Pedro Hernandez, and refusing to rehire and refusing to consider for rehire Pedro Hernandez, Fanor Zamora, and Jeremiah Zermenio, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

2. Delete paragraphs 4–6 of the judge's conclusions of law.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily issued Ruben Munoz a written warning, demoted him, and changed his shift, we shall order the Respondent to rescind the unlawful warning, to remove from its files all references to these unlawful actions, and to notify Munoz in writing that this has been done and that the discipline, demotion, and shift change will not be used against him in any way. The Respondent shall offer Munoz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner described below regarding backpay.

Having found that the Respondent discriminatorily terminated Pedro Hernandez, we shall order the Respondent to remove from its files all reference to his termination and notify him in writing that this has been done and the termination will not be used against him in any way. In addition, we shall order the Respondent to make him whole for any loss of earnings and other benefits suffered as a result of his termination in the manner described below regarding backpay. However, because we will order the Respondent to offer Hernandez reinstatement to remedy its unlawful refusal to rehire him, we shall omit as

duplicative a reinstatement remedy for Hernandez's discharge.

Having found that the Respondent discriminately issued Alberto Rodriguez a written warning and suspended and terminated him, we shall order the Respondent to rescind the warning, to remove from its files all references to the unlawful discipline, suspension, and termination, and to notify Rodriguez in writing that this has been done and that the discipline, suspension, and termination will not be used against him in any way. The Respondent shall offer him full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner described below regarding backpay.

Having found that the Respondent refused to rehire and consider for rehire Pedro Hernandez, Fanor Zamora, and Jeremiah Zermenio, we shall order the Respondent to remove from its files all references to the refusal to rehire and consider for rehire and notify them in writing that this has been done and that the refusal to rehire and consider for rehire will not be used against them in any way. These individuals are entitled to the remedy for unlawful refusal to rehire—instatement and backpay—which subsumes the remedy for the Respondent's unlawful refusal to consider them for rehire. *Jobsite Staffing*, 340 NLRB 332, 333 (2003). The Respondent shall offer them full reinstatement in the positions for which they would have been rehired absent the Respondent's unlawful discrimination or, if those jobs no longer exist, to

substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed, discharging, if necessary, any employees hired in their place. The Respondent shall make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner described below regarding backpay.

Backpay for Pedro Hernandez, Alberto Rodriguez, Fanor Zamora, and Jeremiah Zermenio shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Additionally, the Respondent shall be required to compensate Pedro Hernandez, Alberto Rodriguez, Fanor Zamora, and Jeremiah Zermenio for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016).

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall also compensate Pedro Hernandez, Alberto Rodriguez, Fanor Zamora, and Jeremiah Zermenio for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate

prescribed in *New Horizons*, *supra*, compounded daily as prescribed in *Kentucky River Medical Center*, *supra*.

Backpay for Ruben Munoz shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, *supra*, compounded daily as prescribed in *Kentucky River Medical Center*, *supra*. In addition, we shall order the Respondent to compensate Ruben Munoz for any adverse tax consequences of receiving a lump-sum backpay award, and file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, *supra*.

We agree with the judge that a notice-reading remedy is warranted in the circumstances here. We shall accordingly order the Respondent to hold a meeting or meetings during working hours at its Santa Fe Springs facility, scheduled to have the widest possible attendance, at which the attached notice marked "Appendix" shall be read to employees in English and in Spanish by a high-ranking responsible management official of the Respondent in the presence of a Board agent and a union representative if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a high-ranking responsible management official and, if the Union so desires, a union representative.⁵

⁵ In the absence of exceptions, Member Emanuel affirms the notice reading remedy in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Wismettac Asian Foods, Inc., Santa Fe Springs, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Promising employees better benefits and improved terms and conditions of employment if they reject the Union as their bargaining representative.
 - (b) Promising to give employees back their bonuses and retroactive pay if they reject the Union as their bargaining representative.
 - (c) Soliciting employees to revoke their union authorization cards.
 - (d) Disciplining, demoting, suspending, terminating, and/or changing the work shift of employees because of their support for and activities on behalf of the Union.
 - (e) Refusing to consider for rehire or refusing to rehire employees because of their support for and activities on behalf of the Union.
 - (f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, offer employees Ruben Munoz and Alberto Rodriguez full reinstatement to their former

jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

- (b) Within 14 days from the date of this Order, offer employees Pedro Hernandez, Fanor Zamora, and Jeremiah Zermenno full reinstatement in the positions for which they applied, or if those positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed, discharging if necessary any employees hired in their place.
- (c) Make employees Ruben Munoz, Pedro Hernandez, Alberto Rodriguez, Fanor Zamora, and Jeremiah Zermenno whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the amended remedy section of this decision.
- (d) Compensate Ruben Munoz, Pedro Hernandez, Alberto Rodriguez, Fanor Zamora, and Jeremiah Zermenno for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

- (e) Within 14 days from the date of this Order, rescind the unlawful written warnings issued to Ruben Munoz and Alberto Rodriguez.
- (f) Within 14 days from the date of this Order, remove from its files any reference to the written warning, demotion, and change in work shift of Ruben Munoz; the unlawful discharge of Pedro Hernandez; the unlawful refusals to rehire Pedro Hernandez, Fanor Zamora, and Jeremiah Zermenio; and the written warning, suspension, and discharge of Alberto Rodriguez, and within 3 days thereafter, notify these employees in writing that this has been done and that the discharges, written warnings, demotion, change in work shift, and suspension will not be used against them in any way.
- (g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (h) Post at its facility in Santa Fe Springs, California, copies of the attached notice marked "Appendix" in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized

representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2017.

- (i) Hold a meeting or meetings during working hours at its Santa Fe Springs facility, scheduled to ensure the widest possible attendance of employees, at which the attached notice will be read to the employees in English and in Spanish by a high-ranking responsible management official of the Respondent in the presence of a Board agent and a union representative or, at the Respondent's option, by a Board agent in the presence of a high-ranking responsible management official of

the Respondent and, if the Union so desires, a union representative.⁶

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

IT IS FURTHER ORDERED that the allegation set forth in paragraph 7 of the complaint that the Respondent violated Section 8(a)(1) by issuing Rolando Lopez a verbal counseling record on December 5, 2017, is severed and remanded to Administrative Law Judge Eleanor Laws for the purpose of reopening the record, if necessary, and preparing a supplemental decision addressing the allegation under the Board's *Wright Line* standard, setting forth credibility resolutions, findings of fact, conclusions of law, and a

⁶ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted and read within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted and read within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted or read until a substantial complement of employees have returned to work. Any delay in the physical posting of the paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member
(SEAL)

Dated, Washington, D.C. October 14, 2020

**NOTICE TO EMPLOYEES POSTED
BY ORDER OF THE NATIONAL
LABOR RELATIONS BOARD**

AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

Federal Law Gives You the Right to

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promise employees benefits and improved terms and conditions of employment if employees reject the Union as their bargaining representative.

WE WILL NOT promise to give employees back their bonuses and retroactive pay if employees reject the Union as their bargaining representative.

WE WILL NOT solicit employees to revoke their union authorization cards.

WE WILL NOT discipline, demote, suspend, terminate, and/or change the work shift of employees because of their support for and activities on behalf of the Union.

WE WILL NOT refuse to consider for rehire or refuse to rehire employees because of their support for and activities on behalf of the Union.

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

WE WILL, within 14 days from the date of the Board's Order, offer employees Ruben Munoz and Alberto Rodriguez full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer employees Pedro Hernandez, Fanor Zamora, and Jeremiah Zermenno full reinstatement in the positions to which they applied, or if those positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed, discharging if necessary any employees hired in their place.

WE WILL make employees Pedro Hernandez, Alberto Rodriguez, Fanor Zamora and Jeremiah Zermenno whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest, and WE WILL also make Pedro Hernandez, Alberto Rodriguez, Fanor Zamora and Jeremiah Zermenno whole for reasonable search-for work and interim employment expenses, plus interest.

WE WILL make employee Ruben Munoz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, plus interest.

WE WILL compensate Ruben Munoz, Pedro Hernandez, Alberto Rodriguez, Fanor Zamora, and Jeremiah Zermenio for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the written warning, demotion, and change in work shift of Ruben Munoz; the unlawful discharge of Pedro Hernandez; the unlawful refusals to rehire Pedro Hernandez, Fanor Zamora, and Jeremiah Zermenio; and the written warning, suspension, and discharge of Alberto Rodriguez, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that these unlawful actions will not be used against them in any way.

**NLRB ADMINISTRATIVE LAW
JUDGE, DECISION AND REPORT ON
CHALLENGES AND OBJECTIONS
(AUGUST 30, 2019)**

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WISMETTAC ASIAN FOODS, INC.

and

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 630

and

ROLANDO LOPEZ

and

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 630

Cases: 21-CA-207463, 21-CA-208128,
21-CA-209337, 21-CA-213978, 21-CA-219153,
21-CA-212285, 21-RC-204759

Before: Eleanor Laws,
Administrative Law Judge.

ELEANOR LAWS, Administrative Law Judge.
This case was tried in Los Angeles, California, on
several dates between October 2, 2018, and January

22, 2019. The General Counsel issued the amended consolidated complaint for Cases 21-CA-207463, 21-CA-208128, 21-CA-209337, 21-CA-213978, 21-CA-212285, and 21-CA-219153, on July 19, 2018, based on various charges filed by the International Brotherhood of Teamsters, Local 630 (the Union or Charging Party). Wismettac Asian Foods, Inc. (the Respondent, Company, or Employer) filed a timely answer denying all material allegations. On September 6, 2018, these cases were consolidated for hearing with Case 21-RC-204759.

The complaint alleges numerous violations of Sections 8(a)(3) and (1) of the National Labor Relations Act (the Act) surrounding two elections for representation. Both the Union and the Employer also filed election objections and challenges to certain ballots.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. Jurisdiction

The Respondent, a corporation, imports and distributes Asian foods at its facility in Santa Fe Springs, California. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7). The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Facts

1. Background and the Respondent's operations

Wismettac Asian Foods is a Japanese food distributor. The Company distributes food to restaurants, grocery stores, and wholesalers. Wismettac has total of 16 branches in the United States, and three in Canada. None of Wismettac's facilities are unionized. The facility in Santa Fe Springs, California (the Los Angeles facility), at issue here, has roughly 135 employees, including warehouse workers, drivers, administrative employees, supervisors and managers. National headquarters for Wismettac resides in offices within the Los Angeles facility.

Robert Susaki, who lives in Tokyo, owns Wismettac. During the relevant time period, Takayuki Kanai was the Company's president and chief executive officer (CEO). Frank Matheu was the acting deputy general manager, reporting to Yoshinori Narimoto, the director of logistics. Matheu, who is based on Orlando, Florida, oversees 9 of the Respondent's 16 U.S. facilities. Ronald Minch was national distribution logistics general manager.

Human resources (HR) in Los Angeles serves the entire United States. Hikari Konishi was the HR manager during the relevant time period. Atsuhi Fujimoto was the planning and recruiting manager, and Jinna Baik was the employee relations (ER) specialist. Wismettac uses temporary agencies to help with staffing. The agencies Wismettac uses are decided at the corporate level, but the branch managers are

responsible for communicating with those agencies to fulfill staffing needs.

Anthony Vasquez, sometimes referred to as Jose Vasquez, was the warehouse supervisor and later the logistics branch manager, which is also referred to as the plant manager, at the Los Angeles facility. As plant manager, Vasquez supervised all warehouse employees. Vasquez reported to Matheu.

Isidro Garcia was the warehouse assistant manager on the night shift until December 2017.¹ Christian McCormick became the warehouse assistant nightshift manager on October 16, 2017. McCormick moved to the

¹ Garcia has worked at Wismettac since 2005, first as a warehouse worker, then as the freezer supervisor, export associate, and as assistant warehouse manager for more than 6 years. As assistant warehouse manager he supervised warehouse employees and some drivers. In later November or early December 2017, asked for a demotion because his wife about to give birth, and he wanted to spend more time with his family. He was demoted to headquarters associate, working in the front office. From December 26, 2017–February 5, 2018, Garcia was suspended for showing favoritism to employees. This was the only discipline he received in his 14 years at Wismettac and he did not agree with it. (Tr. 71–72, 100.)

Abbreviations used in this decision are as follows: “Tr.” for transcript; “R Exh.” for the Respondent’s exhibit; “GC Exh.” for the General Counsel’s exhibit; “U Exh.” for the Union’s exhibit; “GC Br.” for the General Counsel’s brief; “R Br.” for the Respondent’s brief, and “U Br” for the Union’s brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based my review and consideration of the entire record.

The General Counsel submitted a motion to correct the transcript, which is hereby granted.

day shift in early January 2018, and Gerber Flores (Ge. Flores) became the nightshift supervisor. Garcia, McCormick, and Ge. Flores reported to Vasquez. Warehouse workers check and load merchandise, and assemble, receive, sort, and store merchandise in the various departments including freezer, deli and dry.² Drivers load merchandise onto trucks and deliver it to customers in the Southern California area.

The Los Angeles facility is housed in a single building. There is a two-story front office where managers and most clerical employees work. The warehouse and delivery docks for the trucks are down a hallway from the front office. (R Exh. 4.) Neither drivers nor warehouse workers have any office space in the front offices, and they spend no working time in that area. (U Exh. 1; Tr. 65.) Employees use badges to access various parts of the facility. Employees who work in the front office can access the main front offices and the warehouse entrance with their badges. Drivers and warehouse workers cannot access the front offices with their badges. (Tr. 96–97.)

2. The Union and early organizing drive

Wismettac employees contacted the Union in the Spring of 2017 to explore organizing the warehouse

² Drivers start between 5:00 and 7:00 a.m., and finish when their routes are completed. Warehouse employees testified that warehouse workers had two shifts, a day shift and night shift. (Tr. 41, 135) while Matheu testified that there were three shifts, with a first shift starting at around 6:00 a.m., a second, small shift starting at around 9:00 a.m., and a third, overnight shift starting at 5:00 p.m. (Tr. 786.) Vasquez testified that warehouse workers are divided into day and night shifts, with some assemblers working a shift in between. (Tr. 639–640.)

workers and drivers. Lou Villalvazo was the secretary-treasurer and principal officer of the Union. Carlos Quinonez and Oscar Ruiz were organizers for the Union assigned to the Wismettac campaign.

The Union organized a committee of about 10–12 employees (the union committee) in February or March 2017, and the broader organizing campaign for drivers and warehouse employees began in April. Union committee members educated themselves about their rights and communicated relevant information about the Union and the organizing drive to their co-workers. The union committee met every couple of weeks. Committee members included Luis Lopez (L. Lopez), Rolando Lopez (R. Lopez), Ronald Mena, Thao Ho, Fanor Zamora, Alberto Rodriguez, John Long, Yader Alvarado, and Carlos Katayama.

In August 2017, The Union distributed T-shirts with the Teamsters logo to about 70 employees. Because drivers wear uniforms, they could not wear the Teamsters T-shirts at work, but instead wore buttons with the Teamsters logo and the phrase, “Respect is in a union contract”.³ Vasquez observed some employees wore the T-shirts almost every day, and others wore them on Fridays. (Tr. 650.)

3. Request for voluntary recognition

The morning of August 21, 2017, a delegation of about 60 employees, accompanied by Quinonez and Villalvazo, went to Nishimoto’s office to request union recognition. The employees wore union T-shirts

³ The Union distributed buttons to 28 of Wismettac’s 32 drivers.

and sang union chants.⁴ They approached Narimoto with authorization cards and Villalvazo asked him to acknowledge the Union and negotiate a contract. Minch intervened, declined to sign the paperwork acknowledging the Union, told Villalvazo he needed to consult with their legal counsel, and asked them to leave. The employees walked back to the warehouse along with Quinonez and Villalvazo. Minch approached and asked the union officials to leave, which they did. There were no threats, assaults, or any other malfeasance associated with the delegation. (R Exh. 13.) The delegation lasted about 15 minutes. (Tr. 224, 304–305.)

4. Events leading up to the first election

The Union filed an election petition with the National Labor Relations Board (the Board) the afternoon of August 21, 2017. The unit was described as:

Included: All full-time and part-time regular drivers class A, B, C and Leads. All full-time and part-time Warehouse workers and Leads in all departments (all shipping and receiving, All Export depts-State, International, dry, cooler, freezer, all forklift drivers, whse clerks, inventory control, assemblers /selectors, labelers)

⁴ There were three chants: The first was a pride chant about being a Teamster, the next was “No justice, no peace, no union no peace,” and then “sign it” as they were asking Minch to acknowledge the Union. For ease of reference, the videos on the flash drive for R Exh. 13 are the same as those uploaded in the Board’s case management system, Employer videos 1–6, dated October 12, 2017.

Excluded: All other employees, office clericals, professional employees, guards, supervisors, and all employment agency workers as defined in the Act.

(GC Exh. 1(a).)

That same day, the Respondent hired labor consultants Gustavo Flores (G. Flores), Carlos Flores (C. Flores), Ed Hinkle, and David Acosta, to help persuade employees not to vote for the Union.⁵ The Respondent also hired guards following the delegation and filing of the petition. The guards, who had visible firearms, were stationed at the gate at the entrance to the warehouse and remained in place at the time of the hearing. (Tr. 1479–1480, 1561, 1701.) They opened the gate for employees, which was locked following the delegation. Guards had not been at the facility prior to the delegation and the filing of the representation petition. (Tr. 1479–1480, 1560–1561.) Matheu testified that Narimoto told him employees were frightened and that was the reason for hiring the security. (Tr. 1701.)

In late August, Narimoto asked Matheu to spend more time in Los Angeles to fix some operational problems and assist with the union campaign. Matheu arrived the Monday after Labor Day, September 5, 2017.⁶ Matheu's goal was "to look at the efficiency of the

⁵ Matheu confirmed the labor consultants were hired to help keep the Union out, and evidence shows they were initially hired from August 21, 2017, through September 19, the day of the first election. (Tr. 885; GC Exh. 55.) LRSI, the firm the labor consultants work for, primarily specializes in union avoidance. (Tr. 1060.)

⁶ The last time he had been to the Los Angeles facility was January 2017. Matheu's general practice beginning on September 5

operation, while at the same time, try and fix some of the issues the employees were having.” (Tr. 794.) Specifically, Matheu stated:

[W]hen I first arrived the day after Labor Day, I got word from upper management, which is owner, vice president, that they would support me in anything that operation needed that we could legally do. For example, I mean, equipment, obviously, you know, we needed to buy some. You know, that was cost-involved. I had the green light to get that done.

(Tr. 807.) Matheu was also concerned with high turnover on the night shift. Matheu met with the labor consultants to learn what behaviors he needed to avoid in terms of the union campaign. He was told to avoid “SPIT”: spying, promising, interrogating and threatening employees. (Tr. 794–796.)

The labor consultants met with employees in small groups, usually about 8–10 employees at a time. Matheu was at the meetings for support, stating, “If anybody has a question, relating to the operation, I would be there to answer them.” (Tr. 806.)

L. Lopez has been a driver for Wismettac for more than 11 [sic] years. His brother, R. Lopez, has been a driver for six years. On September 8, 2017, Matheu and G. Flores met with L. Lopez and R. Lopez in one of Wismettac’s conference rooms. Matheu told them the owner had given him a “green light” to make improvements in the Company, and he would make these changes as long as there was not a third party.

was to come to Los Angeles for the week and return home to Florida for the weekends.

When asked he meant by a third party, Matheu responded that if the Union came in, he could not make the improvements or changes. G. Flores called the organizing drive revenge and instructed the Lopez' to ask for guarantees from the Union. Matheu reminded the Lopez' that the Respondent's Maryland facility had rejected the Union, and encouraged them to do the same. (Tr. 121–122, 343.)

Shortly after the September 8 meeting, L. Lopez was at the warehouse loading his truck when Matheu approached him. Matheu asked if L. Lopez needed help, and L. Lopez said he did not. Matheu then told L. Lopez to think about giving the Company the opportunity to make improvements. Matheu said the owner had given him the power to make changes, he knew that the Company had taken away the bonuses and they had not paid the retroactive pay, and he was going to bring it back. (Tr. 128.)

Yadar Alvarado, a driver who has worked for Wismettac or 13 years, was a member of the union committee. On a Monday morning, Matheu approached Alvarado by the timeclock, and said he had bought new machines for the employees. Matheu said these changes were only the beginning, and encouraged Alvarado to give him more time to make other changes. He also said he would do what was possible within his reach to restore bonuses and retro pay. (Tr. 558–559.)

About seven drivers, including Ronald Mena, Frank Reyes, Alex Ayala, Augustine Troncoso, Enrique Medina, Yadar Alvarado, and Jaime Martinez, were called to a meeting with labor consultant G. Flores and Matheu in mid-September 2017. G. Flores introduced Matheu, who said he had the green light to

make necessary changes, but he needed some time. Mena asked Matheu if he was willing to sign a legal document regarding the changes.⁷ Matheu looked at G. Flores, and responded that he would not sign a document. (Tr. 556–557, 394.) Mena replied, “how is it that you have a green light and you have to consult with a person who knows nothing about the company and you are listening to what he says, to not sign anything that we propose to you. So then, you don’t have a green light like you say.” (Tr. 395–396).

Matheu, along with Wismettac’s owner, Robert Susaki, and Narimoto, conducted a series of meetings with employees on September 15 and 18, 2017. Matheu prepared talking points for these meetings, which stated:

1. My background-Quick pinpoint on how I was taught respect, dedication to people, and more importantly, the word of as a man.
2. When I arrived I was very disappointed. (We have not done a good job as a company)
3. I felt your frustrations
4. No control of both operations and tools needed to do the job
5. That hit me personally-because you are my responsibility, you are my priority as employees/people
6. As the one 100% responsible for the operations of this branch.

⁷ Mena had worked as a driver for about 8 years at the time of the hearing.

7. There will be changes
8. I know what is going on here and you will notice my support
9. I don't want 3rd party who does not care about you or the company.
10. What I saw in the video was disgusting
11. It was disrespectful and cowardly
12. Those are the people you want to represent you?
13. Let me do my job-you don't need to pay me
14. Give me the chance to do what I love doing-making a difference
15. Let's bring respect and tradition back to the operation.
16. Proper communication
17. Fix root of problems
18. Bring back appreciation for your efforts
19. I will now have full support from upper management, they will listen, I will justify, and will change whatever needs to be changed to improve work environment, and give you what you need to get the job done

Now here is Mr. Narimoto.

(GC Exh. 56; Tr. 892.)

Warehouse and office employees attended the September 15 meetings in the lunchroom. The owner, Susaki, was present at the meeting, along with managers and supervisors as well as the labor consultants. Matheu recalled Susaki discussing the struggles the

Company went through as it was getting started, and telling employees they needed to get better, and they would try to accommodate employees.⁸ (Tr. 848–849.) Susaki said he would not allow a third party to come in, and he would not sign any document from the Union.⁹ (Tr. 522.)

Matheu then talked to employees about his values, stating he came from a strong military background and family, and was taught to value respect and truthfulness. He told employees he found the delegation disrespectful and he did not want to deal with a third party. (Tr. 891–892.) He told them that coming from 3,000 miles away, he was not going to waste their time not doing anything, but instead would listen to employees and fix the things he could legally fix right away. (Tr. 851.) Warehouse employees Thao Ho, Jesus De Leon,¹⁰ and Fanor Zamora attended this meeting and recalled Matheu telling the workers that he would make the changes employees needed. (Tr. 146, 522, 374.)

On September 18, the Respondent held a meeting with the drivers in the cafeteria at 5:30 a.m. Susaki,

⁸ Matheu expressed some uncertainty in his memory, stating in reference to Susaki's comments, "Yeah that's about it. Yeah, I don't know much about it." (Tr. 849.) Susaki did not testify.

⁹ This testimony was from Thao Ho, who goes by "Tim" and worked in the warehouse as a stocker on the dayshift. He has worked for Wismettac for 27 years. (Tr. 516.) Ho was an extremely credible witness. His demeanor was no-nonsense and he appeared sincere. This testimony is also unrefuted.

¹⁰ De Leon worked as a warehouse employee on the day shift as a receiver, unloading merchandise and then was in the freezer department as a picker assembler. He left Wismettac in May 2018. (Tr. 368–369.)

Matheu and Narimoto were present for management. The security guards were also present at the meeting. (Tr. 1562.)¹¹ Susaki distributed a notarized document stating that nothing would happen to them if Wissmettac failed to become a union shop, and stated he would not allow a third party to control his company. (Tr. 1520.)

Matheu expressed his belief that the August 21 delegation showed a lack of respect. He reiterated that he had a green light to make changes as long as the Union was not elected in. Matheu said he grew up with the Company, he did not want to share it with strangers, and told employees to think about their votes in the union election. Alvarado, R. Lopez, and L. Lopez recalled Matheu saying he was going to change things and make it better for the employees as long as the Union or a third party was not involved. (Tr. 126–127, 346, 553–556.)

5. The stipulated election agreement and first election

In the wake of the petition for election, the parties worked to reach a stipulated agreement. The Union agreed to the Respondent's request to include temporary employees in the Unit. (Tr. 1614–1615.) The Union also agreed to add 13 employees in four categories, subject to challenge: GPO distribution coordinators, GPO central purchase clerks, logistics office clerks, and central purchase clerks. (U Exhs. 50–52, Tr. 1620, 1623, 1629.) The parties signed the stipulated election agreement on August 30, 2017.

¹¹ This meeting was held in English but translation was offered through the use of headphones.

The first election occurred on September 19 for the following unit:

INCLUDED: All full-time and regular part-time class A, B, and C drivers, warehouse clerks, inventory control employees, assemblers/selectors, labelers, forklift drivers, warehouse employees, and leads in all departments, including the shipping and receiving department, state department, international export department, dry department, and cooler freezer department, and employees in the job classifications described herein who are supplied by temporary agencies, employed by the Employer at its facility currently located at 13409 Orden Drive, Santa Fe Springs, California.

EXCLUDED: All other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

Others permitted to vote: The parties have agreed that GPO Distribution Coordinators, GPO Central Purchase Clerks, central Purchase clerks, and Logistics Office Clerks may vote in the election but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

(R Exh. 17.)

The Union prevailed, with 75 votes cast for the Union, 21 against, 2 void ballots and 31 challenged ballots. The Respondent refused to sign the tally of ballots and both the Respondent and the Union filed objections. (GC Exh. 1(aj); U Exh. 57.)

Shortly after the first election, employees met in Wismettac's parking lot to learn about the objections and how things would proceed. Employees Hernandez, Zamora, Zermenio, and Munoz were among those present. (Tr. 115, 138, 337–338, 548–549.) Employees L. Lopez, Zamora, and R. Lopez saw Vasquez, Matheu, and Narimoto looking out the window of the office toward the parking lot. Narimoto came out to smoke. R. Lopez saw Garcia looking out the window, and Pedro Hernandez saw Vasquez and Garcia looking out the window. (Tr. 473.) Alvarado saw Garcia, Narimoto, Vasquez, and Minch. (Tr. 549.) Vasquez saw the meeting via security camera but could not make out faces. He was watching the meeting because he wanted to go home. Jose Romero, a supervisor, watched the video next to Vasquez and both men left when the meeting ended without discussion. (Tr. 673–674.)

The first election was set aside due to misconduct on the part of a Board Agent.

6. Ruben Munoz letter of warning and demotion

Ruben Munoz has worked for Wismettac for 11 years. He worked in the warehouse on the day shift. He was promoted to lead of the dry department on the night shift in April 2017 based on his demonstrated knowledge and skills. As lead, Munoz reported to Isidro Garcia, the assistant warehouse manager and night shift supervisor.

Munoz started attending union meetings in August 2017 and wore a union T-shirt on Fridays. He spoke to other employees about the Union and was part of the August 21 delegation.

In late September 2017, the Union provided Munoz with an offer of proof the Respondent had filed in support of the first election. In the offer of proof, the Respondent stated Munoz had operated a forklift in an unsafe manner against employees who did not support the Union, and otherwise intimidated such employees. (GC Exh. 47.) The offer of proof specifically mentioned Jose Rosas as a recipient of Munoz' intimidation. Munoz spoke to his supervisor, Garcia, about the incident, who denied receiving any complaints about Munoz. At Garcia's instruction, Munoz went to see Human Resources Manager Hikari Konishi, and expressed concerns that his reputation was being hurt by the offer of proof. Munoz told Konishi the accusations were untrue, and that he did not operate the forklift as part of his duties unless there was an emergency. (Tr. 419, 434, 446–447.)

Rosas was a known union opponent who regularly wore an antiunion T-shirt to work. (GC Exh. 47.) He worked in the freezer department where Ge. Flores was the lead.¹² Rosas wrote a statement about his complaints regarding Munoz on October 18, 2017. (GC Exh. 62.). In October, Matheu, along with labor consultants G. Flores, and C. Flores, met with employee Walter Vargas, another known Union opponent, and Rosas at Rosas' house. (Tr. 854–856. 944.) Vargas said that Munoz harassed him and he felt afraid to

¹² Rosas did not work in the dry department where Munoz was lead.

ask him questions. Vargas also said that Munoz drove his vehicle aggressively, crashed into employees, and humiliated employees who did not build pallets to his standards. (Tr. 854; GC Exh. 59.)

Matheu and G. Flores also met with Oscar Ortiz, another a known union opponent, outside the facility. (Tr. 944.) As lead, Munoz had reported Ortiz to management for using obscene and foul language Around September 2017, Munoz informed their supervisor, Garcia, that Ortiz told employees he was a “piece of shit,” “to send me to hell,” “to go fuck my mother,” and other insults, and he brought witnesses who heard the comments on one occasion. (Tr. 444, 451–453.) During the meeting with Matheu and G. Flores, Ortiz complained to Matheu that Munoz was aggressive with his direction. (Tr. 456, 857, 907.) Supervisor Garcia was not involved in either of these meetings. (Tr. 944.)

Ortiz prepared an undated statement relaying his dissatisfaction with Munoz for a variety of reasons. Ortiz reported that Munoz said he was faking a back injury. Ortiz also stated that he had heard coworkers say Munoz was pushing people to vote for the Union. (GC Exh. 61.) Vargas also prepared an undated statement, which states, “Ruben asked me what I talked about with Gustavo and multiple people asked me what I talked about with him. He is an attorney, he is not from the company.” (GC Exh. 58.)

Matheu relayed the employee complaints to ER specialist Baik. (Tr. 859.) On October 23, 2017, Matheu issued a written warning to Munoz for unsafe operation of company equipment and unprofessional conduct. Specifically, the warning stated:

- We received complaints from your colleagues that you operate your fork lift backward, with the pointy part in the front.¹³
- Several employees reported that you crashed into racks and pallets, and drove unsafely without honks which startled your coworkers.¹⁴ You drove aggressively and almost hit your coworkers. As a result, merchandises fell off from the rack and your coworkers do not feel comfortable working around you.
- You are spreading a rumor about your co-worker's injury that your coworker made up his injury.
- We received a report from several employees regarding your antagonistic and aggressive behavior towards your coworkers. You have threatened your coworkers by stating that if they do not follow your order, they are not going to work here. And you yell at fellow coworkers and talk down on them, creating a very hostile workplace.

(GC Exh. 2.) The written warning was signed by Matheu as supervisor. At the meeting where the discipline was issued, Munoz asked HR Manager Konishi to show him evidence regarding the allegations, which she declined to do. (Tr. 432–433.)

¹³ Matheu admitted this part of the discipline was in error. (Tr. 947.)

¹⁴ No employees were identified other than Rosas, Vargas, and Ortiz.

Matheu said he consulted with Narimoto and Senior Vice President Toshi Nishikawa and decided to demote Munoz because his temperament and character did not fit the lead position. (Tr. 859–860.) On October 25, 2017, Ruben Munoz was demoted from his position as nightshift lead assembler, at a pay rate of \$20.55 per hour, to the position of dayshift assembler, at a pay rate of \$18.95 per hour. (GC Exhs. 2, 48; Tr. 436.) Matheu knew Munoz supported the Union. (Tr. 944.)

Munoz did not know a Wismettac employee named Jose Rosas. (Tr. 419.) He had not received any prior discipline in his 11 years with the Company.

7. Termination of temporary contract employees and re-hiring

On October 24, 2017, Diana Meza, senior branch manager at the temporary staffing agency Ranstad, sent Fujimoto a letter notifying him that Ranstad was terminating its staffing agreement with Wismettac. She cited the following reason:

Randstad's termination of the Agreement is due to Wismettac's breach of Section 13 ("Independent Relationship"), which provides:

Both parties agree that this Agreement is not intended to create nor shall be deemed or construed to create any relationship between the parties other than that of independent entities contracting with each other solely for the purpose of effecting the provisions of this Agreement. Neither the parties hereto, nor any of their respective employees, shall

be construed to be the agent, employer, employee or representative of the other, nor will either party have any express or implied right of authority to assume or create any obligation or responsibility on behalf of or in the name of the other party.

Randstad received notice on October 18, 2017 that Wismettac violated this provision on at least three separate occasions (August 30 2017, September 12, 2017, and October 11, 2017) by representing in writing to third parties, including a government agency (the National Labor Relations Board), that Wismettac is the employer of Randstad's employees. Wismettac did not notify or obtain Randstad's consent prior to making these submissions.

(GC Exh. 29.) Meza concluded her letter by stating Ranstad would work with Wismettac to ensure the employees were on-boarded as Wismettac employees.

That same day, Fujimoto sent an email to all branch managers informing them that Ranstad had terminated the staffing agreement with Wismettac. He stated, "The main reason is because their temps on assignment were involved in NLRB union voting that took place in Los Angeles Branch, which they didn't authorize." (GC Exh. 22.) Fujimoto informed the managers they could either: (1) convert the temporary employees to Wismettac employees, with a potential conversion fee; (2) roll the employees over to another temp agency; or (3) end the worker's assignment. Fujimoto sent a follow-up email on October 31, notifying the managers that they could either convert the Ranstad employees to Wismettac employ-

ees or end their assignments by or before November 23.

On October 31, Vasquez and Matheu held a meeting with the employees working through the Respondent's contract with Ranstad. He informed the employees that the contract with Ranstad had ended, but they could apply to work for Wismettac directly. (Tr. 148, 477, 591.) The daytime employees were laid off effective immediately, and the nighttime employees were permitted to work until the Ranstad contract ended. Matheu allocated additional staffing in the afternoon to make sure there were sufficient employees when the lines came in, and so he decided to let the morning shift go and retain the afternoon/evening shift. (Tr. 861–865.)

Wismettac terminated the assignments of the following warehouse workers employed through Ranstad on October 31: Trammel Age, Henry Garcia, Pablo Ramirez, Thoeun Kong, Deoun Kong, Phandy Suon, Pedro Hernandez, Fanor Zamora, and Jeremiah Zermenio. Christopher Jiminez' assignment was terminated on November 21, 2017. Wismettac terminated the assignments of Dwayne Turpin and Cassandra Massenburg on November 22. The following individuals continued to work for Wismettac through a different temporary agency: Van Thang, Khuaih Shine, Lamar Lomax, Nathaniel Falson, Eduardo Contreras, Harumi Tomimura, Jamaal Parris, Luis Guzman, and Samuel Tavares. Aurelio Leon was converted to a Wismettac employee on December 4, 2017. (GC Exh. 23.)¹⁵ Marcus Mack worked continu-

¹⁵ R Exh. 14 purports to be a chart of what happened to the temporary employees, but the General Counsel was able to show, through Fujimoto's testimony, that it was incomplete

ously for Wismettac because he was rolled over to Spectrum staffing agency on November 23, and eventually became a permanent employee. Walter Vargas and Eric McLoughlin were also rolled over to Horizon staffing agency on November 23. (GC Exh. 51; Tr. 1022–1023.)

On November 1, 2017, Fujimoto sent Diana Meza from Ranstad a list of the dayshift employees whose assignment had ended the previous day: Trannell Age, Henry Garcia, Christopher Jimenez, Thoeun Kong, Deoun Kong, Phandy Suon, Fanor Zamora, and Jeremiah Zermenio. As discussed more fully below, he informed her at Pedro Hernandez was being terminated. Fujimoto concluded by saying he would get back to Meza regarding whose assignments were ending and who would be converted to a Wismettac employee. (GC Exh. 45.)

There were 53 positions budgeted for warehouse employee positions at the beginning of October 2017, all but 5 of which were filled by the end of the month. (GC Exh. 5; Tr. 1013.) In November, around 21 temporary employees were hired through staffing agencies, including Horizon and Cornerstone. (Tr. 1020–1021; GC Exh. 24.) Wismettac hired new temporary employees in November and December 2017. (Tr. 690, 925.)

8. Pedro Hernandez termination and failure to re-hire

Pedro Hernandez worked for Wismettac through Ranstad from June 2017 through October 2017.

(Tr. 1018–1019). It is therefore not considered as reliable evidence.

During the relevant time period, he was a forklift driver on the night shift. Hernandez spoke to employees about the Union and wore his union T-shirt every Friday, including after the September 19 election.¹⁶ (Tr. 466–467, 503.) He was also at the meeting in the parking lot following the first election.

After the October 31 meeting, Matheu told Hernandez that his contract was finished, and he no longer worked for Wismettac. (Tr. 480.) The other nightshift employees were permitted to work through the end of the Ranstad contract on November 23. (Tr. 930; GC Exh. 51.) Matheu did not give Hernandez a reason for his immediate termination other than the Ranstad agreement ending.¹⁷ (Tr. 481, 508.)

Labor consultant G. Flores had told Matheu that Vargas, a known Union opponent, had alleged Hernandez created a hostile work environment on the p.m. shift. (Tr. 870.) In October 2017, Matheu, with G. Flores and C. Flores accompanying him, interviewed Vargas at Rosas' house. (Tr. 854-856, 898-901, 1045–1048.) This is the same meeting where Munoz' alleged creation of a hostile environment in the dry department was discussed. Matheu's interview notes regarding what Vargas said state, “called me dumbass”, “Union will win”, “clapping and calling me dumbass.”

16 Matheu knew Hernandez supported the Union. (Tr. 946.)

17 Matheu testified he told Hernandez the reason for the termination. I credit Hernandez' account on this point because his testimony was more straightforward and as the employee being let go, the conversation had much more of an impact on him than on Matheu. In addition, Matheu's testimony was in response to a leading question that does not directly reference the reason Matheu gave for Hernandez' termination. (Tr. 870–871.)

They also state that Hernandez treated Vargas abusively, showed discriminatory behavior, was slave-like and abusive, and said he would beat him and kick his “—”. (GC Exh. 59.) Matheu never spoke to Hernandez about these accusations. (Tr. 934–935.)

Vargas’ own notes about Hernandez state, “Pedro the Machinist. He is telling the new people that if they are going to vote, to vote for the union. He spends his time conversing with them.” (GC Exh. 58.)

On November 1, Fujimoto informed Meza that Hernandez’s assignment had ended “due to behavioral/performance issues, as well as operational changes within his Department.” (GC Exh. 45.) The reason stated for Hernandez’ termination on a spreadsheet maintained by Wismettac is “Ended assignment due to Ranstad terminating service.” (GC Exh. 23.) At the hearing, Matheu testified Hernandez was terminated for “creating a hostile environment in the p.m. shift, refusing to help employees, being offensive to them.” (Tr. 869.)

Hernandez applied directly to Wismettac on November 1. (GC Exhs. 49–50.) He also applied through temporary agencies CornerStone and Horizon but was not hired. On November 1, Marla Orabuena from Cornerstone emailed Garcia to inform him Hernandez could start at Wismettac the next day. Garcia responded by email stating, “Can we wait on Pedro Hernandez. I think he was a stocker of ours that we just let go of. Can you send information before moving forward?” (GC Exh. 26.) On November 2, 2017, a female representative from Cornerstone called Hernandez and told him to hold off on his drug test because Wismettac did not want him back. (Tr. 488–489.)

Hernandez was never disciplined while at Wismettac. (Tr. 494.)

9. Jeremiah Zermenno failure to re-hire

Zermenno worked for Wismettac through Randstad as an order puller on the day shift from March 2017 through his termination. (Tr. 584-585.) Zermenno attended several union meetings, and spoke to employees about the Union. He wore a union T-shirt on Fridays both before and after the election, and wore a union pin every day starting the week of the election. (Tr. 587-589.) He also attended the meeting in the parking lot following the election.

During the October 31 meeting where Matheu informed him and other employees they were immediately terminated, Zermenno expressed frustration, saying that he could have taken a “fucking job” he was offered at \$18 per hour. (Tr. 659.) As he was leaving the meeting, Zermenno said to nobody in particular that this was “bullshit.” (Tr. 593.)

On November 2, 2017, Matheu told Ashley Anagnos from staffing agency CCSI Talent that Wismettac did not want Zermenno back because of “the manner in which he left and derogatory comments.” (GC Exhs. 9, 44.) Zermenno also reached out to CornerStone, with whom he had submitted a previous application, but he was not re-hired. (GC Exh. 28; Tr. 597.) A woman named Destiny from Cornerstone told Zermenno that she had received an email stating that he and Hernandez were not welcome to return to work with Wismettac. (Tr. 598.) Zermenno was written up once in June or July 2017 for attendance. (Tr. 593-594.)

10. Fanor Zamora termination and failure to re-hire

Fanor Zamora worked as an order puller or Wismettac through the temporary agency Ranstad from April 11, 2017 through his termination. He served on the union committee. Before the first election, Zamora wore his union T-shirt to work twice. After the election, he wore the union T-shirt every Friday until his termination. (Tr. 143-144, 165, 168-169.) He was also at the union meeting in the parking lot following the first election.

During the October 31 meeting, Zamora told Matheu he had applied directly with the company a long time ago, but did not receive a response. Vasquez told Zamora his application has gotten lost, but Matheu told him there had been a problem with his background check. Matheu told Zamora he would take care of his application. (Tr. 152-153.) Zamora applied again on November 1. (GC Exh. 6, p. 18.) Fujimoto received an e-mail on November 3, 2017, from Annette Jimenez, a human resources coordinator, regarding Zamora's third job application, stating:

I just received a call from a temp named Fanor Zamora who was from Randstad. He was let go on Tuesday 10/31 since we termed [sic] our contract with them and mentioned that he applied for one of the warehouse positions available but he has not heard anything yet. Please follow up.

The same day, Fujimoto forwarded the email to Matheu and labor consultant Hinkle, stating "FYI." Hinkle was not involved in the hiring or firing of warehouse employees. (Tr. 1014-1015; GC Exh. 7.)

After he was laid off, Zamora also communicated with two other temporary agencies that sent employees to Wismettac, Horizon, and Cornerstone. The person Zamora spoke with from Cornerstone said she was told Wismettac did not want any of the laid-off employees to be reemployed. (Tr. 155–156.) A man from Horizon told Zamora the same thing. (Tr. 157–158.)

On February 13, 2018, Zamora received the following response to his third application with Wismettac:

Thank you for applying at Wismettac Asian Foods Inc. At this time, we have selected those applicants whose skills and qualifications more closely match the requirements of our current vacancy to continue on in the selection process. Thank you for your interest in employment at Wismettac Asian Foods, Inc. We wish you every success in your job search.

(GC Exh. 19.) Zamora was not disciplined during his time at Ranstad. (Tr. 150.)

11. The lawsuit and CEO letter

On November 29, 2017, Wismettac filed a lawsuit in the Superior Court of California for the County of Los Angeles, alleging creation of a private nuisance, violation of California trespass law, and violation of the California Business and Professions Code, in connection with the August 21 delegation. (R Exh. 89.)

On December 1, CEO Kanai sent a letter to employees updating them on unionization attempts in Los Angeles and Maryland. The letter recapped that

the Maryland employees rejected the Teamsters in in early September, and the election in Los Angeles was set aside “due to the misconduct of the teamsters local 630 and the National Labor Relations Board.” (U Exh. 44, emphasis in original). The letter stated that company filed a “Formal” lawsuit against the Union and Villalvazo for trespassing on company property in August. The letter next stated that Wismettac would legally resist unionization, and that “We do not feel that any of our employees should be forced to pay a union that can promise anything, but Guarantee absolutely nothing but dues, fines and assessments to its members.”¹⁸ Following the letter, employees were scared they were going to get sued. (Tr. 1598.)

12. Rolando Lopez counseling

Rolando Lopez has worked for Wismettac for 9 years, and as a driver for the last 7. In late November 2017, Vasquez and Romero approached driver Augustine Troncoso, and Vasquez told him he needed to fit all his merchandise into his truck. R. Lopez and his coworker Yader Alvarado then helped Troncoso load his truck. R. Lopez told Troncoso that if he was uncomfortable with the merchandise because it was overweight, he was not required to take it. Alvarado told Troncoso to worry about his safety first, not the client receiving his merchandise. (Tr. 348–350, 561; 560–563.)

¹⁸ The Regional Director for Region 21 dismissed a charge the Union had filed alleging the memo about the lawsuit violated Section 8(a)(1) of the Act.

Matheu conducted a safety meeting with the drivers on December 4. Romero, Vasquez, and Susan Sands, the new assistant operations manager, were also present.¹⁹ (Tr. 879.) One purpose of the meeting was to inform drivers how to use the correct codes when filling out paperwork. Matheu started the meeting the same way he started all safety meetings with drivers, by reviewing accidents that had occurred at all branches the previous week. (Tr. 880.) He discussed a safety incident at another company, where some merchandise had fallen out of a truck. R. Lopez asked if he could speak, and relayed his belief that Vasquez had forced Troncoso to drive an overweight truck. R. Lopez recounted an incident when he was issued a ticket in 2016 after being forced to drive an overweight truck. After some back-and-forth, with Matheu telling R. Lopez to lower his voice, Romero told R. Lopez there was no reason to bring up an individual case during a safety meeting. Romero said the problem with Troncoso's truck was airbrakes. A driver named Giovani replied that under the laws of California, the problem is not the airbrakes, the problem is the weight and that the company was forcing the drivers to take the merchandise that was overweight.²⁰ (Tr. 353–354, 565–566.) Other drivers also spoke at the meeting. (Tr. 623.) R. Lopez did not use any profanity, make threats, or touch anyone. (Tr. 672–673.)

On December 5, 2017, Vasquez and Romero called R. Lopez to a meeting and counseled him for his

19 Sands had started at Wismettac on October 8, 2017.

20 Vasquez could not remember if Mr. Giovani made these comments. (Tr. 673.)

comments at the meeting. Romero faulted R. Lopez for bringing up an individual case during a safety meeting. The counseling record stated R. Lopez was using angry and hostile tones, he made comments about issues other drivers had that were not related to the meeting, and Sands was frightened by him.²¹ (GC Exh. 3.)

After the counseling had occurred, Baik contacted Sands to investigate. Sands met with Baik on December 8, and she prepared a statement that she turned in on December 11. (Tr. 624.) R. Lopez' comments at the meeting had been in Spanish, and Sands did not understand him. Sands described R. Lopez as postured "with his arms crossed in front of him, slightly leaning back." She perceived his tone of voice as hostile toward Matheu. Sands testified that R. Lopez ceased speaking after Matheu addressed him. (Tr. 615–616.) Sands described R. Lopez as aggressive, sarcastic, and hostile, noting that he was rolling his eyes and smacking his lips. She wrote:

I've invested a great deal of thought and consideration into the outcome of this meeting. While I want to emphasize that one of the issues described above would not constitute insubordination when viewed singularly, the cumulative effect demonstrates his inability or unwillingness to work as a team, follow protocol, respect for his superiors and the chain of command.

²¹ R. Lopez did not receive the paperwork about the verbal counseling record at the meeting, and did not know it existed until he requested his personnel file at a later time.

She concluded by saying she was “personally distraught by this drivers’ (sic) unprofessional behavior.” (R Exh. 3.)

13. Alberto Rodriguez discipline and termination

a. December 21, 2017 written warning

Alberto Rodriguez started at Wismettac in 2015 through the temporary staffing agency Horizon and became a permanent employee on March 27, 2017. (GC Exh. 33.) He first worked as an order selector, and later became a forklift driver. He worked the night shift and his supervisors were Garcia and Hector Ramundo. Prior to the first election, Rodriguez spoke with employees about the Union, visited their homes, and collected authorization cards. He also regularly wore a union T-shirt. He was one of the employees in the front during the August 21 delegation.

On June 13, 2017, Rodriguez received a verbal counseling record for being repeatedly tardy between April and June. He received another verbal counseling record for tardiness on June 22. (GC Exhs. 39–40.) Vasquez issued a verbal counseling record to Rodriguez on December 11, 2017, for making a derogatory remark during the meeting about an employee who had made a mistake. (GC Exh. 41; Tr. 661–662.)

Matheu issued Rodriguez a written warning on December 21, 2017, for unprofessional conduct. Specifically, the warning stated:

- We received complaints from your colleagues that you reject requests from your team mem-

bers to bring down the merchandise from the top of the shelves.

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

(GC Exh. 34.) In addition to receiving the warning, Rodriguez was no longer permitted to drive the forklift and was placed back into the order selector position.²² Management did not tell Rodriguez who made the complaints. Matheu learned of the complaints from McCormick and Ge. Flores, who at the time was a lead warehouse worker in the freezer department. Matheu did not speak to the unnamed employees who complained about Rodriguez and said it was HR’s investigation.²³ (Tr. 938–939.)

Vasquez and Romero were present with Matheu when he issued Rodriguez the discipline. Rodriguez’ supervisor, Garcia, was not present and was not

²² Rodriguez had complained to Vasquez that he thought Ortiz was harassing him. Despite Rodriguez being placed back into the order selector position, he continued to operate the forklift at management’s direction. (Tr. 232–234, 696.)

²³ There is no testimony or documentary evidence that HR conducted an investigation.

aware of the discipline. Rodriguez said it was not true that he refused to help his coworkers, and believed that Oscar Ortiz was making it up because he was upset Rodriguez had gotten the forklift driver position. Rodriguez said he and coworkers regularly call each other names in a mutually joking manner. (Tr. 229.)

On January 5, 2018, Ge. Flores sent an email to Matheu, G. Flores, and Hikari, stating:

This e-mail is to inform you of some occurrences in the warehouse related to Mr. Alberto Rodriguez, regarding some recent complaints from several employees over the last couple weeks, especially this week.

Early this week (Tuesday night) at around 7:45pm, Employee Jimmy Yato approached me and told me that earlier that day Mr. Rodriguez had been inside the restroom for half an hour and he thought that was not right because Mr. Rodriguez often did that. From what Jimmy Yato said, Jose Avila also witnessed this and made a comment to Jimmy regarding Mr. Rodriguez about this issue.

I infirmed (sic) Mr. McCormick and Mr. Vasquez, Mr. Vasquez checked the cameras and found Mr. Rodriguez had been in the restroom for 20 minutes. This Thursday night Jimmy called me again at 9:15 PM and told me Mr. Rodriguez was in the restroom again and had been there for half an hour. By 9:25PM Mr. Rodriguez passed by the office and talked to Mr. McCormick saying he was sick and therefore had to go home early. Again, this was witnessed by Jose Avila and few other employees who I do not have their

names. However, at that time Daniel Gonzalez approached me and asked me why had the bathroom door looked (sic) for so long and other employees were around listening attentively and laughed.

At this time it all concerns me, because I am seeing a pattern where the warehouse employees are becoming more concerned of Mr. Rodriguez than their own duties.

Therefore, being that, this is the second time this happened this week, I wanted to bring this to your attention.

(R Exh. 10.) On January 7, McCormick sent an email to Matheu, Hikari, and G. Flores, with Vasquez cc'd, relating a complaint from Joes Avila that Rodriguez had spent a lot of time in the bathroom. (R Exh. 10.) Also on January 7, Ge. Flores sent an email to McCormick relating what employee Jose Avila had told him, "Alberto Rodriguez approached him and told him that he felt pressured from most employees and he figured it was because he was pro union but his lawyer was going to come to the LA facility on Monday." (GC Exh. 53.)

On January 8, Matheu sent Narimoto a memo documenting the reasons he wanted to promote Rosas and Kirby to lead positions. (R Exh. 44.) Rosas and Kirby both took over as leads on January 8, 2018.²⁴ (R Exhs. 43–44; Tr. 1196, 1198.) On January 9, McCormick held a meeting to tell employees Rosas would become the freezer lead and Kirby would

²⁴ Rosas was hired on May 15, 2017. Kirby was hired on March 6, 2017.

become the dry lead—Munoz’ former position. McCormick said he was moving to the day shift, and he announced Ge. Flores, who had been freezer lead, as the new nightshift supervisor. (U Exh. 2; Tr. 1370–1373.) Luis Lopez perceived that Kirby and Rosas were supervisors because they walked around with laptops, no longer wore freezer gear, and received money from drivers. (Tr. In Luis Lopez’ experience, only the supervisors and managers accepted money from drivers. (Tr. 1444–1454.) Rolando Lopez thought Kirby was introduced as a supervisor. (Tr. 1565.)

On January 10, 2018, McCormick sent an email to Matheu and G. Flores regarding Rodriguez. (GC Exh. 52.) The email started out by stating:

I wanted to bring to your attention a complaint that Marcus Mack²⁵ brought to Gerber and I. Tonight, at roughly 10:30 pm or so, Marcus came into the office and specifically said, “we have a poison pill on our hands.” Marcus at that point went into detail regarding his comment stating that he heard Alberto Rodriguez complaining about the recent management and leadership changes that are taking place.

The email went on to state:

Marcus approached Gerber and I in the office and said Alberto was heard making some commotion stating that he was going to call the Union and that he did not like or approve of the leadership changes that are

²⁵ Mack was a known antiunion employee. He worked for Wismettac for nine months, as an order picker and a machinist.

taking place. Marcus seemed a little upset regarding what had happened, when he was talking to us. Because Marcus brought this to our attention, later that night with Gerber, I went out to talk with Alberto Rodriguez. At that time, I explained to Alberto that someone approached us complaining that you were talking about the Union. I told Alberto that it was ok to talk about the Union on your breaks and lunch, but during work time I needed him to work. Alberto specifically said, oh no, I know that. I was talking about the Union on my break time. So I thanked him and said, ok. From there, Gerber and I went back to the Office and Alberto went back to assembling.

A Little later that night, when I saw Marcus again. I asked Marcus, "could you tell me when you heard Alberto talking about the Union?" Marcus said, yes, it was twice. The first time it happened was right after the meeting when everyone was going back to work. People were still crowded around the meeting area and that was the first time Marcus said he heard Alberto complaining about the leadership changes and the fact he was going to call the Union. Marcus then said, later that night on the whse floor when he was working, is the second time that he heard Alberto complaining in a rather load (sic) voice concerning the leadership changes and about calling the Union. At this point, Marcus told us there were others around and several of our workers had heard him.

The one name that Marcus mentioned that was close by at that time when Alberto was making this commotion as Marcus put it, was Ericberto Munoz.

(GC Exh. 52.)

An incident occurred between Rodriguez and Mack on January 11, 2018. Rodriguez and Mack were on break in the same area, and Rodriguez was playing music that offended Mack. At the time, the song streaming from Rodriguez's music app was by the rapper \$tupid Young. Mack asked McCormick to intervene because the song's lyrics included the word "nigger."²⁶ Tr. 820.) When McCormick asked Rodriguez to turn the music off, Rodriguez said he was on his break and could play whatever music he wanted. McCormick asked Rodriguez a second time to turn the music off. Rodriguez then turned the music off and McCormick left. (Tr. 822; R Exhs. 11, 12.)

After McCormick left, Rodriguez made a "clicking" sound with his teeth. According to Rodriguez, Mack told him to "shut the fuck up" and threatened to "kick his ass."²⁷ After McCormick left, Rodriguez continued to play the music and would turn it up

²⁶ Rodriguez could not recall whether the word "nigger" was part of the lyrics, but Mack's memory was definite, and his testimony is therefore credited.

²⁷ Rodriguez' contemporaneous statement says Mack threatened to "kick his ass"; In his testimony, Rodriguez said Mack threatened to "fuck him up." (Tr. 246; GC Exh. 37.)

during a racist hook, and Mack left the area within a minute.²⁸ (GC Exh. 37; Tr. 245–249, 823.)

Rodriguez reported Mack's statements to McCormick and said he wanted to file a police report and an internal report because he felt threatened by Mack.²⁹ McCormick told Rodriguez to write a statement. (Tr. 251.)

On January 12, McCormick sent an email to Matheu and Narimoto, with Konishi, Vasquez and G. Flores cc'd, relaying the incident between Mack and Rodriguez, stating:

As I was approaching the water fountain on my way to the hallway, Marcus Mack was sitting against the wall roughly a quarter way to the exit door near the ramp. Alberto Rodriguez was sitting two chairs away from Marcus, closer to the exit door. As I approached Marcus, Marcus motioned towards Alberto and asked is that appropriate? I was in a hurry, so I was moving rather fast so I didn't understand what Marcus was talking about at first. So I asked, is what appropriate? Marcus replied, that music he is listening to. Marcus said, every other word is the "N" word. At that

28 Mack's January 11, 2018 statement says that "ever other word was nigga" and that Rodriguez turned the music up when the song said "fuck that nigga." (GC Exh. 12.) This strikes me as an embellishment, particularly considering McCormick said he would consult with HR to determine if the song was offensive, as discussed below.

29 Rodriguez is 5'4" tall and weighs 140 pounds. Mack is 6'1" tall and weighs 240 pounds. (Tr. 250–251, 844.)

moment, I could hear rap music playing from Alberto's cellphone. I took a step or two towards Alberto and asked him "could you turn your music off, or listen to it outside in private? It is offensive to Marcus!" At that time, Alberto replied, "I am on my break, I can do whatever I want because it's my break." Alberto also replied, "I don't think it's offensive!" At that time, I am not exactly sure what question Alberto asked me specifically, however, I remember answering him stating "I'll find out exactly what is offensive with HR!" I then asked Alberto a second time stating "please, can you turn that down?" This time Alberto turned down the volume on his phone and you were not able to hear it.

. . .

After talking with Abraham for a second, I headed back downstairs. As I was approaching the bathroom and heading towards the office, Marcus Mack motioned towards Alberto again and said "he did it again." I walked into the office and Marcus followed me in and asked what form do I fill out before I had a chance to say anything. At this point, the office was working on fixing the printer/copier so I told Marcus, "give me a second and I'll get with you in a second." Once everything calmed down, I printed out a witness statement and took Marcus to a private room and asked him to fill out the witness statement.

(R Exh. 11.) This same email also conveyed Rodriguez' report of feeling threatened by Mack, Rodriguez' desire to go to human resources and to file a police report, and McCormick's advice to Rodriguez to talk to Vasquez before going to HR.

Rodriguez testified that after this incident, Mack bumped his shoulder a few times when they passed each other at work and drove a forklift at him. (Tr. 252–254.) Rodriguez reported the incidents with Mack to Haro Hikati in human resources. She told him to speak with management, so Rodriguez reported the incidents to Vasquez. Rodriguez wrote a statement on February 1 and gave it to Vasquez. In his statement, Rodriguez said Mack pushed him with his elbow and then said, "excuse me."³⁰ (GC Exh. 38.) Vasquez and McCormick met with Mack, who denied he threatened or touched Rodriguez.³¹ (Tr. 826–827.) Neither Mack nor Rodriguez was disciplined.

b. January 26, 2018 verbal counseling record

Vasquez issued a verbal counseling record to Rodriguez on January 26, 2018.³² The counseling record states:

Today 1/26/18, at roughly 3:30 pm, Mr. Lu³³

³⁰ The statement does not reference the Mack driving the forklift at him.

³¹ The date of this meeting is not clear. (Tr. 825.)

³² This verbal counseling record is not alleged as a violation in the complaint, and is discussed as background evidence only.

³³ Howard Lu is listed as warehouse supervisor on the original voter list and first amended voter list. (U Exh. 53.)

asked Alberto Rodriguez to do something for him that was important to get done soon. Alberto Rodriguez told Mr. Lu that he could not do what Mr. Lu asked him because he didn't have a pallet jack. Mr. Romero overheard this conversation and saw Alberto standing outside. So Mr. Romero went out after 15 minutes and saw Alberto Rodriguez sitting next to Nicole on the chairs. Mr. Romero asked Alberto why he wasn't working. and Alberto aid there were no pallet jacks. Mr. Romero pointed out that we had 5 pallet jacks that were sitting in the charming area. Alberto said, those don't work and Mr. Romero said I just used one of them they work. At that time. Alberto got a pallet jack and started working.

This is a verbal warning for not following directions and wasting company time.

(GC Exh. 42.) Rodriguez told Lu that he would do it after he completed a work order he was currently working on Rodriguez also told Lu that at the time, he did not have his pallet jack because one of the drivers had taken it, so he did not have anything to work with at that moment. (Tr. 262.) Rodriguez testified his pallet jack was not available because one of the drivers had taken it, and the other pallet jacks had boxes on top of them indicating they were being used by another employee. Romero told Rodriguez to grab another pallet jack, and he complied.

c. January 31, 2018 written warning

In mid-January, Rodriguez took some time off because he was evicted. While moving, he injured his

foot. He told McCormick he would not be at work on January 15–16. On January 17, Rodriguez left early because his foot hurt. McCormick noticed Rodriguez did not have enough paid time off to cover his absences. He reached out to human resources for guidance, and Hikari told him to request supporting documentation for the absences, which he did.³⁴ Rodriguez was a no-call, no-show on January 19 and 22.

Rodriguez received a doctor's note on January 24 clearing him to return to work the following day, which he provided to McCormick. On advice from HR, McCormick reminded Rodriguez to bring in the documentation related to his eviction no later than January 29. Rodriguez told McCormick on January 29 and 30 that he could not find the eviction notice. On January 30, Hinkle sent an email to McCormick stating, "Is he working without presenting the document? Who contacted whom? Can we send him home until he produces the document and put him on a timeline?" Konishi responded that if Rodriguez could not present supporting documentation in a week or so, they would need to take disciplinary action. (R Exh. 7.)

On January 31, 2018, McCormick issued Rodriguez a written warning for taking unscheduled time off with no leave available, and for failing to bring in documentation following his absence.³⁵ McCormick

³⁴ In the email communication to human resources asking for guidance, McCormick cc'd labor consultants C. Flores, G. Flores, Acosta, and Hinkle, among others. Hikari's response copied the same individuals. (R Exhs. 7–8.)

³⁵ Rodriguez' testimony regarding his leave was not completely forthright. When asked why he called out sick, Rodriguez responded, "Well, that has to do with the eviction because I

advised that the warning would be disregarded if Rodriguez brought in a doctor's note and supporting documents related to Rodriguez' eviction by February 7. He brought in the doctor's note, but not the paperwork related to the eviction. (GC Exh. 43; Tr. 268–269.)

d. Suspension and termination

Rodriguez was suspended indefinitely without pay on February 2, 2018, pending investigation of an incident that occurred on January 31. (GC Exh. 35.) On February 1, Mack gave the following statement to McCormick regarding what had occurred on January 31:

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

(GC Exh. 12 p. 2.) Mack testified the two employees having the conversation about the Union were Rodriguez and Benjamin Fili, and the third employee who overheard was Eric McLoughlin. Mack did not hear the comments attributed to Rodriguez.

McCormick wrote a statement on February 2, listing the date of the incident as February 1, stating:

didn't have no sick time. So they—I didn't have no PTO to use, so they used it as a sick time." (Tr. 267.) He admitted, however, that he was injured when he moved out of his apartment.

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

(GC Exh. 12 p. 6.)

On February 2, 2018, McLoughlin made a statement about an incident he heard on January 30:

When returning from my break Tuesday evening (01/30/18) I entered the warehouse to overhear the Wismettac employee I know as Beto³⁶ talking to a driver and another employee about the union. When Beto³⁷ seen [sic] me walking by he told the driver to keep it down because I talk to Jose Rosas and I was a union buster. They then said "Let me find out he's one. I don't give a fuck." "Motherf*ck*en union busters don't

³⁶ The statement is handwritten. The name "Rodriguez" is written above and slightly off to the right of "Beto" in smaller print.

³⁷ "Rodriguez" is printed in the same manner as described in the footnote directly above.

even make union buster wages.” They said it loud enough for me to hear I’m assuming to intimidate me. They have also made it clear that if the union loses the election they will start a physical fight. Five minutes after the incident they sent another employee to ask Jose Rosas if we were brothers. I also observed the driver standing next to my car looking at it five minutes after the incident. When he seen [sic] me he stepped back a little but stayed right there until I went back in the warehouse.

Some time on or after February 6, McLoughlin was interviewed about the incident, the notes from which state:

What happened? Coming back from lunch, Eric was heading back to where the time clock area is. Eric saw “Beto” (Alberto Rodriguez) speaking to a driver wearing a Compton hat (Benjamin Fili). As Rodriguez saw Eric walking in, Rodriguez made a comment to Fili saying “he’s one of them” to which Fili responded “let me find out he’s one of them I don’t give a fuck! Fucking Union-Busters don’t even make Union-Buster Wages!” Eric just kept walking. Fili then went outside to the parking lot and stood feet away from my car, as he began to play with his phone. I went outside to make sure it was locked and went back to work.³⁸

³⁸ The statement is in the third person until the last two sentences of this paragraph. It goes on to detail what occurred on February 6. Notes from an interview conducted with Mack

(GC Exh. 12 pp. 3–4.)

When Matheu gave Rodriguez the suspension papers, which were signed by Konishi, Matheu told Rodriguez he was being terminated because he had threatened coworkers to vote for the Union. (Tr. 235.) Rodriguez was officially terminated on February 16, for threats of violence against coworkers, racial harassment of a coworker, and insubordination.³⁹ (GC Exh. 36.) Matheu did not know what the “insubordination” referred to in the termination letter concerned. (Tr. 941.) Rodriguez received the termination notice in the mail. He was not interviewed about any of the alleged incidents comprising his termination.

14. The second election and surrounding events

A couple of days before the election, management hung large banners discouraging employees from voting for the Union, which remained present on the day of the election. (Tr. 1471, 1519–1520; 1566.) One said “DON’T PAY FOR UNION LIES.” Others said, “VOTE NO FOR DUES STRIKES UNION RULES” and “VOTE NO.” (U Exh. 42.) At the pre-election meeting, the Union asked Wismettac to remove the banners from the warehouse floor, to no avail. (Tr. 1683.)

around the same time essentially recount this same conversation as reported to Mack by McLaughlin.

39 The termination notice also reference previous violations of company policy. Rodriguez had been written up on June 13, 2017, and June 22, 2017, for repeated instances of tardiness. (GC Exhs. 39–40.) Matheu made the decision in conjunction with the director of logistics, Mr. Yoshinori, Toshi Nishikawa, and Yoshie Narimoto. (Tr. 878.)

The second election was February 6, 2018. Rodriguez was an observer for the Union but was told to leave the premises. Mack was an observer for Wismettac.

The voting took place in a showroom next to the warehouse office. (Tr. 1704; R Exh. 4.) There was a camera in the hall outside the showroom. Quinonez saw cameras pointing toward the voting room, and a monitor with a camera inside the voting room. The Respondent said the camera on the monitor did not work, and the camera outside the voting room could not be moved, so they would take their chances. (Tr. 1677–1680, 1683.)

According to Matheu, the inside of the showroom was not visible on the cameras. There were cameras throughout the warehouse to observe employees which have been present for a long time. There were at least four cameras were positioned around the warehouse showroom and around 10 cameras hovered in the docks and racks. (Tr. 1704–1707.)

The tally of ballots from the second election showed that of 187 eligible voters, 76 votes were cast for and 46 votes were cast against the Union, with 53 challenged ballots.

15. Events after the section election

The labor consultants' assignments ended after the election, but they were re-hired in March 2018. Laura Garza began as Wismettac's new employee relations manager on March 12, 2018, following Baik's departure.

On March 12, 2018, “Wismettac Asian Foods, Inc. Management” sent employees a letter stating the following:

To WLA Employees:

A number of employees have approached WLA management asking how they can revoke authorization cards they may have previously signed and/or resign their membership in Teamsters Local 630. Attached is a sample letter that can be sent to Local 630 for card revocation/membership resignation.

Sending this letter is your individual choice. There will be no adverse job consequences whether you send or do not send such a letter. WLA does not discriminate against employees based upon their Union affiliation or support.

Should you have questions you may contact NLRB Region 21 NLRB (213-894-5254 or 888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449) and/or the National Right to Work Legal Defense Foundation (800-336-3600 or www.nrtw.org/free-legalaid).

(GC Exh. 20.)

The attached letter stated:

Gentlemen:

I write to inform you that I do not want to be “represented” by your Union, do not wish to be a member of your Union, and do not support your Union in any manner. Please consider my opposition to representation by

your Union to be permanent and continuing in nature.

I hereby revoke and rescind any Union “authorization” card, or any other indication of support for your Union, that I may have signed in the past. Any such card or indication of support for your Union is null and void, effective immediately. To the extent I may have become a member of the International Brotherhood of Teamsters/Teamsters Local 630, I hereby resign such membership.

Please return to me any Union authorization card that I may have signed. Alternatively, please inform me in writing that you are honoring this revocation and rescission of support for your Union.

Please be aware that refusing to honor my card revocation/resignation of membership will violate my rights under the National Labor Relations Act. Moreover, representing to my Employer, Wismettac Asian Foods, Inc., that I support representation by your Union will similarly violate my legal rights.

(GC Exh. 21.)

In mid-March 2018, before the results of the second election were certified, Matheu, Vasquez, and Gustavo Flores held meetings with employees. At the first meeting, Garza was introduced. At the meetings, G. Flores said some employees had approached him and management to inquire about getting their authorization cards back. G. Flores placed copies of the letter a stack on a table. (Tr. 375–379; 538–540.) Garza and

G. Flores held several such meetings over the course of 2 or 3 days. G. Flores read the letter to the employees and told them they were not obligated to sign it. Copies of the letter were also made available in the lunchroom. Gustavo Linares, Jesus De Leon, and Javier Robles, all warehouse workers on the day shift, each attended one of these meetings, though none had sought information about how to revoke his authorization card.⁴⁰ (Tr. 191, 379, 542.) The letter was also distributed to employees around March 12, 2018. (Tr. 205–206.)

The Union received revocation letters, on the form G. Flores provided, from two employees, on March 18 and 22, 2018. (GC Exhs. 17–18, 20–21.)

B. Analysis and Decision

1. Witness credibility

Many of the disputes at issue can be resolved only by assessing witness credibility. A credibility determination may rest on various factors, including “the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole.” *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op at 7 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a

⁴⁰ There was no roster or check-off sheet indicating which employees took a copy of the letter. (Tr. 1050–1052.)

witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Moreover, an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify); *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

Testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, 197 NLRB 489, 491 (1972).

It is impossible to reconcile all of the different recollections of the witnesses for both sides. In evaluating the various different versions of events, I have fully reviewed the entire record and carefully observed

the demeanor of all the witnesses. I have considered the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; consistencies or inconsistencies within the testimony of each witness and between witnesses with similar apparent interests. *See, e.g. NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Testimony in contradiction to my factual findings has been carefully considered but discredited. Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis below.

2. Alleged promises of benefits and improved working conditions

Complaint paragraph 6(a)–(f) alleges that the Respondent violated Section 8(a)(1) of the Act by promising employees better benefits and improved terms and conditions of employment if the employees rejected the Union.

The Board's longstanding test to determine if there has been a violation of Section 8(a)(1) of the Act is whether the employer engaged in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. *Am. Freightways Co.*, 124 NLRB 146 (1959). Further, “It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer’s motive or on whether the coercion succeeded or failed.” *Am. Tissue Corp.*, 336 NLRB 435, 441 (2001) (citing *NLRB v. Ill. Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)). It is the General Counsel’s burden to prove 8(a)(1) violations.

An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a “threat of reprisal or force or promise of benefit.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969).⁴¹

The Supreme Court, in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944), stated that the “action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination.” As the Court explained in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964):

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

(footnote omitted.) The Court held that that “the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union,” interferes with the employees’ protected right to organize.

Employer solicitation of employee grievances or complaints during an organizing campaign may be

⁴¹ The Respondent contends that its communications were protected under Section 8(c) of the Act. As the Supreme Court made clear in *Gissel*, however, speech that crosses the line and violates Section 8(a)(1) is not protected. As such, the Respondent’s argument is rejected where I have found violations of Section 8(a)(1).

considered as an implied promise to resolve complaints elicited favorably for the employees. *See Alamo Rent-A-Car*, 336 NLRB 1155 (2001). *See also Reliance Electric Co.*, 191 NLRB 44, 46 (1971) (employer soliciting complaints, where it has not done so in the past, raises “compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.”) An employer with a past practice of soliciting employee grievances may continue to do so during an organizing campaign as long as the practice remains essentially the same. It is the employer’s burden to establish the past practice. *Longview Fibre Paper & Packaging, Inc.*, 356 NLRB 796 (2011).

The fact that an employer couches the promise of benefits in more general language that does not guarantee anything specific does not remove the taint of illegality. In *Reliance Electric Co.*, 191 NLRB 44 (1971), enf. 457 F.2d 503 (6th Cir. 1972), at preelection meetings, management officials told the employees that they would “look into” or “review” problems. The Board noted that such cautious language, or even a refusal to commit to specific corrective action, does not cancel the employees’ anticipation of improved conditions if the employees vote against the union. *See also Reno Hilton*, 319 NLRB 1154, 1156 (1995).

In assessing each individual alleged violation, I am guided by the principle that “the totality of relevant circumstances” must be appraised and that written and oral statements should not be viewed in isolation from each other. *Mediplex of Danbury*, 314

NLRB 470, 471 (1994); and UARCO, Inc., 286 NLRB 55, 58 (1987), review denied 865 F.2d 258 (6th Cir. 1988).

- a. Paragraph 6(a) of the complaint alleges: About September 8, 2017, Respondent, by Frank Matheu (Matheu), in Respondent's conference room at the Santa Fe Springs facility, promised employees better benefits and improved terms and conditions of employment if employees rejected the Union as their bargaining representative.

The testimony of the R. Lopez and L. Lopez, detailed in the statement of facts, was consistent and shows that Matheu made unlawful promises. They each testified with forthright demeanors and did not appear to embellish their testimony. The Lopez' testimony is also more broadly and generally corroborated by the testimony of other employees who attended similar meetings in the wake of the petition filing. Their recollections of Matheu's comment that he was given a "green light" to make improvements, and would do so as long as no third party came in is very consistent with Matheu's own talking points prepared in and around this same time period. The talking points specifically reference a "green light" to make changes, "disgust" with the "disrespectful and cowardly" actions of the union, an affirmative statement that "there will be changes," and more specifically, "I will now have full support from upper management, they will listen, I will justify, and will change whatever needs to be changed to improve work environment, and give you what you need to get the job done." (GC Exh. 56.)

As current employees testifying against their own interests, I find the Lopez' testimony compelling. Matheu testified that he only conveyed that upper management would support anything he could to within the bounds of the law to assist operations, and did not make specific promises. This is unavailing. *Reliance Electric Co.*, *supra*. I also note that, while the labor consultants G. Flores and C. Flores were both at this meeting, and G. Flores testified at the hearing, he did not address this matter.⁴²

- b. Paragraph 6(b) of the complaint alleges: About mid-September 2017, Respondent, by Matheu, by the time clock at the Santa Fe Springs facility, promised its employees giving back their bonuses and retroactive pay if the employees rejected the Union as their bargaining representative.

Alvarado, a 13-year employee, testified Matheu approached him at the timeclock, said he had bought new machines for the employees, these changes were only the beginning, and he would do what was possible to restore bonuses and retro pay. I credit Alvarado's testimony because it is consistent with

⁴² The General Counsel requests an adverse inference based on the Flores' failure to corroborate Matheu, particularly since G. Flores testified at the hearing. I agree this is warranted under *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact). I would come to the same conclusion without it though. The General Counsel also asks for an adverse inference based on Vasquez' failure to corroborate Matheu's account, which I grant but also note it does not change the outcome.

what other employees heard, and as a current employee testifying against his own pecuniary interests, his testimony is particularly reliable. Alvarado's demeanor appeared honest and straightforward. Moreover, his testimony is consistent with Matheu's talking points.

- c. Paragraph 6(c) of the complaint alleges: About mid-September 2017, Respondent, by Matheu, by the loading dock at the Santa Fe Springs facility, promised its employees giving back their bonuses and retroactive pay if the employees rejected the Union as their bargaining representative.

L. Lopez testified that in early September 2017, Matheu approached him at the loading dock and said the owner had empowered him to make changes, he knew bonuses and retroactive pay had been taken away, and he would bring them back. I credit L. Lopez for the reasons cited above.

- d. Paragraphs 6(d)-(e) allege that a series of meetings on September 15 and 18, promised better benefits and improved working conditions if the employees rejected the Union as their bargaining representative.

The testimony of the employees who attended the meetings, detailed above, consistently conveyed that Matheu promised to make changes as long as a third party did not come in. Drivers R. Lopez, L. Lopez, and Alvarado, as well as warehouse workers De Leon, Ho, and Zamora all recalled Matheu promising changes, and again, this is consistent with his prepared talking points. Ho was a 27-year employee, and I found his testimony to be very credible, based

on his calm and straightforward demeanor. At the time of the hearing, De Leon had left Wismettac and therefore had no personal stake in whether or not the Union won the election. Aside from Matheu's general denial, no other manager or agent who was present at the meeting contradicted the witness' corroborative accounts, which as noted are further corroborated by Matheu's own talking points.

The testimony above shows that on each of the occasions, Matheu told employees that positive changes would be forthcoming as long as the Union stayed out. Based on the foregoing, I find the General Counsel has met the burden to prove the Respondent violated Section 8(a)(1) as set forth in complaint paragraph 6(a)–(f).

3. Rolando Lopez verbal counseling record

Complaint paragraph 7 alleges that the Respondent violated Section 8(a)(1) by issuing Rolando Lopez a verbal counseling record on December 5, 2017.

I must first determine whether R. Lopez engaged in protected concerted activity. “To be protected under Section 7 of the Act, employee conduct must be both ‘concerted’ and engaged in for the purpose of ‘mutual aid or protection.’” *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). The Board has held that activity is concerted if it is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), *revd. sub nom Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985), *on remand Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), *affd. sub nom*

Prill v. NLRB, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

The facts, detailed above, show that R. Lopez and at least one other driver voiced concerns about carrying overweight loads at a safety meeting Matheu conducted with the drivers. R. Lopez did not complain alone, and the topic, carrying overweight loads, was not an individual concern. I therefore find R. Lopez engaged in concerted activity.⁴³

The Respondent argues R. Lopez' safety complaint lost the Act's protection because he "crossed the line" and "disrupted the meeting." "Where, as here, it is clear that an employee was discharged for an outburst that occurred while engaging in Section 7 activity, the appropriate inquiry is whether the outburst was so opprobrious as to remove the employee from the protection of the Act." *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007), citing *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322 (2006). Because the meeting in which R. Lopez' alleged unprotected conduct occurred in person at the workplace, the factors set forth in

43 The evidence establishes that Alvarado shared R. Lopez' concern about overweight loads and spoke out about it shortly before the meeting, and another drivers also complained during the meeting, therefore I do not need to determine whether R. Lopez acted individually to induce group action. In other words, the activity in this case was not the mere "individual griping" the Board addressed in *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019). In any event, as the Board stated in *Meyers II*, *supra*. at 887, "*Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, *as well as* individual employees bringing truly group complaints to the attention of management. (Emphasis supplied.)

Atlantic Steel Co., 245 NLRB 814, 816 (1979), apply. Under *Atlantic Steel*, the Board considers the following factors to determine whether an employee loses the Act's protection: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

Here, the place of the discussion was a safety meeting for the drivers, with Matheu Romero, Vasquez, and Sands present for management. Spontaneous employee comments made during group meetings are more likely to be protected. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007). Moreover, the incident did not entail a risk of disruption of work, as it was a management-ordered meeting safety meeting where the drivers were assembled. *Id.* The first factor weights in the General Counsel's favor.

Second, the subject matter of the discussion was safety. While the Respondent contends the meeting was also assembled to go over how to fill out paperwork, Matheu referred to the meeting as a safety meeting, and R. Lopez' comments about overweight trucks occurred in the context of Matheu reviewing the previous week's accidents. This weighs in the General Counsel's favor. See *Kiewit Power Constructors Co.*, 355 NLRB 708, 709 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011).

Turning to the third factor, the nature of the outburst, I find there was no "outburst" at all. R. Lopez's comments and behavior were very mild. R. Lopez did not use any profanity, make threats, act insubordinately, or touch anyone. At most, he raised his voice, rolled his eyes and smacked his lips, interr-

upted Matheu, and had his arms crossed in front of him, slightly leaning back.⁴⁴ *Postal Service*, 250 NLRB 4, 6 (1980) (calling acting manager a “stupid ass” in a grievance meeting was part of the *res gestae* of the protected discussion); *Mini-Togs, Inc.*, 304 NLRB 644 (1991)(applying *Postal Service* beyond the grievance setting); *Burle Industries*, 300 NLRB 498 (1990), enfd. 932 F.2d 958 (3d Cir. 1991) (Employee did not forfeit protection when, in the course of encouraging employees to leave the facility due to a possible chemical spill, he called a supervisor a “fing asshole” for wanting employees to work despite the fumes). The tame nature of R. Lopez’ generalized comments and his mild actions accompanying them strongly weighs in favor of continued protection.⁴⁵

Finally, I must consider whether R. Lopez’ comments were, in any way, provoked by an unfair labor practice. While not directly linked to an unfair labor practice, the meeting occurred in the wake of meetings Matheu and labor consultants held with employees to discourage them from voting for the Union, which I have found to constitute an unfair labor practice. *See Plaza Auto Center, Inc. v. NLRB*,

44 Sands also said R. Lopez was sarcastic, but given that she admittedly did not understand him because she does not speak Spanish, I do not credit this, and I find Sands’ after-the-fact recollection of the meeting, put in writing at HR’s prompting after the discipline was already issued, is entitled to very little weight.

45 The Respondent cites to *Central States SE & SW Areas, Health & Welfare Pension Funds*, 362 NLRB 1280 (2005) (R Br. 21.) The correct citation is 362 NLRB 1280, and I cannot discern how this case stands for the proposition that R. Lopez lost the Act’s protection.

664 F.3d 286 (9th Cir. 2011). Accordingly, considering the *Atlantic Steel* factors and the totality of the circumstances, I find that R. Lopez' remarks retained the Act's protection.

Most cases involving alleged discriminatory discipline are analyzed under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The Board has held, however, that *Wright Line* does not apply to situations where a causal connection between the employee's protected activity and the employer's conduct that is alleged to be unlawful may be presumed. See e.g., *Aluminum Co. of America*, 338 NLRB 20, 22 (2002); *Atlantic Scaffolding Co.*, 356 NLRB 835, 839 (2011). An employee's discipline independently violates Section 8(a)(1), regardless of the employer's motive or a showing of animus, where "the very conduct for which employees are disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981). Furthermore, when an employee is disciplined for conduct that is part of the *res gestae* of his protected concerted activities, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford NY, LLC*, 344 NLRB 558 (2005); *Aluminum Co. of America*, *supra*.

As detailed above, R. Lopez was disciplined for his protected concerted activity of raising a safety concern at a safety meeting.⁴⁶ Accordingly, I find the

⁴⁶ Even assuming R. Lopez was not engaged in protected activity, the General Counsel has still established a violation under *Wright Line*. R. Lopez was a known advocate for the Union, there is extensive evidence of animus as discussed

General Counsel has proved the Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraph 7.

4. Ruben Munoz written warning, removal from lead position, and shift change

Complaint paragraph 8 alleges the Respondent violated Section 8(a)(3) and (1) of the Act by issuing Ruben Munoz written warning on October 23, 2017, and removing him from his lead position, and changing his work shift on October 25, 2017.

To determine whether an employer has taken an adverse action because of union activity, the Board applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 889 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must prove the employee's protected activity was a motivating factor in the adverse employment action. The elements commonly required are union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. *See Willamette Industries*, 341 NLRB 560, 562 (2004); *East End Bus Lines, Inc.*, 366 NLRB No. 180 (2018). If the General Counsel makes this initial showing, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have been

throughout this decision, and the Respondent's post-hoc solicitation of Sands' statement to justify the discipline along with other evidence of pretext and antiunion bias establish unlawful motivation.

taken even in the absence of the protected conduct.” *Allstate Power Vac.*, 357 NLRB at 346 (quoting *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)). “The ultimate inquiry” is whether there is a nexus between the employee’s protected activity and the challenged adverse employment action. *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327-1328 (D.C. Cir. 2012).

The Respondent concedes Munoz was a known Union supporter. With regard to animus, the record is replete with direct evidence showing very clearly Wismettac’s disdain for the Union, including Matheu’s talking points and the meetings where they were put into action.

Moreover, animus can be inferred from other evidence, such as “suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly [disciplined], and disparate treatment.” *Medic One, Inc.*, 331 NLRB 464, 475 (2000). *See also Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (timing); *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 260 (2000), enfd. mem. 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534 (1993) (other unfair labor practices); *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1473–1474 (6th Cir. 1993); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (statements showing animus); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) and *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment); *JAMCO*, 294 NLRB 896, 905 (1989), affd.

mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991) (departure from past practice).

The timing of events with regard to Munoz' discipline is highly suspicious. The Respondent, on the heels of the first election in its September 26, 2017 offer of proof to support its objections, stated Munoz had operated a forklift in an unsafe manner against employees who did not support the Union, and otherwise intimidated such employees. The offer of proof specifically mentioned Jose Rosas as a recipient of Munoz' intimidating behaviors. Yet, Matheu visited Rosas' house in October to gather the information he needed to support Rosas' contention.⁴⁷ Breaking from past practice both as to location and participants, instead of having human resources conduct an investigation, he took labor consultants G. Flores and C. Flores to Rosas' house to personally interview employees about their dissatisfaction with Munoz. Ortiz and Vargas did not date the statements they made about Munoz' shortcomings, and the undated statements in turn give no dates for Munoz' alleged misconduct. For these reasons and also considering the fact that Munoz was in his position as lead for about six months without any indication of problems, I find the timing and circumstances extremely suspicious.

The investigation is likewise suspicious, as nobody interviewed Munoz or his direct supervisor Garcia,

⁴⁷ I find the evidence establishes the meeting at Rosas' house occurred in October. This was Matheu's initial testimony, the only dated statement related to this meeting is October 18, and the discipline and termination stemming from the meeting occurred in late October.

who was conspicuously kept out of the loop.⁴⁸ An employer's failure to conduct a full and fair investigation into an employee's alleged misconduct may, depending on the circumstances, constitute evidence of discriminatory motive. *Hewlett Packard Co.*, 341 NLRB 492 fn. 2 (2004); *Alstyle Apparel*, 351 NLRB 187, 1288 (2007), *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004), enfd. 198 Fed. Appx. 752 (10th Cir. 2006); *See also Diamond Electric Mfg. Corp.*, 346 NLRB 857, 861 (2006), *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002) (The failure to give an employee an opportunity to explain the circumstances for which he or she is being disciplined or discharged supports a finding of pretext.) In the circumstances of this case, given the timing of the investigation in relation to the first election, the inclusion of union-avoidance labor consultants in the investigation, and the evidence of antiunion sentiment, I find that the manner in which the investigation of Munoz was conducted is strong evidence of discriminatory intent. In addition, other unfair labor practices, which exist here, "are clearly sufficient to

48 At best, Matheu mentioned the complaints to Garcia at some unspecified time without involving him in any meaningful way:

Q Now, did you ever discuss the issues raised by Walter Vargas and Oscar Ortiz to the behavior of Mr. Munoz? Did you ever discuss those with Isidro Garcia?

A Yes, I did.

Q And do you recall his response?

A Isidro's response was yes, I've heard there was there-some arguments amongst them and there's some issues amongst them. He did mention that. (Tr. 859.)

establish antiunion animus on the part of that company.” *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423–424 (D.C. Cir. 1996)

Based on the foregoing, the General Counsel has overwhelmingly established the initial *Wright Line* burden.

The burden now shifts to the Respondent “to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line*, *supra*, at 1089. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, or that it could have taken the action, but must persuade by a preponderance of the evidence that the action would have taken place absent the protected activity. *Dentech Corp.*, 294 NLRB 924, 956 (1989); *Structural Composites Industries*, 304 NLRB 729, 730 (1991).

Where the General Counsel makes a strong showing of discriminatory motivation, the employer’s defense burden is substantial. *See, e.g., Bally’s Park Place, Inc.*, 355 NLRB 1319, 1321 (2010) (reversing judge and finding violation because judge “did not consider the strength of the General Counsel’s case in finding that the Respondent met its *Wright Line* rebuttal burden”), *enfd.* 646 F.3d 929 (D.C. Cir. 2011); *East End Bus Lines*, *supra*. Given the wealth of evidence regarding animus, I find this is such a case.

The Respondent contends Munoz was demoted because of employee complaints about his temperament and character as lead. The specific reasons set forth in the demotion, however, do not line up with the evidence. I find the complaints were drummed up

to justify demoting Munoz and are pretexted to hide discriminatory motivation.

Pretext has been established in a variety of circumstances, including showing the employer's explanations are implausible or illogical, *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1364–67 (D.C. Cir. 1997); unfounded or untrue, *See CC1 Ltd. Partnership v. NLRB*, 898 F.3d 26 (D.C. Cir. 2018); exaggerated or inflated, *Sprain Brook Manor Nursing Home, LLC*, 359 NLRB 929, 942-43 (2013), incorporated by reference in 361 NLRB 607 (2014), enfd. 630 F. App'x 69 (2d Cir. 2015); *Jackson Corp.*, 340 NLRB 536, 588–89 (2003); or inconsistent, shifting, or post hoc. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007); *Con-Way Freight*, 366 NLRB No. 183 (2018), slip op. at 4.

One of the reasons for Munoz' demotion, driving the forklift backward with the pointy part in the front, was untrue and admittedly not supported. None of the employees who complained about Munoz testified. One is left to believe that Matheu genuinely concluded Munoz was no longer fit for his job based on reports from known antiunion employees of undated instances of Munoz' misdeeds that Matheu, along with the labor consultants hired to keep out the Union, elicited at know antiunion employee Rosas' home, with no input from Munoz or his first-line supervisor.

For example, Vargas reported Munoz "harassed" him, but no specific instances of such harassment are described or placed in time. Vargas said Munoz drove his vehicle aggressively, but again gave no specific account. Vargas said Munoz "humiliated" employees who did not build pallets to his standards. Again, the

factfinder is left wondering what form this alleged humiliation took, to whom it was directed, and when it occurred. Despite making a statement of his own, Vargas did not mention any of the infractions that ended up in Munoz' written warning.⁴⁹

Ortiz' complaints in his undated statement likewise offer no temporal context. Indeed, this is undoubtedly the reason the discipline itself conspicuously fails to list dates of any alleged infractions. Even had Munoz been included in an investigation, it is impossible to see how he could have responded in any meaningful way. At the hearing, Munoz denied he engaged in any of the conduct alleged against him. Munoz was a highly credible witness, who appeared confident and sincere in his answers. I credit Munoz' testimony over the witness statements or Matheu's second-hand testimony about them.

It is undisputed that Rosas worked in freezer department and rarely interacted with Munoz.⁵⁰ Labor Consultant G. Flores, who was present at Rosas' house, only testified that during the meeting Rosas complained about Munoz's union activities.⁵¹ Rosas also submitted a written statement regarding his issues with Munoz. He mentioned Munoz crashing into two employees, but failed to name the employees or provide timeframes. The bulk of Rosas' statement concerns Munoz talking about "political issues" and voting. Rosas failed to detail when any incidents occurred, or

49 Vargas' statement is at GC 61.

50 Tr. 409–410, 896–897.

51 Tr. 1059.

how he heard about them given that he worked in a different area.

The insertion of a union-avoidance labor consultant to interview employees about Munoz' conduct is unorthodox and smacks of inappropriate bias. Faced with this oddity, Matheu struggled to explain:

Q Okay, and with regard to the operation-excuse me, the investigation, where you testified, as related to Mr. Munoz, and there was testimony that Gus Flores was involved. Why was Mr. Flores involved, as opposed to human resources?

A There was a lot going on during that time period. A lot going on. And HR was short-handed. Obviously with the legality and the size of this-this, you know, this thing, this situation, we needed help.

(Tr. 947–948.)

That first-line supervisor Garcia was not involved in the conversations with the antiunion employees about Munoz' alleged aggressive and unsafe behavior shows that union/antiunion sentiment, as opposed to genuine concern for workplace safety, was the driving force. Longstanding Board precedent has consistently held that “an employer’s failure to conduct a full and fair investigation of an employee’s alleged misconduct is evidence of discriminatory intent, especially when viewed in the light of the employer’s union hostility.” *Firestone Textile Company*, 203 NLRB 89, 95 (1973), and case cited therein. In the heat of a union-organizing drive, the Respondent’s one-sided reliance on known antiunion employees’ statements to demote Munoz, without even the semblance of an indepen-

dent investigation, is glaring.⁵² This is particularly true considering temporary employees Vargas and Rosas had only been working at Wismettac a few months, while Munoz was an 11-year employee with no previous discipline.⁵³

Moreover, it is implausible that management genuinely relied upon the witness' statements to demote Munoz. If indeed Munoz was crashing into employees on the workroom floor, it makes no sense to place him in a warehouse position where he could continue this highly dangerous behavior. It also defies reason that such dangerous conduct would not have contemporaneously been brought to management's attention by someone in the warehouse, or picked up on one of the cameras used to observe employees on the warehouse floor. Indeed, when management was informed Rodriguez spent too long in the bathroom, cameras were checked after the fact to verify just how much time he took.

In sum, in late September, the Respondent sought to object to the first election based in part Rosas' report of Munoz' conduct of "repeatedly driving a forklift in a threatening manner" and approaching

⁵² Baik, who was responsible for conducting investigations, admitted she did not conduct an independent investigation into the employees' complaints about Munoz. She did not speak to Munoz or his supervisor, Garcia, about Munoz' conduct. (Tr. 1396, 1419.)

⁵³ Vargas began as a temporary employee in July 2017 and Rosas in May 2017. The General Counsel cites to comparative employees to show disparate treatment. (GC Br. 119–121.) While I find the comparisons are factually supported in the record, I do not rely on them because none of the comparators were leads, and I find other evidence more persuasive and more than sufficient to meet the General Counsel's burden.

employees who did not support the Union. The forklift driving allegation flat-out fell apart, as described above, and the ensuing “investigation” to justify vilifying Munoz was an obvious sham, as was the resulting discipline, demotion and shift change. Any prospect the Respondent honestly formed a reasonable belief the employees’ complaints about Munoz were a legitimate basis for his demotion is unmistakably belied by the Respondent’s pronounced one-sidedness in seeking to justify its actions.

Based on the foregoing, I find the proffered reasons for Munoz’ letter of warning and subsequent demotion and loss of pay were pretext to mask the Respondent’s unlawful antiunion motivation, and the General Counsel has proved the allegations in complaint paragraph 8.

5. Pedro Hernandez termination

Complaint paragraph 9 alleges the Respondent violated Section 8(a)(3) and (1) by terminating Pedro Hernandez on October 31, 2017.

The *Wright Line* paradigm applies here. It is undisputed Hernandez engaged in union activity and management knew about it. Antiunion animus has been established, as detailed above. Accordingly, the General Counsel has established the initial *Wright Line* burden.

The burden now shifts to the Respondent “to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line, supra*, at 1089. The Respondent contends Hernandez was terminated because he created a

hostile environment on the night shift. I find this reason is pretexted to mask anti-union motivation.

Matheu's involvement in documenting Herandez' behavior began when labor consultant G. Flores told him Vargas had alleged Hernandez created a hostile work environment on the p.m. shift. In the midst of an organizing drive, given the known respective stances of management, the labor consultants, Vargas, and Hernandez toward the Union, if the aim was at all to get at the truth, minimal prudence and basic common sense dictate that a careful and independent verification would ensue. As with Munoz, however, the opposite occurred.

As the General Counsel points out, however, Matheu, the decision-maker, was very inconsistent regarding how he gathered the information he used to support Hernandez' termination. Matheu first testified as follows:

- A I spoke to him after the-right after the meeting.
- Q Okay. And what did you tell him?
- A I took him obviously to an area where-very private, and I explained to him that that was his last day with the Company.
- Q Okay. And why was it his last day?
- A There were allegations of him also creating a hostile environment in the p.m. shift, refusing to help employees, being offensive to them.
- Q Okay. And do you recall who made those allegations against him?

A I believe it was Walter Vargas. I cannot recall that.

Q Did you interview Mr. Vargas personally regarding the allegations about Pedro Hernandez?

A I did not.

Q Okay. Do you know who did?

JUDGE LAWS: Do you know if anybody did?

THE WITNESS: I believe somebody did, I don't know-I don't know who

Q BY MR. WILSON: Okay.

A —at this point.

Q Do you recall who reported that information to you?

A Yes.

Q Who was that?

A It was Gus Flores.

Q Okay. To your knowledge, did Gus Flores do an interview with-if you know, with Mr. Vargas regarding the allegations made against Mr. Hernandez?

A I believe he did, yes.

(Tr. 870–871.) Apparently, Matheu recalled relying on the labor consultant's recitation of an interview he had conducted with Vargas to justify Hernandez' termination. Yet the evidence shows Matheu did interview Vargas about Hernandez' alleged creation of a hostile work environment, and he took notes. In fact, Matheu interviewed Vargas about Hernandez

during the same visit to Rosas' house where Matheu interviewed him about Munoz' alleged creation of a hostile work environment.⁵⁴

Later in his testimony, Matheu recalled interviewing Vargas about Hernandez, and recalled that Vargas said Hernandez made comments about how the Union will win.⁵⁵ G. Flores likewise admitted that Vargas complained to both him and Matheu about Hernandez' involvement with the Union.⁵⁶

Matheu's notes regarding what Vargas said about Hernandez state, in total, the following: "called me dumbass" "Union will win" "Treats me very bad. Very abusive and discriminatory behavior" "clapping and calling me dumbass." "Slave like abusive actions. Told me he will beat me and kick my ___"

I also find the investigation into Vargas' allegations against Hernandez suffer from the same flaws as described above for Munoz. Again, we are asked to believe that Matheu genuinely concluded Hernandez should be fired based on a report from Vargas of undated comments Hernandez ostensibly directed only at him, which Matheu, along with the labor consultants hired to keep out the Union, elicited at know antiunion employee Rosas' home, with no input from Hernandez or his first-line supervisor.

Vargas did not testify, and therefore the only firsthand account in the record is his statement,

54 Tr. 934

55 Tr. 912.

56 Tr. 1058.

which says, “Pedro the Machinist. He is telling the new people that if they are going to vote, to vote for the union. He spends his time conversing with them.”⁵⁷ I assign more weight to Vargas’ own statement than to Matheu’s hearsay interview notes about what Vargas said.

The Respondent’s shifting explanations are indicative of pretext. The only internal Wismettac document in evidence shows Hernandez was terminated because the contract with Ranstad ended. Fujimoto told Meza from Ranstad that Hernandez was terminated due to his performance/behavioral issues and operational changes. No operational changes were identified other than Matheu’s decision to lay off the dayshift employees and keep the nightshift employees, which obviously doesn’t hold up in Hernandez’ case. At the hearing, Matheu testified Hernandez was terminated because he created a hostile environment, was offensive, and refused to help other employees. Yet neither Vargas’ statement nor Matheu’s notes reference any refusal to help other employees.

The disparate treatment Hernandez received, as the only nightshift employee singled out for termination on October 31, also points to pretext. His immediate termination, with no history of discipline, also is a marked departure from the progressive discipline Wismettac practiced with its other employees, which is strong evidence of pretext.⁵⁸ *Keller*

⁵⁷ The General Counsel requests an adverse inference regarding Vargas’ failure to testify. (GC Br. 145.) I agree that this is warranted, but it does not impact my decision.

⁵⁸ The record contains numerous examples of this; A representative sample is contained in GC Exhs. 2–4. Though Wismettac’s

Manufacturing Co., 237 NLRB 712, 714 (1978). “Such discrimination, without plausible explanation by Respondent coupled with its hostility to the Union, gives rise to the inescapable inference that [the employee] was discharged and barred from reemployment in reprisal for his union activities and to discourage union membership and support among the employees, in violation of Section 8(a)(3) and (1).” *Fayette Cotton Mill*, 245 NLRB 428 (1979).

Based on the foregoing, I find the proffered reasons for Hernandez’ termination was pretext to mask unlawful antiunion motivation, and the General Counsel has proved the allegations in complaint paragraph 9.

6. Alberto Rodriguez written warnings, suspension, and termination

Complaint paragraph 10 alleges that the Respondent issued Rodriguez a written warning on December 21, 2017, suspended him on February 2, 2018, and terminated him on February 16, 2018, in violation of Section 8(a)(3) and (1). The complaint was amended at the hearing to include a written warning issued to Rodriguez on January 31, 2018.

a. The arbitration agreement

The Respondent asserts that Rodriguez agreed to arbitrate all employment-related claims and therefore his termination should be resolved by arbitration. (R Exh. 2.) In *Prime Healthcare Paradise Valley, LLC*,

handbook states the progressive discipline system is discretionary, the evidence shows a practice of progressive discipline except in extreme cases.

368 NLRB No. 10 (2019), the Board held that the employer’s arbitration agreement violated Section 8(a)(1) of the Act by restricting employees’ access to the Board and its processes. The Respondent is urging a reading of Wismettac’s arbitration agreement as precluding Board charges. As such a reading is unlawful, the Respondent’s argument is rejected.

b. The December 21, 2017 written warning

Rodriguez’ December 21, 2017 written warning stated he rejected requests from coworkers to help them bring merchandise down from the top shelves, employees expressed concern that Rodriguez was watching and monitoring them while working, and he called a coworker “stupid” and “idiot.”

The *Wright Line* paradigm applies. It is undisputed Rodriguez engaged in Union activity. Prior to the first election, Rodriguez spoke with employees, visited their homes, and collected authorization cards for the Union. He also regularly wore a union T-shirt, and was part of the August 21 delegation. I find the Respondent knew Rodriguez supported the Union. Anti-union animus has been established, as detailed above. Accordingly, the General Counsel has established the initial *Wright Line* burden.

The burden now shifts to the Respondent “to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line, supra*, at 1089. The Respondent contends that Rodriguez was issued the written warning because he engaged in the conduct described therein. I find this is pretext for the following reasons.

First, as with Munoz and Hernandez, Rodriguez' first-line supervisor was completely bypassed. In addition, there is no evidence of any attempt whatsoever to determine the veracity of the undated and unnamed complaints against Rodriguez. Matheu never spoke with the nameless employees who complained about Rodriguez, and it's not clear Matheu even knew who they were. According to Matheu, he heard about the complaints from McCormick and Ge. Flores. McCormick, who not only testified at the hearing, but testified extensively about Rodriguez, was not asked about the employee complaints comprising the December 21 written warning. Ge. Flores did not testify. Matheu testified the investigation was HR's purview. No testimony or documents, however, reflect any HR investigation, despite the fact that multiple HR employees testified.

By contrast, Rodriguez testified that he did not refuse to help his coworkers and that he and coworkers regularly call each other names in a mutually joking manner, which was common among employees in the warehouse. I credit this testimony both based on Rodriguez' demeanor, which was forthcoming and appeared sincere. Instead of flat-out denying he called anyone names, he admitted he did so in a joking manner that was common in the warehouse.⁵⁹

As the sole legitimate basis proffered for this discipline rests on double-hearsay, and is refuted by

⁵⁹ This testimony was unrefuted. Though I determined Rodriguez was not completely forthright in his testimony about his absences from work in January 2018, this does not affect my finding that his testimony about the letter of warning was credible and trustworthy. *NLRB v. Universal Camera Corp.*, *supra*.

Rodriguez' credited firsthand denial that he engaged in the conduct alleged to support the discipline, I find the Respondent has not met its burden to prove the written warning would have issued absent Rodriguez' union activity. *See T.L.C. St. Petersburg*, 307 NLRB 605 (1992), affd. mem. 985 F.2d 579 (11th Cir. 1993) (administrative law judge properly accorded no weight to the company president's testimony concerning statements allegedly made by employees to an employee and a supervisor that they subsequently conveyed to him).

Based on the foregoing, I find the General Counsel met the burden to prove this complaint allegation.

c. The January 31, 2018 written warning

The January 31, 2018, written warning was for being absent without submitting requested supporting documentation.

The *Wright Line* paradigm applies. At this point there is more evidence that management knew about Rodriguez' union activity. McCormick, who issued warning, had specifically been told that Rodriguez supported the Union. He attempted to that this equated with knowledge, but the testimony was tortured and unavailing:

- Q. You testified that you know who Alberto Rodriguez is, correct?
- A. I do. Uh-huh.
- Q. And you were aware that he was an active union supporter, correct. It's a yes or no question.

- A. No. I'm not sure if I was aware or not, to be honest with you.
- Q. At no time were you aware that he was a union supporter?
- A. I don't recall. I mean, I don't recall anyone telling me who was union and who was not.

(General Counsel Exhibit Number 53 Marked for Identification)

...

- Q. Could you please take a minute and review this email?
- ...
- Q. This was an email you forwarded to Mr. Wilson, the Respondent's counsel, correct?
- A. I don't recall if I forwarded it or not. I don't remember that.
- Q. This email was sent to you on January 7th, 2018, correct?
- A. Yes.
- Q. By Gerber Flores?
- A. That's correct.
- Q. So you do know that Alberto Rodriguez was pro-union, correct?
- A. No. That's not correct. No. That's not—no.
- Q. Isn't that what this email says?
- A. Well, the email states from Gerber that he's pro-union. But that doesn't mean he's pro-union. He didn't specifically tell me, or I

didn't have that conversation that said hey, this person's pro-union.

Q. So after reading this email, you did not believe Alberto Rodriguez was pro-union?

A. I don't know what I believed after reading that email.

(Tr. 751–753.)

Antiunion animus has been established, as articulated above. Moreover, by this point there is evidence of specific animus toward Rodriguez' union activity. The emails, detailed above, show extensive emails between the Respondent's supervisors, managers, and the outside labor consultants, discussing Rodriguez' union activity. McCormick sent Matheu and G. Flores an email stating Mack had told them Rodriguez was a "poison pill" and was going to call the Union about leadership changes. This is a thinly-veiled reference to Rodriguez' union activity and is an expression of animus. *Assn. of Community Organizations For Reform Now*, 338 NLRB 866 (2003). Accordingly, the General Counsel has established the initial *Wright Line* burden.

The burden now shifts to the Respondent "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, *supra*, at 1089. The Respondent contends that Rodriguez was issued the written warning because he failed report to work and did not submit the paperwork to excuse his absences. I find this is supported by the evidence. It is undisputed that McCormick asked Rodriguez to bring in his eviction papers to support the time he had taken off for moving. When he did not do so, the letter of warning

was issued, subject to rescission if Rodriguez brought in the eviction papers. Given Rodriguez' prior discipline, this was an objectively reasonable step.⁶⁰

The General Counsel points to the labor consultants being copied on the emails regarding Rodriguez, and Hinkle's email suggesting he be put on a timeline as evidence of pretext. While McCormick could not explain why he included the labor consultants on the emails, and I have found their involvement to be evidence of animus, I do not find it establishes pretext under the circumstances here.

The General Counsel also points to McCormick straying from Konishi's recommendation of a verbal warning. Her email to McCormick states, in relevant part, "If he can't provide the backup documents for these unpaid time off, the manager needs to take the progress disciplinary action, by starting a verbal warning (verbal counseling report)." Given that Rodriguez had just received a verbal counseling report on January 26, I do not find McCormick's action of issuing a written warning telling of anything other than he took the next step of progressive discipline.

With regard to Konishi's recommendation to wait a week or so, McCormick gave Rodriguez a week to bring in the documentation which would result in the letter of warning being rescinded. I do not find this to be evidence of pretext, absent a showing McCormick's offer of a week's time was disingenuous.

The only evidence in the record regarding discipline issued to employees for leave issues was a

⁶⁰ I specifically am not including the December 21, 2017 written warning in making this assessment.

“counseling and employee notification of performance issues” given to employee Robert Lee, dated September 21, 2005, over 12 years ago. (GC Exh. 4, pp. 22–23.) There is no evidence regarding whether Lee had prior discipline. No meaningful comparison can therefore be made.

Based on the foregoing, I find the General Counsel has not met his burden to prove the January 31 written warning issued to Rodriguez violated the Act and I recommend dismissal of this complaint allegation.

d. Suspension and termination

Applying *Wright Line*, the General Counsel’s initial burden has been met per the analysis above, and the Respondent must prove that the same action would have taken place even in the absence of the protected conduct. For the following reasons, I find the Respondent’s burden has not been met.

On February 2, Matheu told Rodriguez he was being “fired” because he had threatened his co-workers to vote for the Union. The disciplinary documentation from HR explicitly states Rodriguez was on suspension pending investigation of an incident that occurred on January 31. The evidence about the events of January 31 is riddled with problems.

The catalyst was Mack writing a statement about being told by other employees about a conversation on January 31 between two unnamed employees that there “will be hell to pay” and “be ready to fight” if the Union loses. Though there are no names in the statement, Mack testified the two employees were Rodriguez and Benjamin Fili. McCormick

then wrote a statement on February 2, the day of Rodriguez' suspension, placing the date of the incident on February 1. Eric McLoughlin, one of the employees who heard the conversation at issue, also made a statement on February 2, placing the date of the incident on January 30. It is unclear when the conversation serving as the basis for Rodriguez' suspension occurred.

The problems with the date of the incident, however, pale in comparison to the problems with the content. Most fundamentally, Mack's statement about what another employee told him he overheard does not name any employee and does not attribute any specific comment to Rodriguez. Somehow, however, in McCormick's statement, Mack had actually overheard this conversation and only Rodriguez had commented "if the union doesn't win we are going to kick your ass." McLoughlin, who ostensibly actually heard the conversation, reported only the following statement, attributing it to both Rodriguez and Fili: "Let me find out he's one. I don't give a fuck." "Motherf*ck*en union busters don't even make union buster wages." McLoughlin also said "they" made it clear they would start a fight if the Union lost, but did not report what words were used by either employee. Notes from an interview of McLoughlin attribute the offensive comments to Fili:

As Rodriguez saw Eric walking in, Rodriguez made a comment to Fili saying "he's one of them" to which Fili responded "let me find out he's one of them I don't give a fuck! Fucking Union-Busters don't even make Union-Buster Wages!"

(GC Exh. 12.) Simply put, there is no competent evidence Rodriguez threatened anyone on January 31. The evidence is very clear that the Respondent seized on a double-hearsay statement from Mack to suspend Rodriguez just days before the second election. The documentation is not voluminous, complex or technical. Under a simple reading of the documents supporting the suspension, the Respondent could not honestly have formulated a reasonable belief Rodriguez had threatened anyone regarding the Union. The General Counsel has met his burden to prove Rodriguez' suspension violated Section 8(a)(3) and (1).

Rodriguez was terminated for his repeated warnings of violation of company policy over the last 8 months, threats of violence against coworkers, racial harassment of a coworker, and insubordination. In part, then, the termination was justified by discipline I have found to violate the Act, *i.e.* the December 21 letter of warning and the suspension, and is therefore tainted. *Care Manor of Farmington, Inc.*, 318 NLRB 725, 726 (1995) (explaining that a decision to discipline or discharge an employee is tainted if the decision relies on prior discipline that was unlawful); *Dynamics Corp.*, 296 NLRB 1252, 1253–1254 (1989) (same), enfd. 928 F.2d 609 (2d Cir. 1991). The Respondent therefore has the burden to demonstrate it would have reached the same decision without reliance on the discriminatorily issued prior discipline. *Id.* at 1254.

Neither Matheu nor Rodriguez knew what the “insubordination” referred to in the termination letter was, and no witness identified it. The racial harassment presumably concerns the incident with Mack, for which he received no contemporaneous discipline.

As the Respondent notes, racial harassment is grounds for immediate termination, yet the incident where Rodriguez was playing racially offensive music occurred on January 11, management knew about it that same day, and took no action.⁶¹ *See Doctor's Hospital of Staten Island, Inc.*, 325 NLRB 730, 738 (1998) (delay in acting on alleged misconduct evidence of pretext). The record shows the Respondent acted swiftly to terminate two other employees, Kirby and Cameron San Nicholas, for racial/sexual harassment.⁶² Only after Rodriguez served as observer to the election did the Respondent see fit to act on the incident with Mack.

Though the Respondent contends that the threats to coworkers was only one reason for Rodriguez' termination, it is clear that absent the suspension pending investigation, the Respondent was not in the process of terminating Rodriguez' employment. Put more simply, erase the suspension and, absent some other intervening event, Rodriguez would still be employed. *Structural Composites Industries, supra*.

Based on the foregoing, I find the General Counsel has established that Rodriguez' termination violated Section 8(a)(3) and (1) as alleged.

61 The incident with Mack did not factor into the level of discipline Rodriguez received when his January 31 letter of warning was discussed and issued.

62 *See R. Exhs. 16 and 82.* These documents also demonstrate a disparity in the in-depth quality of the investigations HR undertook for the complaints about Kirby and San Nicholas, as opposed to the lack of real investigation in Rodriguez' case.

7. Refusal to Consider or re-hire Fanor Zamora, Jeremiah Zermenno, and Hernandez

Complaint paragraph 11 alleges the Respondent violated Section 8(a)(3) and (1) by refusing to consider for re-hire or re-hire Zamora, Zermenno, and Hernandez.

Wright Line applies to claims alleging discriminatory refusal to hire. *See Merit Elec. Co, Inc.*, 328 NLRB 212 (1999). Hernandez' union activity and the employer's knowledge of it is discussed above. It is clear Zamora and Zermenno were active union supporters. Zamora served on the union committee, after the first election he wore a Union T-shirt every Friday until his termination, and he was in the meeting in the Respondent's parking lot following the first election. Zermenno spoke to employees about the Union, wore his union T-shirt every Friday, and wore a union pin every day. He also attended the meeting in the parking lot. The union meeting in the parking lot after the first election was outside a window from an office where managers were waiting to go home. While Vasquez said he could not make out faces from the video camera, the testimony that some of the managers were looking out a window and that Narimoto came out to smoke is unrefuted. In the wake of the first election, I find the Respondent was well aware these employees who openly displayed their loyalties at work supported the Union. I have extensively discussed animus above.

In *FES*, 331 NLRB 9, 12 (2000), the Board articulated the following test to establish a discriminatory refusal to hire violation: The General Counsel must initially show:

- (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct;
- (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and
- (3) that antiunion animus contributed to the decision not to hire the applicants.

If the General Counsel establishes these factors, the burden shifts to the respondent to show that “it would not have hired the applicants even in the absence of their union activity or affiliation.” *Id.* If the respondent asserts the applicants were not qualified for the positions it was filling, “it is the respondent’s burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity.” *Id.*

There is no dispute the Respondent was hiring when Zamora, Zermeno, and Hernandez reapplied for their positions following the mass layoff, as the evidence shows at least 21 new employees were hired through staffing agencies for warehouse employees at the Los Angeles facility. In addition, Harumi Tomimura, Mack, Vargas, and McLoughlin, all working

under the Ranstad contract, were retained after the Ranstad contract ended.

Zamora, Zermenno, and Hernandez were all qualified, as they had successfully worked in the warehouse prior to the layoff. Finally, the antiunion animus in and around November 2017 is well-documented as described above. It is buttressed with regard to this complaint allegation by the November hirings of Mack, Vargas, and McLoughlin, three employees who were known to be against the Union. In addition, even though labor consultant Hinkle was not involved in hiring warehouse employees, on November 3, 2017, Fujimoto forwarded him an inquiry about Zamora's application. Accordingly, the General Counsel's initial burden is met.

The Respondent has not met its burden to prove that Zamora, Zermenno and Hernandez were not qualified for the warehouse worker positions it filled, or that the individuals hired had superior qualifications.

The only other evidence offered as a justification for failure to rehire is that Zermenno, at the meeting where the layoff was announced, expressed frustration and said he should have taken another “fucking job” he had been offered and that the events of the October 31 meeting were “bullshit.” Zermenno had just lost his job, and to fail to re-hire him based on these stray comments in this context does not withstand basic scrutiny.

The Respondent asserts that there is no link between the layoffs and the employees' union activities because they were no more active than many employees who were not laid off. But there is no basis

in law for the proposition that an employer must act against all union supporters to show its actions against a particular union supporter violate the Act.

I find the General Counsel has established the Respondent failure to consider Zamora, Zermenio, and Hernandez for re-hire, and as such did not re-hire them, in violation of Section 8(a)(3) and (1).

8. March 2018 solicitation of employees to revoke union authorization

Complaint paragraph 6(g) alleges the Respondent violated Section 8(a)(1) of the Act by soliciting employees to revoke their authorization cards in March 2018.

An employer violates Section 8(a)(1) of the Act by “actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative.” *Wire Products Mfg. Co.*, 326 NLRB 625, 640 (1998), enf'd. sub nom. mem. *NLRB v R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000). The appropriate inquiry is “whether the Respondent’s conduct constitutes more than ministerial aid.” *Times Herald*, 253 NLRB 524 (1980). The Board considers the circumstances to determine whether “the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned.” *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) (citing *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967)); *see also Hall Industries*, 293 NLRB 785, 791 (1989), enf'd. mem. 914 F.2d 244 (3d Cir. 1990).

“An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right *nor offers any assistance*, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation.” *R. L. White Co.*, 262 NLRB 575, 576 (1982) (footnote omitted, emphasis supplied). Such “advice” may also be unlawful in the context of an employer’s commission of other unfair labor practices. *L’Eggs Products, Inc.*, 236 NLRB 354, 389 (1978), enfd. in relevant part 619 F.2d 1337 (9th Cir. 1980); *Register Guard*, 344 NLRB 1142, 1143 1144 (2005).

In *Register Guard*, the Board found a violation of Section 8(a)(1) where the employer “did more than inform employees of their right to revoke their cards—it enclosed a sample form with its June 16 letter for employees to use to revoke their union authorizations.” *Id.* at 1044. Here, as described fully in the statement of facts, the Respondent provided a sample letter requesting revocation of employees’ union authorization cards to employees at meetings conducted by labor consultant G. Flores. The Respondent also distributed the revocation form letter sample to employees with an attached letter from “management.” Moreover, the Respondent took these actions on the heels of the second election after committing numerous unfair labor practices. *Hall Industries*, 293 NLRB 785 fn. 11 (1989). I find, under these circumstances, the General Counsel has proved the Respondent violated the Act as alleged in complaint paragraph 6(g).

III. The Challenged Ballots

The tally of ballots from the second election showed that of 187 eligible voters, 76 votes were cast for and 46 votes were cast against the Union, with 53 challenged ballots. As a result of stipulations, the challenged ballots were narrowed. Specifically, the parties stipulated and agreed to open and count the challenged ballot cast by Emilio Gonzalez upon determination of the other challenged ballots. The parties agreed not to open or count the challenged ballots cast by Masae Inagaki, Shin Chang, Erica Chen, Ji Yun Chung, Stacey Imoto, Hannah Jeon, Francis Maring, Haruko Okawara, Salvacion Rivera, Yuko Sato, and Michelle Thai. The following 41 employees' ballots remain challenged:

Yukihiko Amanuma	Shun Man Yung
Wesley Chang	Chiaki Mazlomi
Kaipo Eda	Fumi Meza
Kumiko Estrada	Kristie Mizobe
Joshua Fulkerson	Steffanie Mizobe
Senllacett Guardado	Joseph Napoli
Cheryl Johnston	Thao Nguyen
Kaori Juichiya	Kayoko Nishikawa
Kazumi Kasai	Brian Noltensmeier
John Kirby	Shuji Ohta
Maho Kobayashi	Suguru Onaka
Rachel Lin	Wakako Park
Sachie Liu	Domingo Pliego
Stephany Manjarrez	Ryan Marie Prewitt
Alberto Rodriguez	Hideki Takegahara
Jose Rosas	Jenifer Tran
John Salzer, Jr.	Stacey Umemoto
Miwa Sassone	Karen Yamamoto
Chizuko Sho	Chiaki Yamashita

Mamoru Tagai
Keiko Takeda

Yasuhiro Yamashita

The stipulated election agreement stated as follows:

INCLUDED: All full-time and regular part-time class A, B, and C drivers, warehouse clerks, inventory control employees, assemblers/selectors, labelers, forklift drivers, warehouse employees, and leads in all departments, including the shipping and receiving department, state department, international export department, dry department, and cooler freezer department, and employees in the job classifications described herein who are supplied by temporary agencies, employed by the Employer at its facility currently located at 13409 Orden Drive, Santa Fe Springs, California.

EXCLUDED: All other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

Others Permitted to Vote: The parties have agreed that GPO distribution coordinators, GPO central purchase clerks, central Purchase clerks, and logistics office clerks may vote in the election but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be

resolved, if necessary, following the election.

A. Clearly Undisputed Employee Categories

There is no dispute that employees in the following positions are properly included in the Unit.

1. CDL driver

CDL drivers at Wismettac deliver products to customer and perform other warehouse-related duties, such as “loading and unloading trucks when required, picking and loading materials to/from trucks, pallets and other transport vehicles, securing loads and pre and post trip vehicle inspections and collecting payments from customers and forwarding payments to the office department.” (R Exh. 28.) The essential job functions are:

- Responsible for driving delivery trucks (with a weight more than or equal to 26,000 pounds) in an efficient and safe manner.
- Deliver the company’s products over established routes or within an established territory.
- Load or unload the merchandise at the customer’s place of business. Be able to load and unload items weighing 50 pounds.
- Develop and maintain effective relationships between the Company and the customer.
- Provide a positive representation of the company by demonstrating safe, responsible driving practices.
- May be required do to interstate driving.

- Operate company vehicle in a safe manner by applying knowledge and skills in maneuvering vehicle at varying speeds in difficult situations such as heavy traffic, in climate weather, or in tight loading dock areas.
- Perform pre-trip, in-route and post-trip inspections on equipment. Ensure equipment defects are reported immediately.
- Keep tractor interior clean and orderly.
- Promptly report all accidents involving driver or company equipment and any delays due to customers, breakdowns, weather or traffic conditions, or other emergencies, or any irregularities relating to pick up or delivery of freight.
- Submit all paperwork and documents required by Federal D.O.T. and Wismettac in a timely manner.
- Have customers sign receipts for goods and receive payment for the merchandise if there is a cash-on-delivery arrangement.
- Turn in receipts, payments, records or deliveries made, and any reports on mechanical problems with their trucks.
- Preform and follow all Food Safety Modernization Act (FSMA) Section 111 (Code of Federal Regulations 21 CFR Parts-1 and 11) and Sanitary Transportation of Human and Animal Food guidelines set by Logistics Headquarters.
- Assist in loading the trucks and arrange items for ease of delivery.

Drivers should have a high school diploma or equivalent, hold a valid ideal candidate will Class A or Class B commercial driver's license, and have experience with a forklift and electric pallet jack. The drivers must be able to read, write and speak English, and 1-2 years of previous driving experience in delivery vehicle is preferred. The knowledge/skills/abilities are:

CDL Driver must have a valid commercial driver license; must have knowledge of traffic rules and regulations; must be able to read and write and have the mental capacity to manually complete required paperwork and reports; must have a desire to serve customers and support the warehouse department; must meet the Company's minimum qualified drivers requirements, as defined by the Human Resources Department; must have the ability to load and unload 50 pounds; must be able to accurately read gauges and dials; must be able to enter and exit the vehicle's cab using footholds and handholds; must be able to spend 80% to 90% of the day sitting and driving; must be able to bend and lift freight when necessary; ability to use E-log books computer/tablet system; ability to follow and adhere to Food Safety Modernization Act (FSMA) Section 111 (Code of Federal Regulations 21 CFR Parts 1 and 11) and Sanitary Transportation of Human and Animal Food guidelines; must be able to accomplish hand, aim, leg and foot motions necessary to driver the tractor and twisting, turning and bending needed to load/unload trailers; Must be able

to work required hours; Must have knowledge of DOT regulations governing safe driving, hours of service, inspection and maintenance.

The working conditions are described as follows:

Truck driving has become less physically demanding because most trucks now have more comfortable seats, better ventilation, and improved, ergonomically designed cabs. Although these changes make the work environment less taxing, driving for many hours at a stretch, loading and unloading cargo, and making many deliveries can be tiring.

CDL Drivers frequently work 50 or more hours a week. Shift could start late at night or early in the morning. Typical workweek is Monday through Friday; however, evening and weekend hours are common in some branch office. Although most drivers have regular routes, some have different routes each day. Many truck drivers load and unload their own trucks. This requires considerable lifting, carrying, and walking each day. CDL Drivers will do long-distance driving and may not return home for 2 or 4 days depending on some branch offices; may be exposed to heat, cold, dust, irritants, etc.

The U.S. Department of Transportation governs work hours and other working conditions of truck drivers engaged in interstate commerce. A long-distance driver may drive for 11 hours and work for up to 14 hours—including driving and non-driving duties—

after having 10 hours off-duty. A driver may not drive after having worked for 60 hours in the past 7 days or 70 hours in the past 8 days unless they have taken at least 34 consecutive hour's off-duty. Most drivers are required to document their time in a logbook. Many drivers, particularly on long runs, work close to the maximum time permitted because they typically are compensated according to the number of miles or hours they drive. Drivers on long runs face boredom, loneliness, and fatigue. Drivers often travel nights, holidays, and weekends to avoid traffic delays.

(R Exh. 28.)

2. Driver (non-CDL)

The non-CDLs drivers have a job description similar to the CDL drivers, with the main difference being the size of the loads they carry. The essential functions are basically the same, with the loads for non-CDL drivers not to exceed 26,000 pounds. The driver must hold a valid driver's license, and preferably have 1–2 years' experience driving a delivery vehicle. In all other material respects, the job description matches that of the CDL driver. (R Exh. 29.)

3. Warehouse worker

There are two job descriptions for "warehouse worker" in the record. The first one states the job's purpose is provide labor support to the branch office. The warehouse workers "perform a range of general and specific warehouse task that can be easily learned on the job such as receiving, stocking, assembling,

staging, loading, and unloading products.” (R Exh. 27.) The essential functions of the position are:

- Package finished product for shipping (Shrink wrapping, boxing, labeling).
- Stage finished product for loading.
- Check purchase order/ work orders to ensure that products are correctly assembled and ready for delivery
- Check items to ensure that correct number of products are being assembled.
- Load finished product onto truck
- Unload product from truck, container and stock them in the designated area.
- Responsible for quality control. Ensure that no damaged products are sent out, and no damaged product will be stored.
- Operate within standard operating procedures
- Operate with forklift and/or palette jacks.
- Perform preventive maintenance on forklifts, and palette jacks
- Perform on the job training to new employees
- Handle inventory movement into and out of controlled locations
- Prepare customers’ orders for delivery
- Provide fill in support for other departments in the warehouse
- Other duties as assigned.

The warehouse worker should have a high school diploma or equivalent, and basic reading, writing and arithmetic skills. The warehouse worker also should have experience operating a forklift and electric pallet jack. The knowledge/skills/abilities for the position are:

Warehouse Worker must have the ability to organize and prioritize numerous tasks and complete them under various time constraints; Principles, practices and procedures of warehouse environment. Incumbent should be able to follow written and/or oral instructions; correctly follow a given rule or set of rules in order to arrange things or actions in a certain order; some warehouse workers in specific position require considerable and strenuous physical exertion so incumbents should have the ability to lift heavy objects over 50 pounds.

The working conditions are described as follows:

Warehouse Worker will spend long hours standing, bending, walking, and stretching, lifting materials and products up to 50 pounds and carrying of smaller items will be involved. The work still can be strenuous, even though mechanical materials-handling equipment is employed to move heavy items. Machinery operation requires the use of safety equipment to include but not limited to: eye safety glasses, hearing protectors, work boots, and hardhats. Typical workweek is Monday through Friday; however, evening weekend hours are common in some branch office.

(R Exh. 27.)

The other job description is very similar. (GC Exh. 49.) It states that warehouse workers “perform a range of general and specific warehouse task that can be easily learned on the job such as staging loading, unloading, stock, receiving, and assembly.” The essential functions are virtually identical. Experience with MS Office is included in the experience/training/education section. The ability to work in subzero temperatures is included, as the working conditions can require prolonged time in the freezer and deli sections.

The warehouse workers’ EEO category is “laborers and helpers.” Beatriz Gonzales and Jose Erazo are the labelers. (Tr. 1510, 1675–1676.)

4. Lead warehouse worker

The lead warehouse worker is the most senior warehouse employee on the warehouse floor. Leads are not supervisors, but they assist other employees. (Tr. 1146–1147.) The lead warehouse worker is described as follows:

The Lead Warehouse Worker contributes to the efficient operation of the warehouse by providing direct supervision to warehouse workers at the Branch Office. Lead Warehouse workers in this job perform a range of general and specific warehouse task such as staging, loading, unloading, stock, receiving. This position serves as the most experienced/skilled warehouse worker and is usually tasked as a section team leader and is responsible for the daily activity of stocking,

receiving, checker, assembler, freezer, deli, or shipping section.

(R Exh. 26.) The essential functions are:

- Fills in for Logistics Manager/ Supervisor as necessary,
- Trains current workers on safety, in services, new equipment, new technology
- Conducts safety audits/inspections
- Build orders according to assigned load tickets using industrial power equipment.
- Manually lift and move product to restock and repack ensuring date code accuracy and proper rotation.
- Adhere to good manufacturing practices and safety standards.
- Act as back-up support for Logistics manager/ supervisor as needed.
- Responsible for established inventory process to include checking out drivers, managing inventory processes and reconciliation.
- Package finished product for shipping (Shrink wrapping, boxing, labeling).
- Stage finished product for loading.
- Load finished product onto truck
- Unload product from truck, container and stock them in the designated area.
- Responsible for quality control. Ensure that no damaged products are sent out, and no damaged product will be stored.

- Operate with forklift and/or palette jacks.
- Perform preventive maintenance on forklifts, and palette jacks
- Handle inventory movement into and out of controlled locations
- Prepare customers' orders for delivery
- Provide fill in support for other departments in the warehouse
- Other duties as assigned.

The lead requires the same base experience, training, and education as the warehouse worker, but requires 4+ years in warehouse operations, and familiarity with Wismettac logistics operations. The knowledge/skills/abilities are:

Lead Warehouse Worker must have the ability to lead their team and organize and prioritize numerous tasks and complete them under various time constraints; Principles, practices and procedures of warehouse environment. Incumbent should be able to follow written and/or oral instructions; correctly follow a given rule or set of rules in order to arrange things or actions in a certain order; some warehouse workers in specific position require considerable and strenuous physical exertion so incumbents should have the ability to lift heavy objects over 50 pounds, demonstrate knowledge of Wismettac rules and regulations; demonstrate mastery in performing all activities related to warehousing;

(R Exh, 26.) The working conditions are the same as for warehouse workers.

a. John Kirby and Jose Rosas

The Union challenged these ballots, asserting that John Kirby and Jose Rosas were supervisors, not leads, and therefore should not have been permitted to vote. It is the Union's burden to establish supervisory status. *See NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001).

The evidence shows that both Kirby and Rosas were leads, not supervisors. The Act defines supervisors, at Section 2(11), as follows:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

There is no evidence that Kirby or Rosas performed any of these supervisory functions.⁶³

63 The Union requests an adverse inference based on the Respondent's failure to present Kirby and Rosas as witnesses. As it was the Union's burden to prove supervisory status, I find an adverse inference is not warranted. Moreover, Kirby was subsequently terminated for making obscene comments about female coworkers, so he is not reasonably assumed to be favorably

Moreover, the record evidence is clear that Kirby and Rosas were promoted to positions as leads, not as supervisors, in January 2018. (R Exhs. 43–44.) They reported to Ge. Flores, who had recently been promoted to supervisor. (Tr. 1377.) That some employees perceived Kirby and Rosas were supervisors because they walked around with laptops, no longer wore freezer gear, and received money from drivers, does not convert them to supervisors.⁶⁴ Because Kirby and Rosas were warehouse leads, they were included in the stipulated Unit. Accordingly, Kirby and Rosas' ballots should be counted.

B. Disputed Categories

The remaining disputed employees fall into two broad categories: (1) employees in job categories permitted to vote with unresolved stratus pursuant to the stipulated election agreement; and (2) employees in other job categories.

The Board has long held that election agreements are “contracts,” binding on the parties that executed them. *Barceloneta Shoe Corp.*, 171 NLRB 1333, 1343 (1968); *M.W. Breman Steel Co.*, 115 NLRB 247 (1956); *T&L Leasing*, 318 NLRB 324, fn. 13 (1995); *See also NLRB v. O'Daniel Trucking Co.*, 23 F.3d 1144, 1148–1149 (7th Cir. 1994). In the

disposed toward the Respondent. *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 4 (2019).

64 The Union relies on an exhibit showing that Kirby and Rosas each earned \$46 per hour. (U Br. 108; U Exh. 2.) The exhibit is clearly erroneous, as it shows other warehouse employees and drivers making unrealistically disparate pay, and shows the assistant operations manager making \$2,115.39 per hour.

absence of special circumstances, the Board will enforce stipulated election agreements, provided their terms are clear, unambiguous, and do not contravene express statutory exclusions or established Board policy. *See, e.g., Business Records Corp.*, 300 NLRB 708 (1990); *Granite & Marble World Trade*, 297 NLRB 1020 (1990). In stipulated unit cases, “the Board’s function is to ascertain the parties’ intent with regard to the disputed employee[s] and then to determine whether such intent is inconsistent with any statutory provision or established Board policy.” *White Cloud Prods., Inc.*, 214 NLRB 516 (1974), quoting *Tribune Company*, 190 NLRB 398 (1971). “The Board examines the intent on an objective basis, and denies recognition to any subjective intent at odds with the stipulation.” *Viacom Cablevision*, 268 NLRB 633 (1984).

Elections conducted pursuant to a stipulated election agreement are evaluated under the three-step test set forth in *Caesars Tahoe*, 337 NLRB 1096, 1097 (2002). *See Northwestern University*, 2018 WL 4678787 (2018). Under this test, the Board first decides whether the stipulation is ambiguous regarding the inclusion of the challenged voters. If the objective intent is clear, the Board will hold the parties to their stipulated agreement. If the objective intent is ambiguous, however, the Board will attempt to determine the parties’ intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If intent still cannot be discerned, the Board turns to the community of interest doctrine to resolve the challenged voters’ unit inclusion. *Caesars Tahoe, supra; Detective Intelligence Service*, 177 NLRB 69 (1969), enfd. 448 F.2d 1022

(9th Cir. 1971). The burden of proof lies with the party asserting the challenged voter is ineligible to vote. *Sweetener Supply Corp.*, 349 NLRB 1122, 1122 (2007).

1. Permitted to vote but status unresolved

Pursuant to the stipulation, the parties agreed that the following categories of employees were permitted to vote, but their inclusion in the Unit was not resolved: GPO distribution coordinators, GPO central purchase clerks, central purchase clerks, and logistics office clerks.

The Respondent argues that because “inventory control employees” are stipulated to as eligible voters, the persons in the aforementioned job titles are included because their duties relate to inventory control. The stipulation itself, however, also explicitly states, “No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit.” As is clear from the stipulation, “the parties had never reached a meeting of the minds on the meaning of the provision.” *NLRB v. Fountain Valley Regional Hospital*, 935 F.2d 275 (9th Cir. 1991), enf'dg. *Fountain Valley Regional Hospital*, 297 NLRB 549, 551 (1990).

Moreover, “[b]ecause the express language of the stipulation neither specifically includes nor specifically excludes the classifications” . . . of GPO distribution coordinators, GPO central purchase clerks, central purchase clerks, and logistics office clerks, . . . “the parties’ intent with regard to [those positions] is unclear.” *Caesars Tahoe, supra.* at 1098; citing *R. H. Peters Chevrolet*, 303 NLRB 791 (1991); *see also Lear Siegler*, 287 NLRB 372 (1987). This is particu-

larly true considering some employees with inventory-related duties could be classified as office clericals, professional employees, supervisors, or managers, all of which are categories of employees explicitly excluded from the stipulated unit.

The next step under *Caesars Tahoe* is to attempt to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. The Union argues the extrinsic evidence shows the Union only agreed to the 13 challenged ballots originally identified by Wismettac during the negotiation of the stipulated election agreement. (U Br. 57–58; U Exhs. 50–51.) While the exhibits and testimony the Union cites to certainly show the Union's subjective intent, I do not find it establishes mutual intent.

The Respondent argues that comparing the original petitioned-for unit to the stipulated election agreement shows an intent to expand the number of employees eligible to vote. Specifically, the Respondent argues that by changing the language from "inventory control" to "inventory control employees" the parties' intent to expand the number of warehouse employees was clear. (R Br. 137–138; GC Exhs 1(a), 1(aj).) While this shows the Respondent's subjective intent, I do not find it establishes mutual intent. *See Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232, 1236 (2003) (modification of petition language alone is not conclusive evidence of the parties' intent).

The one job title I find is resolved through extrinsic evidence is "logistics office clerk." As detailed below, evidence shows this term is synonymous with

“warehouse clerk” which is explicitly included in the Unit pursuant to the stipulated agreement.

Because the objective intent regarding the other “eligible to vote” categories of employees is a matter of dispute that cannot be resolved through extrinsic evidence, the community of interest standard applies.⁶⁵ *Fountain Valley, supra; Caesars Tahoe, supra*. In determining whether a unit of employees is appropriate, the Board considers the following factors:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

United Operations, 338 NLRB 123 (2002); *See also PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), overturning *Specialty Healthcare & Rehabilitation*

⁶⁵ The cases to which the Respondent cites to argue that the community of interests test should not apply are materially distinguishable, as the stipulated agreements in those cases did not contain expressly disputed categories of employees, as present here. (R Br. 138–141.)

It is a well-established matter of contract law that documents should be considered as a whole and phrases should not be read in isolation. As such, the inclusion of “inventory control employees” is read in conjunction with the section of the stipulated agreement that states the parties dispute whether the enumerated categories of employees are included.

Center of Mobile, 357 NLRB 934 (2011), and restoring *United Operations* criteria.

a. Logistics office clerk

Facts

Logistics office clerks provide administrative support for the warehouse office for the Los Angeles branch. The terms “logistics office clerk” and “warehouse clerk” are used interchangeably. (Tr. 73, 1145, 1274; R Exh. 25.) The job purpose is stated as follows:

The Logistics Office Clerks contribute to the efficient operation of the logistics department by providing Administrative support. Logistics Office Clerks in this job perform a range of general and specific administrative tasks including office/clerical tasks that can be easily learned on the job such as filing, copying and collecting documents, answering phones, ordering and distributing supplies and data entry. It also includes warehouse/ driver support such as communicating with drivers, sales, and vendors when needed, creating and maintaining logistics related data and report. Other tasks may include, but are not limited to: maintaining customer records, sorting and distributing incoming/ outgoing mail, printing invoices and assemble sheets, and/or receiving phone calls.

(R Exh. 24.) The essential functions are:

- Coordinate warehouse activities and assist the Logistics Branch Manager in the daily warehouse duties.

- Maintains and/or creates file or record keeping systems. Sorts, labels, files and retrieves documents, or other materials.
- Monitors and driver related documents and paper works which includes but not limited to DQ files, E-log, adjustment paper, and trip report and delivery schedule. Teach first time drivers and continuously communicate with them to improve DOT compliance.
- Receives calls, takes and relays messages, responds to requests for information; provides information or directs caller to appropriate individual including drivers, sales and vendors.
- Responsible for daily registration activities including but not limited to printing invoices, printing assemble sheets, forward payment orders to accounting department and check on payment status, and filing permanent copies.
- Compiles & completes inventory, ordering, & receiving records & reviews reports for correctness; maintenance of warehouse database system; additional warehouse duties as assigned.
- Organizing warehouse and work area for orderliness at all times.
- Assist warehouse (receiving and assembling) operation as needed.
- Creates reports for branch management as necessary
- Assisting in counting of physical inventory.
- Other duties as assigned.

The logistics office clerk position requires a high school diploma or equivalent, basic reading, writing, and arithmetic skills, general office skills and computer skills including Microsoft word, excel, and outlook software. The knowledge/skills/abilities for the position are:

Logistics Office Clerk must have the ability to organize and prioritize numerous tasks and complete them under various time constraints; Principles, practices and procedures of warehouse environment. Incumbent should be able to follow written and/or oral instructions; correctly follow a given rule or set of rules in order to arrange things or actions in a certain order; some warehouse workers in specific position require considerable and strenuous physical exertion so incumbents should have the ability to lift heavy objects over 50 pounds.

As for working conditions, the position description states:

Logistics Office Clerks will spend the work day sitting and using office equipment and computers which can cause muscle strains. Logistics Office Clerk may spend long hours standing, bending, walking, and stretching, lifting materials and products up to 50 pounds and carrying of smaller items will be involved. The work still can be strenuous, even though mechanical materials-handling equipment is employed to move heavy items. Logistics Office Clerks will work a standard 40 hours a week; however some work shifts or overtime during busy periods. Typical

workweek is Monday through Friday; however, evening weekend hours are common in some branch office.

The logistics office clerks work in the warehouse office. Drivers give the logistics office clerks paperwork showing a delivery has been completed. The position was previously referred to as warehouse clerk. (Tr. 1144–1145.)

Shin Chang, Erica Chen, Ji Yun Chung, Kumiko Estrada, Stacey Imoto, Hannah Jeon, Cheryl Johnston, Maho Kobayashi, Sachie Liu, Frances Maring, Fumi Meza, Kristie Mizobe,

Steffanie Mizobe, Shuji Ohta, Haruko Okawara, Suguru Onaka, Wakako Park, Domingo Pliego, Salvacion Rivera, Yuko Sato, Mamoru Tagai, Keiko Takeda, Michelle Thai, Stacy Umemoto, Karen Yamamoto, Chiaki Yamashita, and Yasuhiro Yamashita were all listed as logistics office clerks on the sixth amended voter list at the time of the second election. (R Exh. 18.) Of these employees, the challenged ballots are for Kumiko Estrada, Cheryl Johnston, Maho Kobayashi, Sachie Liu, Fumi Meza, Kristie Mizobe, Steffanie Mizobe, Shuji Ohta, Suguru Onaka, Wakako Park, Domingo Pliego, Mamoru Tagai, Keiko Takeda, Stacy Umemoto, Karen Yamamoto, Chiaki Yamashita, and Yasuhiro Yamashita.

Analysis

Kumiko Estrada was hired on May 8, 2006, as a product development assistant. She became an administrative assistant for the new business division in 2009. (U Exh. 23; R Exh. 65.) Garcia knew Estrada as an employee who worked in export. He

did not know or work with her as a logistics office clerk. The chart of office workers Garcia received on January 18, 2018, shows Estrada as working in the international export section of first floor office. (Tr. 84–86; U Exh. 1.) Narimoto was her supervisor. (U Exh. 23.) Fujimoto knew her as an export office clerk. (Tr. 1239.) Her name was not on the original voter list, the first amended list, or the second amended list. She appears as an export office clerk on the addendum to the third amended voter list, and is absent from the fifth amended voter list. (U Exhs. 53, 59.) There is simply no evidence Estrada was a logistics office clerk, and therefore she should not be included in this category of employees. Her eligibility to vote will be based on her position as an export office clerk.

Maho Kobayashi was a temporary employee who reported to Narimoto during the relevant time period. Fujimoto testified she was an export office clerk, and documents in her personnel file reflect this as well. (Tr. 1244–1245; R Exh. 67; U Exh. 25.) She worked in the first floor front office in the international export department in January 2018, and she was offered the position of office clerk after the election on May 29, 2018, reporting to export senior manager Kengo Sawada. (U Exhs. 1, 25.) She first appears on the sixth amended voter list as a logistics office clerk. As there is no evidence Kobayashi was a logistics office clerk, she should not be included in this category of employees. Her eligibility to vote will be based on her job as an export office clerk.

According to Fujimoto, Sachie Liu was a sales assistant in the institutional customer division (ICD) at the time of the second election. (Tr. 1249–1250.)

She was hired in 2004 as an operations analyst, and became an office clerk in 2010, reporting to Hirotake Ikejiri. (U Exh. 26.) She is absent from the voter lists until the fifth amended list dated December 20, 2017, where she is listed as a logistics office clerk. (U Exhs. 53, 59.) As there is no evidence Liu worked as a logistics office clerk, she should not be included in this category of employees. Her eligibility to vote will be based on her job as an ICD sales assistant.

Fumi Meza was hired in 2010 as a sales assistant. As of at least May 2015, she was a GPO export clerk supervised by Nobuyasu Yamamoto. (R Exh. 69; Tr. 1253–1254.) The first voter list she appears on is the third amended voter list dated September 12, 2017, where she is listed as an export office clerk. (U Exh. 53.) She is first listed as a logistics office clerk on the fifth amended voter list, dated December 20, 2017. (U Exh. 59.) As there is no evidence Meza worked as a logistics office clerk, she should not be included in this category of employees. Her eligibility to vote will be based on her job as GPO export clerk.

Kristie Mizobe was hired in October 2016 as a sales assistant in the institutional customer division, and was in this position at the time of the second election. Her supervisor was Shuzo Hosoma, manager for the institutional customer division.⁶⁶ (R Exh. 70; Tr. 1255–1256.) She first appears on the fifth amended voter list dated December 20, 2017, as a logistics office clerk. (U Exhs. 53, 59.) As there is no evidence K. Mizobe worked as a logistics office clerk,

⁶⁶ The EEO category listed for K. Mizobe's position is "administrative support workers." (U Exh. 28.)

she should not be included in this category of employees. Her eligibility to vote will be based on her job as an ICD sales assistant.

Steffanie Mizobe worked as an export office clerk starting in October 2016. She reported to Nobuyasu Yamamoto, the GPO manager. (R Exh. 71; Tr. 1256–1257.) As of January 2018, she worked in the first floor front office. (U Exh. 1.) She is listed as an export office clerk on the original voter list, the first amended list, the second amended voter list, third amended voter list. She is first listed as a logistics office clerk on the fifth amended voter list. (U Exhs. 53, 39.) As there is no evidence S. Mizobe worked as a logistics office clerk, she should not be included in this category of employees. Her eligibility to vote will be based on her job as an export office clerk.

Shuji Ohta was hired as an office clerk in August 2016, and became a purchasing clerk on September 19, 2016, holding that position at the time of the second election. (R Exh. 72; Tr. 1259.) He worked in the first floor main office and reported to Mayumi Misawa, the purchasing supervisor. (U Exh. 1; R Exh. 72, Tr. 91, 1260.) Ohta is listed as an office clerk on the original voter list, the first amended voter list, the second amended voter list, and the third amended voter list. He is listed as a logistics office clerk on the fifth amended voter list. (U Exhs. 53, 59.) As there is no evidence Ohta worked as a logistics office clerk, he should not be included in this category of employees. His eligibility to vote will be based on his job as a purchasing clerk.

Wakako Park was hired in August 2015 as a GPO Central Purchase Clerk. On July 24, 2017, she changed positions and became a sales assistant in

the institutional customer division. She worked in the first floor main office and her supervisor was Kazutaka Sato. (R Exh. 74; U Exhs. 1, 32; Tr. 1268–1269.) The first voter list she appears on is the fifth amended voter list dated December 20, 2017, where she is listed as a logistics office clerk. (U Exhs. 53, 59.) As there is no evidence Park worked as a logistics office clerk, she should not be included in this category of employees. Her eligibility to vote will be based on her job as an ICD sales assistant.

Keiko Takeda was hired as a purchasing clerk on December 13, 2017, and held this position at the time of the second election. (R Exh. 77; Tr. 1275.) As she was not hired until December 2017, she first appears on the fifth amended voter list dated December 20, 2017, listed as a logistics office clerk. As there is no evidence Takeda worked as a logistics office clerk, she should not be included in this category of employees. Her eligibility to vote will be based on her job as a purchasing clerk.

Stacey Umemo was hired in December 2011 as a purchasing clerk, a position she began in January 2012 and held through the time of the second election. (R Exh. 78; Tr. 1277.) She worked in the second-floor front office in the fresh and processed produce department office. (U Exh. 1.) She is listed as a purchasing clerk on the original voter list, the first amended list, the second amended list, and the third amended list. The first time she is listed as an office logistics clerk is the fifth amended voter list. (U Exhs. 53, 59.) As there is no evidence Umemo worked as a logistics office clerk, she should not be included in this category of employees. Her eligibility to vote will be based on her job as a purchasing clerk.

Karen Yamamoto was hired in 2015 as an export sales assistant, a position she held through the date of the second election. (R Exh. 79; Tr. 1278.) The position was characterized as an office clerk. (U Exh. 37.) She first appears on the addendum to the third amended voter list, dated September 12, 2017, as an export office clerk. She is listed as a logistics office clerk on the fifth amended voter list. (U Exhs. 53, 59.) As there is no evidence K. Yamamoto worked as a logistics office clerk, she should not be included in this category of employees. Her eligibility to vote will be based on her job as an export sales assistant.

Chiaki Yamashita worked as an export sales assistant starting in 2015. (R Exh. 80.) Fujimoto testified she worked as a GPO export clerk at the time of the second election. (Tr. 1281.) She worked in the first floor main office.⁶⁷ (U Exh. 1; Tr. 93.) C. Yamashita is listed as a “CMP rep” on the original voter list, the first amended list, the second amended list, and the third amended list. She is listed as a logistics office clerk for the first time on the fifth amended voter list. (U Exhs. 53, 59.) As there is no evidence C. Yamashita worked as a logistics office clerk, she should not be included in this category of employees. Her eligibility to vote will be based on her job as a GPO export clerk.

Yasuhiro (David) Yamashita became an office clerk for the retail group on January 10, 2012. (R Exh. 81.) Fujimoto testified that he was the administrative

⁶⁷ There are two disputed voters with the first name Chiaki—Chiaki Mazlomi and Chiaki Yamashita. The evidence establishes it was Chiaki Yamashita who date next to Fumi Meza in the first floor main office. (Tr. 93.)

assistant for the institutional customer division at the time of the second election. His supervisor, Jon Chen, supervises sales associates. (Tr. 1282–1283.) Stocker Carlos Katayama testified that Y. Yamashita did not work in the warehouse. Y. Yamashita did not appear on a voter list until he appeared as a logistics office clerk on the fifth amended voter list. (U Exhs. 53, 39.) As there is no evidence Y. Yamashita worked as a logistics office clerk, he should not be included in this category of employees. His eligibility to vote will be based on his job as an administrative assistant.

Domingo Pliego was hired as a temporary employee in the warehouse as a food safety coordinator on September 18, 2017, and held this position through the time of the second election. He worked in warehouse office and reported to Vasquez. (R Exh. 75; Tr. 2171–1272.) He is listed on the fifth amended voter list as a logistics office clerk.⁶⁸ As there is no evidence Pliego worked as a logistics office clerk, he should not be included in this category of employees. His eligibility to vote will be based on his job as a food safety coordinator.

Sheryl Johnston worked as a temporary employee in the position of warehouse clerk from June 2017 to March 2018.⁶⁹ (U Exh. 24; R Exh. 66; Tr. 1243, 1335.) She worked in the warehouse office. As warehouse clerk is explicitly included in the stipulated election agreement, and is not rendered ambiguous by the “others permitted to vote” employment categories or any other provision of the stipulated agree-

⁶⁸ This is the first voter list that post-dates Pliego’s hire.

⁶⁹ After the second election she was hired as a direct employee. about order status, changes, or cancellations.

ment, I find Johnston was an eligible voter and her vote should be counted.

Suguru Onaka was hired as a warehouse worker in 2014. At the time of the election, he was a logistics office clerk working in the warehouse office. (R Exh. 73; Tr. 75, 1263.) He was listed as a logistics office clerk on all of the voter lists. It is undisputed that “logistics office clerk” and “warehouse clerk” are one in the same. (Tr. 73.) As warehouse clerk is explicitly included in the stipulated election agreement, I find Onaka was an eligible voter and his vote should be counted.

Mamoru Tagai was hired as a warehouse clerk, and started work in that position on September 2, 2014. He worked in the warehouse office, reporting to the warehouse manager. He was in the same position at the time of the election, though the name changed to logistics office clerk. (R Exh. 76; Tr. 1273–1274.)

It is undisputed that “logistics office clerk” and “warehouse clerk” are one in the same. As warehouse clerk is explicitly included in the stipulated election agreement, I find Tagai was an eligible voter and his vote should be counted.

The evidence establishes that Johnston, Onaka, and Tagai were logistics office clerks, or warehouse clerks, included in the stipulated Unit, and eligible to vote.

b. GPO distribution coordinator

Facts

The GPO distribution coordinator provides “routine logistic support to the Global Procurement Operation

headquarters and will be responsible for the procurement of all products coming in to the Company.” (R Exh. 23.) The essential job functions are:

- Track all incoming shipments from Vendors, NTC Japan and other third party clients to ensure that all products are received and ready for distribution to other branch warehouses.
- Scheduling third party truck company, arranging pick up and drop offs and scheduling loading dock use of mechanized equipment such as forklifts
- Prepares transportation of products, enhancement to existing system and problem resolution. Defines the project scope, business and GPO distribution requirement, and cost /benefit analysis, make recommendation on improvement.
- Checking and verifying shipping records, handling questions or concerns of shipping shortages or overages and addressing any problems with inventory control.
- Respond to Branch, third party trucking company, and outside warehouse's inquiries
- Responds to internal and external inquiries concerning shipments and/or issue resolutions.
- Perform other related duties as required.

For experience, education, and training, the GPO distribution coordinator requires a high school diploma or equivalent, 1–3 years office or business experience,

and computer skills, including word processing. The knowledge/skills/abilities for the job state:

The GPO Distribution Coordinator will have skills in keyboarding and in the use of word processing, spreadsheet, and database management computer software package; ability to organize and prioritize numerous tasks and complete them under various time constraints; principles, practices and procedures of an office environment; ability to use the telephone in a professional and courteous manner; assemble, sort, and/or distribute documents, supplies, and/or materials/items; deal with people in a manner which shows sensitivity, tact, and professionalism; follow written and/or oral instructions; speak clearly, concisely and effectively; listen to, and understand, information and ideas as presented verbally; establish, organize and/or maintain files; knowledge in Microsoft application (*i.e.* Word, Excel, Access, PowerPoint); ability to use Oracle ERP system; knowledge of procurement procedures.

As for working conditions, the position description states:

The GPO Distribution Coordinator usually works a standard 40-hours week in clean offices; however some work shifts or overtime during busy periods. They sit for long periods and sometimes must contend to noise levels caused by various office machines. These workers are susceptible to repetitive strain injuries such as carpal tunnel syndrome, neck and back injuries, and eyestrain. To help

prevent these conditions, many offices have adopted regularly scheduled exercise breaks, and work stations that allow workers to stand or sit as they wish. The GPO Distribution Coordinator may spend a few hours in the warehouse to see if products have arrived from vendors. Travel is sometimes necessary.

(R Exh. 23.)

At the time of the second election, Yukihiko Amanuma, Chiaki Mazlomi, Brian Noltensmeier, Ryan Prewitt, John Salzer, and Hideki Takegahara were listed as GPO distribution coordinators.⁷⁰ (R Exh. 18.) Their ballots are all challenged.

Analysis

i. Employees with Job Title

Takegahara's employment records show he was in global product development as of May 1, 2011. (R Exh. 64.) Takegahara did not appear on the initial voter list, the first amended voter list, or the second amended voter list. He appears on the addendum to the third amended voter list, dated September 12, 2017, and the fifth amended voter list, dated December 20, 2017, as a GPO distribution coordinator. (U Exhs. 53, 59.) In the position statement Wismettac filed on August 29, 2017, Takegahara is included as a data entry rep. (U Exh. 47.) Driver Luis Lopez did not know or work with Takegahara. (Tr. 1457.) Warehouse stocker Carlos Katayama did not know or work with Takegahara. (Tr. 1501.) Rolando Lopez did not

⁷⁰ Amanuma's EEO category in his personnel files state "administrative support." (U Exh. 7.)

know or work with Takegahara. (Tr. 1552.) The only evidence regarding Takegahara as a GPO distribution clerk came from Fujimoto, who testified as follows:

Q And at the time of the election, was Mr. Takegahara employed at the company?

A Yes, he was.

Q And when I say time of the election, we're referring February 6, 2018?

A Yes.

Q And what position was he employed in? He was a distribution-GPO distribution coordinator.

Q And how do you know that?

A Knowing that his position, you know, when I walk downstairs and talking to him.

Q Okay. Did you interact with him?

A Yes.

Q During February 2018?

A Not during February, the actual date, but throughout my course of employment at the company.

(Tr. 1235–1236.) This testimony is imprecise regarding when Takegahara assumed the position of GPO distribution coordinator, and it is insufficient to show Takegahara was a GPO distribution coordinator on February 6, 2018. The Board will “only consider bona fide titles or job descriptions that fairly represent the employee’s function and have been applied for a reasonable period of time.” *Viacom, supra*, at fn. 8. Takegahara did not testify. Taken in connection with

the confusing documentary evidence and his absence from the first three voter lists despite no record of a change in job during this time period, I find the evidence fails to establish Takegahara was a GPO distribution coordinator at the time of the second election. As the most recent position competent evidence shows Takegahara held was global product development, and this is not a category included in the stipulated Unit or rendered ambiguous by the stipulated agreement, I find Takegahara was ineligible to vote.

Chiaki Mazlomi held a number of positions with Wismettac, including GPO central purchase clerk. She became a GPO coordinator on January 11, 2016. (U Exh. 18; R Exh. 60.) She held this position at the time of the second election, and reported to Hwami Oh, the GPO operations manager. (Tr. 1212, 1229.) The voter lists reflect Mazlomi was a GPO coordinator until the fifth amended voter list, where she was then listed as GPO distribution coordinator even though her job did not change. (U Exhs. 53, 59.) As there is no evidence Mazlomi worked as a GPO distribution coordinator, she should not be included in this category of employees. Her eligibility to vote is assessed below in relation to her actual work as the GPO coordinator at the time of the second election.

Yukihiko Amanuma was hired as a GPO distribution coordinator on March 25, 2015, reporting to Nobuyasu Yamamoto, who was the assistant operation manager. (R Exh. 59; Tr. 1227.) A manger request form was signed transferring Amanuma from GPO operation office to GPO operation warehouse in the warehouse department on May 18, 2015. The branch/department manager who signed the request was

George Reynaga.⁷¹ (U Exh. 17 p. 5.) According to Fujimoto, Amanuma worked in an office receiving area of the warehouse. (Tr. 1232.) The EEO category listed on Amanuma’s personnel records is “administrative support workers.” (U Exh. 17 p. 12.) The voter lists consistently reflect Amanuma as a GPO distribution coordinator.⁷²

Brian Noltensmeier became a GPO distribution coordinator on November 13, 2017, and held this position at the time of the second election. He reported to Nobuyasu Yamamoto. He had previously been a GPO central purchasing clerk. (R Exh. 61; Tr. 1230–1231.) He was included on the first, second, and third amended voter list as a GPO central purchase clerk, which was the position he held at the time of each list. He appears as a GPO distribution coordinator on the fifth amended voter list, dated December 20, 2017. (U Exhs. 53, 59.)

Ryan Prewitt was hired on July 31, 2017, as a GPO distribution coordinator, reporting to Hwami Oh, the GPO assistant manager. She held this position at the time of the second election. Prewitt works in the first floor main office because there is no room for her in the warehouse receiving area office. (R Exh. 62; Tr. 1231–1232.) The voter lists consist-

⁷¹ Reynaga, who had been a GPO distribution supervisor, left in January 2017. (R Exh. 60.)

⁷² The original and first amended list simply state “GPO Distribution” but I do not find this to be a telling distinction because the GPO clerks are specifically identified as such. Although one document references Amanuma as a clerk (U Exh. 17 p. 4), the weight of the evidence establishes him as a GPO distribution coordinator.

ently reflect Prewitt as a GPO distribution coordinator.⁷³

John Salzer was hired as a GPO distribution coordinator on October 23, 2017, reporting to Nobuyasu Yamamoto, the GPO manager. He held this position at the time of the second election. (R Exh. 63; Tr. 1233–1234.) He is listed on the fifth amended voter list, the first since his hire, as a GPO distribution coordinator. (U Exh. 59.)

The evidence establishes that Amanuma, Noltensmeier, Prewitt, and Salzer were GPO distribution coordinators at the time of the second election.

ii. Community of Interests Standards

I find the Union has met its burden to prove the GPO distribution coordinators

Amanuma, Noltensmeier, Prewitt, and Salzer do not share a community of interest with the Unit employees.

The global procurement distribution coordinators are part of the GPO operations division, reporting to the GPO manager, who was N. Yamamoto during the relevant time period. (R Exh. 23.) The drivers are part of the logistics-driver branch, reporting to the logistics branch manager, who was Vasquez during the relevant time period. (R Exhs. 28–29.) The warehouse workers were part of the logistics warehouse department, also reporting to the logistics branch manager Vasquez. (R Exh. 27.) Drivers and warehouse workers are warehouse employees, while GPO

⁷³ As with Amanuma, the original and first amended list simply state “GPO Distribution.”

employees, including distributions coordinators, are headquarters employees. In sum, they are in separate departments and have a separate supervisory chain.

The drivers and warehouse workers have distinct requirements and training. Both have to possess the ability to drive a forklift and pallet jack, the ability to lift 50 pounds. Drivers and warehouse workers need to be able to do strenuous work, including considerable lifting, carrying, and walking. The GPO distribution coordinators have no such requirements. One of the purposes of the driver position is to assist warehouse workers. (R Exhs. 28–29.) Drivers and warehouse workers receive training on how to lift heavy equipment. (Tr. 1433.) Drivers and warehouse workers also participate in warehouse training, including the use of pallet jacks and forklifts. (U Exhs. 41, 45, 46.) GPO distribution coordinators do not undergo this type of training.

Conversely, the GPO distribution coordinator requires 1–3 years of office or business experience and general office skills. More specifically, the GPO distributions clerk requires skills in keyboarding, spreadsheets, database management, ability to use the Oracle ERP system, and knowledge of procurement procedures. The driver and warehouse workers have no such requirements.

The essential job functions of the drivers and warehouse workers differ substantially from the essential job functions of the GPO distributions coordinators. Broadly speaking, they differ in two material aspects. First, the drivers and warehouse workers perform manual labor the vast majority of their time, and the GPO distribution coordinators perform office work

the vast majority of their time. Moreover, the drivers and warehouse workers are branch-level employees, and as such their duties serve the Los Angeles facility. The GPO distribution clerks' duties are focused on global operations and serve headquarters. This is clear from the list of essential functions of the GPO distribution clerk, which include tracking shipments for distribution to other branches and scheduling third-party trucking companies (as opposed to the warehouse branch drivers).

GPO distribution clerks do not spend any time operating heavy machinery, loading and unloading products, performing maintenance on heavy equipment, or providing fill-in support for departments in the warehouse. While the GPO distribution clerks may spend a few hours a week in the warehouse to see if products have arrived from outside vendors, they do not interact with the internal drivers or warehouse workers for any job-related functions. Their work is primarily performed in an office. Drivers and warehouse workers do not fill in for GPO distribution clerks, and vice-versa. There is no evidence of cross-training.

Likewise, there is no significant functional integration between the drivers/warehouse workers and the GPO distribution coordinators. The drivers and warehouse workers service the Los Angeles branch and its customers. They prepare product for delivery to Southern California customers and deliver the product to those customers. The GPO distribution coordinator, true to its title, serves global operations on a much broader scale.

As for other contact, the testimony from drivers, warehouse workers, and the former assistant ware-

house manager was consistent in stating that drivers and warehouse workers do not interact with GPO distribution coordinators. (Tr. 94–95, 1455–1463, 1497–1507.)⁷⁴ No GPO distribution coordinator testified that he or she has contact with drivers or warehouse workers.⁷⁵

There is no evidence of interchange or temporary transfers between the GPO distribution coordinators and the drivers or warehouse employees.

Finally, while the GPO distribution coordinators and the warehouse workers/drivers are subject to some of the same corporatewide policies, many of their terms and conditions of employment diverge. For example, drivers and warehouse workers have specialized attire—the drivers wear uniforms and the warehouse workers require hardhats, safety glasses, hearing protectors, work boots, and hardhats. There is no specialized attire for GPO distribution coordinators. In addition, both the driver and warehouse workers’ working conditions contemplate exposure to

⁷⁴ This cited testimony applies to various categories of challenged ballot employees and is hereby incorporated into the analyses of those categories whether the testimony addresses the category or the name of employee(s) in that category.

⁷⁵ The Union requests an adverse inference based on the Respondent’s failure to call challenged ballot voters as witnesses. I find such an adverse inference is not warranted. *See Quicken [sic] Loans, supra.* I also find the testimony of the warehouse employee witnesses and Garcia, which is largely unrefuted and which I credit (see *Gold Standard Enterprises, supra.*), constitutes the great weight of the evidence. The warehouse employees testified based on their direct and personal experience of their day-to-day interactions at work. This is much more probative than Fujimoto’s testimony about his observations regarding the challenged ballot employees.

extreme temperatures. Finally, the evidence shows that drivers and warehouse workers were routinely hired through temporary agencies. There is no evidence GPO distribution coordinators were employed through temporary agencies.

Based on the foregoing, I find the GPO distribution coordinators do not share a community of interests with the drivers and warehouse workers.

c. Central purchase clerks

Facts

The job purpose for central purchase clerks is to provide “routine administrative support to the Operation headquarters and will be responsible for the procurement of all products coming in to the Company.” They are “responsible for monitoring outgoing and incoming products, monitor shipping quantity, adjust inventory overages and shortages and ensure that all products are distributed to each branch offices.” (R Exh. 19.) The essential job functions are as follows:

- Responsible for coordination, transfer and appropriate translation of all technical documentation required to support the Company product line in North America. Translate written and oral communications from English to Japanese; and Japanese to English for all levels of the business relationship, including administration and management.
- Check inventory level for each branch office before and after reviewing shipment of products.

- Confirm the sales forecast/commitment from each branch to determine purchasing quality for Headquarters purchase.
- Confirm the purchase quantity request from the branch office for HQ purchasing.
- Adjust shipping quantity for each branch office
- Adjust inventory overages and shortages for each branch office and arrange internal transfer (in/out oracle)
- Create and revise purchase order (PO), internal requisition (IR), and container creation (overhead calculation table).
- Responsible to monitor and approve PO and IR.
- Confirm sales confirmation (SC = need PO confirmation), estimated time of arrival (ETA), quantity, price and etc.
- Responds to internal and external inquiries and confirm vessel shipping schedule.
- Process branch ship confirmed documents in Oracle and prepare packing slips (PS) and Bill of Lading (BL).
- Prepare and submit payment orders for expense to accounting
- Prepare and submit 3 way matching documents (payment order for inventory) to accounting.
- Manage and keep log of payment order log sheet.

- Process credit (both in/ out Oracle) and return to Vendor (RTV) process and review RTV report.
- Perform other related duties as required.

Central purchase clerks must have a high school diploma or equivalent, computer skills, office skills, 1–3 years' experience in an office, and be bilingual in English and Japanese. The knowledge/skills/abilities are as follows:

Candidate will have skills in keyboarding and in the use of word processing, spreadsheet, and database management computer software package; ability to organize and prioritize numerous tasks and complete them under various time constraints; Principles, practices and procedures of an office environment; ability to use the telephone in a professional and courteous manner; assemble, sort, and/or distribute documents, supplies, and/or materials/items; deal with people in a manner which shows sensitivity, tact, and professionalism; follow written and/or oral instructions; speak clearly, concisely and effectively; listen to, and understand, information and ideas as presented verbally; establish, organize and/or maintain files; knowledge in Microsoft application (*i.e.* Word, Excel, Access, PowerPoint); ability to use Oracle ERP system; knowledge of procurement procedures.

As for working conditions, the job description for the central purchase clerk states:

The Central Purchase Clerk usually works

a standard 40-hours week in clean offices; however some work shifts or overtime during busy periods. They sit for long periods and sometimes must content to noise levels caused by various office machines. These workers are susceptible to repetitive strain injuries such as carpal tunnel syndrome, neck and back injuries, and eyestrain. To help prevent these conditions, many offices have adopted regularly scheduled exercise breaks, and work stations that allow workers to stand or sit as they wish. The Central Purchase Clerk may spend few hours in the warehouse to see if products have arrived from vendors.

(R Exh. 19.)

Central purchase clerks work for headquarters for global procurement operations. As described by Fujimoto, central purchase clerks ensure the company purchases the proper inventory for each branch. Each branch requests how much product they want and the purchase clerk will make sure the request is for the correct inventory. When the inventory comes in, the purchase clerks check with the warehouse to ensure the inventory has arrived properly. Central purchase clerks work in the first floor main office. (Tr. 1130–1134.)

Kayoko Nishikawa, Wesley Chang, Masae Inagaki, and Thao Nguyen were listed as central purchase clerks on the sixth amended voter list. (R Exh. 18.) The only ballot not challenged is that of Masae Inagaki.

Analysis

i. Employees with Job Title

Thao Nguyen was offered the position of assistant buyer on January 12, 2017, with a start date of February 5, 2018. She was performing the duties of assistant buyer on February 6, the date of the second election. (R Exh. 46; Tr. 1203.) Prior to this, she was a GPO central purchase clerk, beginning that job on November 17, 2014. (U Exh. 4; Tr. 1203.) She received a raise and additional responsibilities in November 2015. (U Exh. 4.) Nguyen is listed as a central purchase clerk on all of the voter lists. (U Exhs. 53, 59.) As there is no evidence, she was a central purchase clerk, she was not properly included in this category of employees. Her eligibility to vote will be considered in relation to her actual work as a GPO central purchase clerk during the relevant time period.

Kayoko Nishikawa was hired as a central purchase clerk in December 2013, and held this position at the time of the second election. (R Exh. 47; Tr. 1206.) Nishikawa reported to Nobuyasu Yamamoto. The voter lists consistently reflect she is a central purchase clerk. (U Exhs. 53, 59.)

Wesley Chang was hired as a shipping/receiving clerk on August 1, 2011, reporting to Nobuyasu Yamamoto. He became a central purchase clerk in December 2013.⁷⁶ (R Exh. 45; Tr. 1200.) Chang's EEO job

⁷⁶ Fujimoto testified that Chang was a GPO distribution coordinator at the time of the second election. (Tr. 1200.) This appears to be an error, as the weight of the evidence shows he was a central purchase clerk, and there is no documentation showing he was [sic] a GPO distribution coordinator and no explanation for a lack of such documentation.

category is listed as “Administrative Support Workers” and his business unit is “sales headquarters.” (U Exh. 3.) Chang is listed as a central purchase clerk on every voter list. (U Exhs. 53, 59.)

The evidence establishes Chang and Nishikawa were central purchase clerks at the time of the second election.

ii. Community of Interest Standards

For the same reasons as stated above in the analysis of the GPO distribution coordinator position, I find the Union has established the central purchase clerks do not share a community of interest with the drivers and warehouse workers.

In addition, the central purchase clerks sit in cubicles in the front offices, which is a part of the facility warehouse employees and drivers do not work, and in fact cannot access with their badges. Moreover, the central purchase clerk must be fluent in English and Japanese, and has significant translating duties, unlike drivers and warehouse workers.

Though Every few months on Fridays and Saturdays front office staff assisted with counting inventory, this is insufficient to establish community of interests.⁷⁷

d. GPO central purchase clerks

Facts

Global Procurement Operations (GPO) central purchase clerks perform the same function as central

77 Tr. 1537.

purchase clerks. (Tr. 1138; R Exh. 21.) The essential job functions, experience/training/education, knowledge/skills/abilities, and working conditions are the same as the central purchasing clerk. (R Exhs. 19, 21.)

The essential job functions vary slightly from the central purchase clerk, but the experience/training/education, knowledge/skills/abilities, and working conditions are the same.

Joshua Fulkerson, Senllacett Gonzalez Guardado, Kaori Juichiya, Kaipo Eda, Rachel Lin, Stephany Manjarrez, Miwa Sassone, Chizuko Sho, Jenifer Tran, and Shun Man Yung were listed as GPO central purchase clerks, at the time of the second election.⁷⁸ (R Exh. 18.) Their ballots are all disputed. The parties do not dispute that Fulkerson, Gonzalez Guardardo, Juichiya, Eda, Manjarrez, and Tran worked in the agreed-upon challenged voter classification. As detailed above, Thao Nguyen was a central purchase clerk.

Analysis

i. Employees with Job Title

With regard to Lin, the evidence shows she was an assistant buyer beginning on May 1, 2017. (R Exh. 52; Tr. 1213–1214.) She is listed as an assistant buyer on the original voter list, and the first, second, and third amended voter lists. She is not on the fifth amended voter list, and reappears as a GPO central purchasing clerk on the sixth amended voter list. As there is no evidence, she held the position of GPO

⁷⁸ Fulkerson, Gonzales, Juichiya, Eda, Manjarrez, and Tran reported to Oh. (U Exhs. 6–9, 11, 14; Tr. 1301, 1303, 1305, 1307, 1311.)

central purchase clerk, she is not properly included in this classification. Her eligibility to vote will be determined on her actual position of assistant buyer.

Sassone was also an assistant buyer starting in 2016, and was likewise ineligible to vote as a GPO central purchase clerk. (R Exh. 54; Tr. 1215–1216.) She was not on the original voter list, or the first or second amended lists. She appears on the addendum to the third voter list as a GPO assistant buyer. She was not on the fifth amended voter list, but was re-inserted into the sixth amended list as a GPO central purchase clerk, despite no job change. As there is no evidence, she held the position of GPO central purchase clerk, she is not properly included in this classification. Her eligibility to vote will be determined on her actual position of assistant buyer.

The personnel records show Chizuko Sho worked as a production associate at headquarters. She was hired as a product development assistant starting in May 2006, and the paperwork from her exit interview in March 2018 lists her as a production associate. (R Exh. 55; U Exh. 13.) She is listed as an associate on the original voter list, the first amended, second amended, and third amended voter lists. She appeared for the first time as a GPO central purchase clerk on the fifth amended voter list, even though her job did not change. (U Exhs. 53, 59.) There is no documentation of Sho in the GPO central purchase clerk position, with the justification that her paperwork never went through.⁷⁹ (Tr. 1217–1218.) I find the

⁷⁹ With regards to Fujimoto's testimony, while I don't think he was trying to be dishonest, it is clear he did not recall all of the many employees' jobs as of February 2018 correctly. *See, e.g.* footnote 76. The contemporaneous documentation clearly shows

weight of the evidence establishes Sho was a production associate. As this position was not included in the stipulated Unit, I sustain the Union's objection and find she was ineligible to vote.

The evidence establishes Fulkerson, Gonzalez Guardardo, Juichiya, Eda, Manjarrez, Tran, and Nguyen were GPO central purchase clerks at the time of the second election.

ii. Community of Interest Standards

For the same reasons as stated above in the analysis of the central purchase clerk position, I find the Union has established the GPO central purchase clerks do not share a community of interest with the drivers and warehouse workers.

2. Other disputed employees

Wismettac seeks to include employees with job titles not specifically mentioned as included, excluded, or otherwise eligible to vote. Specifically, Wismettac seeks to include “[a]ll challenged employees who handle inventory.” (R Br. 137.) Wismettac also seeks to include certain employees as labelers.

The Union seeks to exclude various employees as office clericals. The stipulated unit expressly excludes “office clerical employees.” The Union also asserts that inventory control employees are a subset of warehouse employees. (U Br. 11.) While this was clearly the case in the petition the Union filed back in August 2017, in the stipulated agreement at issue

Sho held the production associate job when she was hired and when she left Wismettac in March 2018.

“warehouse employees” and “inventory control employees” are listed as separately.

The stipulated unit includes “inventory control employees.” Three warehouse employees appear on the voter lists as inventory controllers. Specifically, Alfredo Flores, Alex Garcia, Justin Luong are listed as inventory controllers on the first, first amended, second amended, and third amended voter lists. Luong is absent on the fifth amended voter list, but all three men are listed as inventory controllers on the sixth amended voter list. These inventory controllers are not in dispute.

Applying *Caesars Tahoe, supra.*, I must first determine whether the stipulation is ambiguous regarding the challenged voters. Though the paradigm is the same as for the “otherwise eligible to vote” employees, its application is different because the language of the stipulation itself does not create ambiguity. The Board has provided the following guidance to help determine whether the intent of a stipulated term is ambiguous or clear:

In order to determine whether a stipulation’s intent is ambiguous or clear, the Board will compare the express descriptive language of the stipulation with the bona fide titles or job descriptions of the affected employee. If the employee’s title fits the descriptive language, the Board will find a clear expression of intent and include the employee in the unit. If the employee’s title does not fit the descriptive language, it will also find a clear expression of intent and exclude the employee from the unit. The Board bases this approach on the expectation that the parties are know-

ledgeable as to the employees' job titles, and intend their descriptions in the stipulation to apply to those job titles.

Viacom Cable, supra, 633–634 (footnote omitted). A classification will be deemed to be excluded if it is not mentioned in the inclusions and there is an exclusion for “all other employees.” *Bell Convalescent Hospital*, 337 NLRB 191 (2001); *Los Angeles Water and Power Employees' Assn.*, 340 NLRB 1232, 1235 (2003); *National Public Radio, Inc.*, 328 NLRB 75 (1999).

If the stipulation is ambiguous, the analysis proceeds to the next steps of the *Caesars Tahoe* analysis, as set forth above.

a. GPO distribution clerk

The Respondent claims GPO distribution clerk was part of the “others permitted to vote” category. But the agreement specifically listed only four jobs in that category, delineated above, and GPO distribution clerk was not one of them. Nonetheless, employees who were listed as holding this position on the sixth amended voter list or who were otherwise claimed to have held this position, were permitted to vote, as detailed below.

Facts

GPO distribution clerks provide “administrative/warehouse support to the product development reps and managers and director.” They are responsible for “receiving process, maintaining foreign and domestic purchase orders, entering data into Nishimoto's⁸⁰

⁸⁰ This is in reference to Wismettac's former name.

computer system and is responsible to maintain the merchandise flow for the Company." (R Exh. 22.) The essential functions are listed as:

- Verifies items received by inspecting condition of items; comparing of items to purchase order and packing list; noting discrepancies.
- Documents items received by recording identifying information and enter product data in to the oracle system.
- Transfers orders received by routing or delivering items to requesting branch/departments.
- Determines method of shipment by examining items to be shipped, destination, route, rate, and time of shipment.
- Documents items shipped by recording identifying information of items and transport information.
- Maintains shipping and receiving materials by checking stock to determine inventory level; anticipating needed materials; placing and expediting orders for materials; verifying receipt of materials.
- Replaces damaged items and shortages or obtains credit by informing shipper and transporter of damage or shortage; returning damaged items; requesting new items or credit for shortages.
- Determine whether orders have been filled correctly by verifying incoming shipments

against the original order and the accompanying bill of lading or invoice.

- Record incoming products from domestic, foreign vendors into a computer ensuring inventory are up to date.
- Control all receiving platform operations, such as scheduling of trucks, recording of shipments, and handling of damaged goods.
- Create foreign purchase orders/ invoices and ensure that each purchase order is sent to the proper customer, client or vendor.
- Liaison with FDA and USDA reps if product are on hold at ports, and arrange sample of products to ensure that products meet FDA/ USDA guidelines and criteria.
- Create receiving log and submit log to accounting department
- Ensures the timely data entry of all domestic and foreign products and price is set for each item
- Perform other related duties as required.

(R Exh. 22)

For experience/training/education, the employee should have a high school diploma or equivalent, 1–2 years of office or business experience, basic computer skills including word processing, and other general office skills. Training in the Oracle ERP system is desired. The knowledge/skills/abilities are as follows:

Candidate will have skills in keyboarding and in the use of word processing, spreadsheet, and database management computer soft-

ware package; Knowledge of raw materials, production processes, quality control, costs, and other techniques for maximizing the effective manufacture and distribution of goods; The ability to arrange things or actions in a certain order or pattern according to a specific rule or set of rules; ability to organize and prioritize numerous tasks and complete them under various time constraints;

Principles, practices and procedures of an office environment; ability to use the telephone in a professional and courteous manner; assemble, sort, and/or distribute documents, supplies, and/or materials/items; deal with people in a manner which shows sensitivity, tact, and professionalism; follow written and/or oral instructions; speak clearly, concisely and effectively; listen to, and understand, information and ideas as presented verbally; establish, organize and/or maintain files.

The working conditions section of the position description states:

GPO Distribution Clerks often work in offices inside the warehouse. Most jobs involve frequent standing, bending, walking, and stretching. Lifting and carrying items also may be involved. Incumbent will work a standard 40-hours week in clean offices; however some work shifts or overtime during busy periods.

(R Exh. 22.)

Analysis

Kazumi Kasai was the only employee listed as a GPO distribution clerk at the time of the second election. (R Exh. 18.) Documents from her personnel file, however, list her as working at the order desk. Her EEO category is “administrative support workers.” (R Exh. 58, U Exh. 16.) Fujimoto testified that Kasai was an import clerk at the time of the second election. (Tr. 1223.) Kasai was listed “lead order desk” on the original voter list, and the first, second, and third amended voter lists (U Exhs. 53(a)–(d).) She was listed as a GPO distribution clerk on the fifth and sixth amended voter lists. (U Exh. 59; R Exh. 18.) Kasai was not called as a witness, and there is no documentary evidence placing her in the position of GPO distribution clerk. Given the various different job titles attributed to Kasai, I find the best evidence is the objective documentation in her personnel file. As the order desk employee is not included in the Unit, and there is an exclusion for “all other employees,” Kasai is deemed to be excluded. *Bell Convalescent Hosp., supra*. I therefore find Kasai was ineligible to vote.

I have determined the only other employee alleged to have held this position, Takegahara, actually held a different position. As there were no other distribution clerks, the analysis ends here.

b. Assistant buyer

The Respondent seeks to include assistant buyers as eligible voters. The Union asserts assistant buyer was not an eligible classification.

Facts

The position description states the job purpose of the assistant buyer as follows:

The Assistant Buyer will provide routine administrative support for the Product Division for the Global Procurement Operation (GPO) Headquarters. The Assistant Buyer will be responsible to keep track of all products coming in to Company. The Assistant Buyer will also be responsible to support the division to achieve sales goal while working in collaboration with the GPO Associates, GPO Operation Staff, and Branch offices.

(R Exh. 30.) The essential functions are:

- Ensure that each customer, client and vendor received outstanding customer service by providing a friendly environment which includes greeting and assisting every customer, maintaining outstanding product knowledge and all other components of customer service.
- Prepare and maintain item registration form and documents for custom brokers to obtain HTS# and create English caption of import items.
- Responsible for coordination, transfer and appropriate translation of all technical documentation required to support the Company product line among branches in the world.
- Translate written and oral communications from English to Japanese; and Japanese to English

for all levels of the business relationship, including administration and management.

- Maintain document control for specification sheets/ manufacture processing sheets, including storing, verifying and translating obtain and maintain from makers.
- Maintain and track sales and inventory results.
- Monitor and maintain vendor account management including but not limited to claim merchandise expense, invoicing, and confirmation of payment.
- Responsible to set-up, establish and monitor a cooperative response system to register items into the Oracle System.
- Obtain specification sheet of each product from vendors, check for leaks and errors of content and submit to Food Safety Department
- Responsible checking whether or not the content of private brand (PB) products complies with FDA rules.
- Support GPO Associates and managers and collaborate with marketing staff to achieve sales target and objectives.
- Perform other related duties as required.

The position requires a high school diploma or equivalent, 1–3 years of office or business experience, computer skills including word processing, general office skills, and the ability to speak both English and Japanese. The knowledge/skills/abilities are delineated as follows:

Candidate will have skills in keyboarding and in the use of word processing, spreadsheet, and database management computer software package; ability to organize and prioritize numerous tasks and complete them under various time constraints; Principles, practices and procedures of an office environment; ability to use the telephone in a professional and courteous manner; assemble, sort, and/or distribute documents, supplies, and/or materials/items; deal with people in a manner which shows sensitivity, tact, and professionalism; follow written and/or oral instructions; speak clearly, concisely and effectively; listen to, and understand, information and ideas as presented verbally; establish, organize and/or maintain files; knowledge in Microsoft application (*i.e.* Word, Excel, Outlook, PowerPoint); ability to use Oracle ERP system; knowledge of procurement procedures.

The working conditions state:

The Assistant Buyer usually works a standard 40-hours week in clean offices; however some work shifts or overtime during busy periods. They sit for long periods and sometimes must content to noise levels caused by various office machines. These workers are susceptible to repetitive strain injuries such as carpal tunnel syndrome, neck and back injuries, and eyestrain. To help prevent these conditions, many offices have adopted regularly scheduled exercise breaks, and work stations that allow workers to stand or sit

as they wish. The Assistant Buyer may spend few hours in the warehouse to see if products have arrived from vendors.

(R Exh. 30.)

Assistant buyers work in the second floor office. They go to the warehouse floor when a container is received to review the products coming into the facility. (Tr. 1150–1151.)

Analysis

Though no assistant buyers were listed on the sixth amended voter list, the evidence detailed above shows Rachel Lin and Miwa Sassone were assistant buyers at the time of the second election. (R Exhs. 51, 54; Tr. 1213, 1216.) Lin learned how to build and customize the business intelligence report from information technology, and was among about 10 employees in the entire company of about 1,080 with this skill. (U Exh. 10; Tr. 1309.)

No party disputes that the title assistant buyer is bona fide as applied to Lin and Sassone. The title “assistant buyer” is not included in the stipulated Unit, which excludes “all other employees.” The Board operates under the “expectation that the parties are knowledgeable as to the employees’ job titles, and intend their descriptions in the stipulation to apply to those job titles.” *Viacom, supra*. Though the Respondent asserts the assistant buyers are inventory control employees, their titles do not contain the terms “inventory” or “control.” “When a stipulation agreement excludes ‘all other employees’ as does this one, it will be read to exclude from the unit any employee whose classification does not match the

stipulated bargaining unit description.” *Neises Construction Co.*, 365 NLRB No. 129 (2017). There is no evidence the assistant buyers were in a classification of “inventory control employees.” I find; therefore, they are clearly and unambiguously excluded from the Unit under extant Board caselaw.⁸¹

c. Institutional customer division sales assistant

The Respondent seeks to include Institutional customer division (ICD) sales assistants as eligible voters. The Union asserts they was not an eligible classification.

Facts

ICD sales assistants assist with the sale of products by performing “office and administrative functions, which includes but not limited to order entry, answering telephones, taking orders from customers, inside sales rep, and sales associates.” (R Exh. 34.) The essential functions are listed as:

- Ensure that each customer, client and vendor received outstanding customer service by providing a friendly environment which includes greeting and assisting every customer, maintaining outstanding product knowledge and all other components of customer service.
- Review customer’s orders and ensure that orders are processed through the order processing system.

⁸¹ Because of the exclusion of “all other employees” I need not determine at this juncture whether the assistant buyers fall into the category of “office clerical” employees.

- Receive and respond to customers inquire by phone, email and or mail regarding order information, such as unit price, inventory, and shipping dates, and any anticipated delays
- Receive and respond to customer inquiry or complaint and direct to responsible personnel.
- Check inventory to determine availability of requested merchandise
- File copies of orders received or post orders on records
- Confer with sales associate, inside sales rep, warehouse, and office personnel in order to expedite order for customers.
- Coordinates follow-up with customer service to ensure timely and accurate deliveries
- Responsible for daily registration activities including but not limited to printing invoices, matching purchase orders as necessary, check on payments and forward cash receipt to accounting department, mailing invoices, creating payment orders; filing permanent copies
- Maintain professionalism and stay abreast of new products and recommend alternative products for out-of-stock items.
- Provides new and current customers with product information including pricing, delivery, inventory stocking, and/ or back order availability, functionally-equivalent cross matches and value added product information.
- Perform other related duties as required

The sales assistant position requires a high school diploma or equivalent, 1–2 years of office or business experience, basic computer skills including word processing, a general office skills. In addition, sales assistance should have an understanding of Asian food products, excellent interpersonal, written and verbal communication skills, and the ability to handle confidential information. The knowledge/skills/abilities are stated as follows:

Sales Assistant will have knowledge of Asian Food products sold by Wismettac Asian Foods; knowledge of office methods and practices including familiarity with office equipment; skill in keyboarding the use of word processing, spreadsheet, and databases management computer software; good written communication skills; strong customer service orientation with ability to initiate and sustain productive business relationship with customers; good problem solving skills with ability to develop innovative solutions to customer problems; good organization skills; ability to organize and prioritize numerous tasks and complete them under various time constraints; ability to use Oracle ERP system; ability to use the telephone in a professional and courteous manner; ability to use the telephone in a professional and courteous manner; assemble, sort, and/or distribute documents, supplies, and/or materials/items; ability to deal with people in a manner which shows sensitivity, tact, and professionalism; ability to follow written and/or oral instructions; ability to listen to, and

understand, information and ideas as presented verbally.

The working conditions are as follows:

Sales Assistant usually works standard 40-hours a week in clean offices; however some work shifts or overtime during busy periods. They sit for long periods and sometimes must content to noise levels caused by various office machines. These workers are susceptible to repetitive strain injuries such as carpal tunnel syndrome, neck and back injuries, and eyestrain. To help prevent these conditions, many offices have adopted regularly scheduled breaks, and work stations that allow workers to stand or sit as they wish.

John Chen was the assistant sales manager for the institutional customer division, and supervised sales associates. (Tr. 1366.) The sales assistants check with inventory to make sure what they have on hand is in the system and they help label products. (Tr. 1161–1163.) Sales assistants work in the first floor office. Sachie Liu, Kristie Mizobe, and Wakako Park were sales assistants for the institutional customer division at the time of the election. (R Exhs. 68, 70, 74; Tr. 1250, 1255, 1268.) In Liu's request for new employee form, the minimum requirements were a college degree, a language skill, and a computer skill. (U Exh. 26; Tr. 1340.) Kazutaka Sato was the ICD manager.

Analysis

For the reasons set forth above regarding the assistant buyer classification, I find that ICD sales assistants are excluded from the Unit.

d. Export sales assistant

Facts

Export sales assistants work in the international export division serving South America and Mexico. They “perform clerical and administrative tasks related to all phases of employment, including filing, data entry, supporting the sales associate, answering telephones and providing customer service to customers and clients.” (R Exh. 35.) The essential functions are:

- Responsible for coordination, transfer and appropriate translation of all technical documentation required to support the Company product line in Japan and South America. Translate written and oral communications from English to Spanish; and Spanish to English for all levels of the business relationship, including administration and management.
- Ensure that each customer, client and vendor received outstanding Customer Service by providing a friendly environment which includes greeting and assisting every customer, maintaining outstanding product knowledge and all other components of customer service.
- Answer questions on division services and function.

- Responds to internal and external inquiries concerning shipments and/ or issue resolutions
- Review international/ domestic orders to ensure appropriate documentation is submitted to the government to ensure shipment of products.
- Coordinates follow-up with customer service to ensure timely and accurate deliveries.
- Provide excellent customer service by communicating with clients to expedite the resolution of customer problems/ complaints and provide positive feedback.
- Plan, coordinate, and perform general office functions such as telephone support, handling mail, ordering supplies, and maintaining files and records.
- Inputs list of items, number, or other data from invoices, purchase order into computers or complete forms that appear on a computer screen.
- Assist Sales Associate in taking daily order for client.
- Responsible for daily registration activities including but not limited to printing invoices, matching purchase orders as necessary, check on payments and forward cash receipt to accounting department, mailing invoices, creating payment orders; filing permanent copies.
- Perform other related duties as required.

The position requires a high school diploma or equivalent, 0–1 years of office or business experience, familiarity with word processing software, oracle

ERP and other general computer skills. The employee must also be bilingual in English and Spanish. The knowledge, skills, and abilities are listed as follows:

The Export Sales Assistant must have the ability to organize and prioritize numerous tasks and complete them under various time constraints; Principles, practices and procedures of an office environment; ability to use the telephone in a professional and courteous manner; assemble, sort, and/or distribute documents, supplies, and/or materials /items; deal with people in a manner which shows sensitivity, tact, and professionalism; follow written and/or oral instructions; speak clearly, concisely and effectively; listen to, and understand, information and ideas as presented verbally; establish, organize and/or maintain files; operate office equipment knowledge in Microsoft application (*i.e.* Word, Excel, Access, PowerPoint) and ability use Oracle ERP System.

The working conditions are described as:

Export Sales Assistant works in comfortable office settings. Those on full-times schedule will work a standard 40 hours a week; however some work shifts or overtime during busy periods. Prolonged exposure to video display terminal may lead to eyestrain for assistants who work with computers.

(R Exh. 35.)

Karen Yamamoto and Chiaki Yamashita were export sales assistants at the time of the election.

Analysis

For the reasons set forth above regarding the assistant buyer classification, I find that ICD sales assistants are excluded from the Unit.

e. Administrative assistant

Facts

The administrative assistant in the institutional customer division “performs a variety of administrative duties” for the division.⁸² He/she is responsible for “understanding the customer needs, leveraging and maintaining business relationships.”(R Exh. 40.) The essential functions are:

- Ensure that each customer, client and vendor received outstanding customer service by providing a friendly environment which includes greeting and assisting every customer, maintaining outstanding product knowledge and all other components of customer service.
- Control all US Retail Service’s account inquiries with other branch offices.
- Process orders which includes but not limited to checking inventory, confirming shipping schedules with clients, placing orders, checking each order after begin assembled, checking printed invoices, filling invoices and bill of lading copies, mailing invoices and bill of lading to clients.

⁸² The institutional customer division was previously called the U.S. retail service division. Tr. 1178.)

- Research and create a profile for retail markets nationwide, which includes but not limited to location of headquarters, board of directors, store count and its locations, annual revenue, and etc.
- Work, closely with designers to create better packaging; includes working with manufactures, through Tokyo Branch to provide necessary data to designers (nutrition facts, ingredients list, allergen warnings, and other package information). Understand the Company's target market and marketing goals in order to communicate with the designers and effectively execute the message to our consumers.
- Prepare and present marketing plans
- Plan, coordinate, and perform general office functions such as telephone support, handling mail, ordering supplied and maintaining files and records
- Assist sales associate in creating sales collaterals; including planograms, product catalogs, presentation, and offer sheets.
- Perform other related duties as assigned.

The administrative assistant position requires a high school diploma or equivalent, 1–2 years of office or business experience, basic computer skills including word processing, an general office skills. In addition, sales assistance should have an understanding of Asian food products, excellent interpersonal, written and verbal communication skills, and the ability to handle confidential information. The knowledge/skills /abilities are:

Administrative Assistant will have knowledge of: sales and cold calling methods and procedures; types of Asian Food products sold by the Company; knowledge of marketing strategies and sales techniques; knowledge of office methods and practices including familiarity with office equipment; skill in key-boarding the use of word processing, spreadsheet, and databases management computer software; demonstrated sales skills with strong achievement orientation; good written communication skills; strong customer service orientation with ability to initiate and sustain productive business relationship with customers; good problem solving skills with ability to develop innovative solutions to customer problems; good organization skills; ability to organize and prioritize numerous tasks and complete them under various time constraints; ability to use Oracle ERP system; ability to use the telephone in a professional and courteous manner.

The working conditions for the administrative assistant are:

Administrative Assistant usually works standard 40-hours a week in clean offices; however some work shifts or overtime during busy periods. They sit for long periods and sometimes must contend to noise levels caused by various office machines. Inside sales rep may need to travel to customer's location and may be away from home for several days or weeks at a time, and may need to travel by car or plane. These workers are

susceptible to repetitive strain injuries such as carpal tunnel syndrome, neck and back injuries, and eyestrain. To help prevent these conditions, many offices have adopted regularly scheduled breaks, and work stations that allow workers to stand or sit as they wish.

(R Exh. 40.) The administrative assistant works in the first floor office and works with warehouse employees to ensure there is inventory on hand to ship to customers. (Tr. 1178.)

David Yamashita was the administrative assistant at the time of the second election. (Tr. 1282.)

Analysis

For the reasons set forth above regarding the assistant buyer classification, I find that administrative assistant is excluded from the Unit.

f. Food safety coordinator

Facts

The food safety coordinator “coordinates food safety related activities and assists the Logistics Branch Manager in the food safety administration for the branch office. The responsibilities of this role are numerous and include coordination of food safety related programs within Company operation standards that will ensure food safety compliance for the branch operation.” (R Exh. 39.) The essential functions are:

- Communicate with Logistic Co. Supervisor, Logistic Branch Manager and Corporate Food

Safety Department for HACCP and Branch food safety plan.

- Monitor all HACCP and food safety related paperwork. Ensure all forms are up-to-date, completed, signed, and reviewed by designated personnel.
- Upload all HACCP/ Food safety worksheets to designed shared folders at the beginning of each month.
- Ensure branch is in compliance with government regulation and 3rd party audit requirement.
- Work with related departments/ personnel and follow up on the corrective action from the Internal Audit conducted by Food Safety Department.
- Communicate with related departments for any customer food safety requests.
- Maintain and organize all HACCP and food safety related documents, ensure that records are kept for at least 3 years.
- Assist with Corporate Food Safety Department in maintaining food safety programs.
- Attend all internal food safety meeting and training programs as needed.
- Other related duties as assigned.

In addition to a high school diploma, the food safety coordinator must have 2–5 years of food safety experience, as well as administrative skills including

Microsoft word and excel. The knowledge/skills/abilities are listed as follows:

Food Safety Coordinator must have the ability to organize and prioritize numerous tasks and complete them under various time constraints; Principles, practices and procedures of warehouse environment; knowledge of principles, practices and procedures of warehouse environment; Incumbent should be able to follow written and/or oral instructions; correctly follow a given rule or set of rules in order to arrange things or actions in a certain order; some warehouse workers in specific position require considerable and strenuous physical exertion so incumbents should have the ability to lift heavy objects over 50 pounds.

Domingo Pliego was the food safety coordinator at the time of the second election. The food safety coordinator works in the warehouse office and interacts with warehouse employees and drivers. (Tr. 1175.)

Analysis

For the reasons set forth above regarding the assistant buyer classification, I find that food safety coordinator is excluded from the Unit.

g. Export office clerk

Facts

The job purpose for export office clerk states:

The Export Office Clerk contributes to the efficient operation of the Export Division by providing administrative support. Export Office Clerk in this job perform a range of general and specific office/ clerical task that

can be easily learned on the job such as filing, copying and collecting documents, answering phones, ordering and distributing supplies and data entry. Other task may include, but are not limited to: maintaining customer records, sorting and distributing incoming/ outgoing mail, and/or receiving phone calls.

(R Exh. 31.) The essential job functions are:

- Responsible for coordination, transfer and appropriate translation of all technical documentation required to support the Company product line in Japan and South America. Translate written and oral communications from English to Japanese; and Japanese to English for all levels of the business relationship, including administration and management.
- Responds to internal and external inquiries concerning shipments and/ or issue Resolutions
- Review international/ domestic orders to ensure appropriate documentation is submitted to the government to ensure shipment of products.
- Follow-up with vendors to ensure products procurements are on time.
- Handle customer service function in a manner that presents the company in the highest possible image, insuring timely call-backs, expediting of customer request and order confirmation and verification.

- Communicate and correspond with incumbent in Japan to ensure timely shipments of products. Copies and collates documents, sends faxes and performs similar office tasks.
- Receives calls, takes and relays messages, responds to requests for information; provides information or directs caller to appropriate individual.
- Responsible for daily registration activities including but not limited to printing invoices, matching purchase orders as necessary, check on payments and forward cash receipt to accounting department, mailing invoices, filing permanent copies.
- Supports export associates and department staff and acts as an assistant on various tasks
- Provide assistance to others in the export department as appropriate (*i.e.* labeling of products).
- Other tasks as assigned.

The position requires a high school diploma or equivalent, 0–1 years of office or business experience, familiarity with word processing software, oracle ERP and other general computer skills. The employee must also be bilingual in English and Spanish. The knowledge, skills, and abilities are listed as follows:

The Export Office Clerk must have the ability to organize and prioritize numerous tasks and complete them under various time constraints; Principles, practices and procedures of an office environment; ability to use the telephone in a professional and

courteous manner; assemble, sort, and/or distribute documents, supplies, and/or materials/items; deal with people in a manner which shows sensitivity, tact, and professionalism; follow written and/or oral instructions; speak clearly, concisely and effectively; listen to, and understand, information and ideas as presented verbally; establish, organize and/or maintain files; operate office equipment knowledge in Microsoft application (*i.e.* Word, Excel, Access, PowerPoint) and ability use Oracle ERP System.

The working conditions are the same as for export sales assistant, as described above.

According to Fujimoto, the export office clerks help label items for shipping. The interact with warehouse workers to make sure they understand how a container is labeled. This has an inventory function because without labeling the containers, they cannot move inventory. (Tr. 1155–1156.) Steffanie Mizobe, Kumiko Estrada, and Maho Kobayashi were export office clerks.

Analysis

For the reasons set forth above regarding the assistant buyer classification, I find that export office clerks are excluded from the Unit. In addition, the export office clerk is an office clerk, which is explicitly excluded from the Unit in the stipulated agreement.

h. Export clerk

Export clerks “provide routine administrative support to the Product Allocation Division, Distrib-

ution Section and will be responsible in handling and arranging the custom clearance at the Los Angeles/Long Beach ports for all merchandise.” (R Exh. 36.) The essential functions are:

- Ensure branches are being communicated with regularly to ensure they are aware of the latest shipment status.
- Recognizing potential problems with delivery schedules and expediting orders as needed.
- Alert Shipping on all destination shipment with shipment details and any special instructions.
- Complete all relevant shipping forms that include Master Air Waybill/Bill of Lading, Export declaration, Certificate of Origin, to name a few.
- Perform other related duties as required.

The export clerk requires a high school diploma or equivalent, 1–3 years of business or office experience, computer skills including word processing, and general office skills. The export clerk should also have import/export experience with ocean carrier freight forwarder or customs agencies. The knowledge/skills/abilities for the position are:

Candidate will have skills in keyboarding and in the use of word processing, spreadsheet, and database management computer software package; ability to organize and prioritize numerous tasks and complete them under various time constraints; Working knowledge of U.S. Customs and other government agency regulations a plus; Prin-

ciples, practices and procedures of an office environment; ability to use the telephone in a professional and courteous manner; assemble, sort, and/or distribute documents, supplies, and/or materials/items; deal with people in a manner which shows sensitivity, tact, and professionalism; follow written and/or oral instructions; speak clearly, concisely and effectively; listen to, and understand, information and ideas as presented verbally; establish, organize and/or maintain files; knowledge in Microsoft application (*i.e.* Word, Excel, Access, PowerPoint); ability to use Oracle ERP system; knowledge of procurement procedures.

The working conditions for the export clerk are:

The Import (sic) Clerk usually works a standard 40-hours week in clean offices; however, some work shifts or overtime during busy periods. They sit for long periods and sometimes must content to noise levels caused by various office machines. These workers are susceptible to repetitive strain injuries such as carpal tunnel syndrome, neck and back injuries, and eyestrain. To help prevent these conditions, many offices have adopted regularly scheduled exercise breaks. The Import (sic) Clerk may be asked to visit vendor's location, which may be off-site on occasions.

(R Exh. 36.)

Export clerks work in the first floor main office. They work with warehouse employees to ensure they

have the inventory to export products and to allocate that product. (Tr. 1167.) Fumi Meza and Chiaki Yamashita were export clerks at the time of the election.

Analysis

For the reasons set forth above regarding the export office clerk, I find export clerks are excluded from the Unit.

i. Import clerk

Facts

The import clerk provides “routine administrative support to the Product Allocation Division, Distribution Section and will be responsible in handling and arranging the custom clearance at the Los Angeles/Long Beach ports for all merchandise.” (R Exh. 37.) The essential functions are:

- Provide import estimates and information regarding importing into the United States (via air, ocean, and truck).
- Provide customer service to internal departments and overseas affiliates/clients.
- Maintain import data and verify information accuracy.
- Classify all entries, resolve import problems and monitor carnet imports for incoming exhibitions.
- Coordinate all deliveries and security arrangements from the port and airport to the facility.

- Handle all post-entry amendments and internal audits of all imports that have been imported.
- Assist the distribution and purchase allocation manager with projects as requested.
- Responsible in asking the Custom Broker the import tariff classification and duties of new items and Harmonize codes by country.
- Coordination and arrangement of customs clearance and delivery, of import ocean/air cargo in accordance with direction of supervisor/ manager.
- Process of documents related to the above-mentioned tasks, including shipping documents; billing invoices and payment invoices.
- Perform other related duties as required.

The experience, training, and education requirements, and the knowledge/skills/abilities are the same as for the import clerk. The working conditions for the import clerk are:

The Import Clerk usually works a standard 40-hours week in clean offices; however, some work shifts or overtime during busy periods. They sit for long periods and sometimes must contend to noise levels caused by various office machines. These workers are susceptible to repetitive strain injuries such as carpal tunnel syndrome, neck and back injuries, and eyestrain. To help prevent these conditions, many offices have adopted regularly scheduled exercise breaks. The Import Clerk may be asked to visit customer broker or outside commercial warehouse location,

which may be off-site on occasions.

(R Exh. 37.)

Import clerks work in the first floor main office. The clerks work with warehouse employees to ensure containers arrived to the warehouse facility. (Tr. 1170.)

Analysis

Fujimoto testified Kasai was an import clerk. For the reasons set forth above, however, I find the evidence shows otherwise. Even if she is considered an import clerk, for the reasons set forth above regarding the export office clerk, I find import clerks are excluded from the Unit.

j. Purchasing clerk

Facts

Purchasing clerks perform “a variety of purchasing clerical duties in the processing of purchase order requisitions and confirmations and handling a variety of typing and record keeping functions for the Branch Office; and performs a variety of related duties which include, but not limited to, verifying receipt of service and products, following up on purchase orders, monitoring inventory and payment status, resolving issues, and filing and general department organization.” (R Exh. 38.) The essential functions are:

- Ensure that each customer, client and vendor received outstanding customer service by providing a friendly environment which includes greeting and assisting every customer, maintaining outstanding product knowledge and all other components of customer service.

- Process inventories for products and maintains inventory for all products at Branch location.
- Responsible for keeping inventory databases current, completes purchase orders and purchase order partials for the branch office.
- Investigates inadequate purchase orders, delinquent orders, billing/shipping discrepancies, and returns materials; provides cost summaries for branch location.
- Participates in annual/ quarterly inventory control.
- Maintain supplied prices for parts and supplies in the computer.
- Meet with domestic/ international vendors to maintain existing accounts.
- Work cooperatively and productively with other employees and supervisors.
- Perform other related duties as required.

The purchasing clerk should have a high school diploma or equivalent, 1–2 years of office or business experience, basic computer skills including word processing, a general office skills. Additional requirements are excellent interpersonal, written and verbal communication skills, and the ability to handle confidential information. The knowledge/skills/abilities are stated as follows:

Purchasing clerk will have knowledge of purchasing and warehousing methods and procedures; types of supplies, materials, and equipment commonly used by the Com-

pany; financial record keeping methods and procedures; office methods and practices including familiarity with office equipment; skill in keyboarding the use of word processing, spreadsheet, and databases management computer software; ability to organize and prioritize numerous tasks and complete them under various time constraints; knowledge in Oracle ERP System; Principles, practices and procedures of an office environment; ability to use the telephone in a professional and courteous manner; ability to read and write Japanese and decipher the information into English.

The working conditions for the purchasing clerk are:

Purchasing clerk usually works standard 40-hours a week in clean offices; however some work shifts or overtime during busy periods. They sit for long periods and sometimes must content to noise levels caused by various office machines. These workers are susceptible to repetitive strain injuries such as carpal tunnel syndrome, neck and back injuries, and eyestrain. To help prevent these conditions, many offices have adopted regularly scheduled exercise breaks, and work stations that allow workers to stand or sit as they wish. Due to the nature of the work, and dealing with different types of people on time restraints can be stimulating and demanding. Purchasing clerk may spend few hours in the warehouse to see if products have arrived from vendors.

(R Exh. 38.) Purchasing clerks work in the first floor office. Shuji Ohta, Keiko Takeda, and Stacy Umemoto were purchasing clerks at the time of the election. (R Exhs. 7, 76-77; Tr. 1259, 1275.) Mayumi Misawa was the purchasing supervisor. (Tr. 1260.)

Analysis

For the reasons set forth above regarding the export office clerk, I find purchasing clerks are excluded from the Unit.

k. GPO procurement operation coordinator

Facts

The GPO procurement operation coordinator, also referred to as the GPO coordinator, is the most experienced central purchase clerk. (Tr. 1159; R Exh. 33.) The GPO coordinator provides “routine support to the Global Procurement Operation headquarters and will be responsible for the procurement of all properly coming in to the Company.” The GPO coordinator is also responsible for “monitoring outgoing and incoming products” to ensure they are distributed to each branch office. (R Exh. 33.)

The essential functions are:

- Responsible for coordination, transfer and appropriate translation of all technical documentation required to support the Company product line in North America.
- Translate written and oral communications from English to Japanese; and Japanese to English

for all levels of the business relationship, including administration and management.

- Ensure that each customer, client and vendor received outstanding customer service by providing a friendly environment which includes greeting and assisting every customer, maintaining outstanding product knowledge and all other components of customer service.
- Responsible to set-up and monitor Oracle vendor information and product registration and Business Intelligence (BI) set-up.
- Responsible to handle system transaction which includes purchasing and sales and input that information in the Oracle System.
- Collaborate with Branch Offices to see if shipments were properly received and contact foreign and domestic vendors to check status on products.
- Maintains all purchasing records and keep files in a retrievable manner.
- Respond to Branch and vendor's inquiries about order status, changes, or cancellations.
- Responsible to check credit limit on vendor's and clients.
- Receives calls, takes and relays messages, responds to requests for information; provides information or directs caller to appropriate individual.
- Responsible for daily registration activities including but not limited to printing invoices, matching purchase orders as necessary, check

on vendor payments and forward cash receipt to accounting department, mailing invoices, filing permanent copies.

- Support Managers and collaborate with staff to achieve department target and objectives.
- Perform other related duties as required.

(R Exh. 33.) The experience/training/education, knowledge/skills/abilities, and working conditions essentially mirror the central purchase clerk.

Chiaki Mazlomi was the GPO coordinator. (R Exh. 60; Tr. 1229.) Mazlumi's EEO category in personnel documents is "administrative support." (U Exh. 18.)

Analysis

For the reasons set forth above regarding the export office clerk, I find the GPO procurement operations coordinator is excluded from the Unit.

C. Other Challenged Employee Ballots

1. Joseph Napoli

Joseph Napoli, who was not on the voter list, was challenged by the Board. Napoli worked for Wissmettac through the temporary agency Adecco. The invoice from Adecco for January 22, 2018, shows the warehouse department paid for Napoli's services during that time period through the second election. (R Exh. 42; Tr. 1194.)

Employees in the unit who worked during the payroll period immediately preceding the date of the direction of the election are eligible to vote provided they are still employed at the time of the election.

Columbia Pictures Corp., 61 NLRB 1030 (1945). The February 6 election was noticed on January 29, 2018, so Napoli was working during the pertinent time period. Though the Board agent challenged the ballot, it is the Union's burden to establish ineligibility. *See Arbors at New Castle*, 347 NLRB 544, 545-546 (2006) (although the Board agent challenged employee because her name was not on the eligibility list, it was the petitioner seeking to establish employee's ineligibility that had the burden to so prove); *See also Sweetner Supply Corp.*, 349 NLRB 1122 (2007). As the Union failed to call any witnesses or offer any evidence to establish Napoli's eligibility, this challenge is not sustained.

2. Alberto Rodriguez

The Respondent challenged Alberto Rodriguez' ballot. He was suspended but still on the payroll immediately preceding the election. In any event, his suspension and termination were unlawful. His vote is properly counted.

D. Conclusion

The Employer has successfully established the ballots of John Kirby, Jose Rossas, Cheryl Johnston, Suguru Onaka, Mamoru Tagai, and Joseph Napoli should be counted. The Union has successfully established the ballot of Alberto Rodriguez should be counted and has established the other employee ballots, as detailed above, should not be counted. Even if Emilio Gonzales' vote is opened and counted, this is an insufficient number to change the results of the election. I therefore recommend that the International Brotherhood of Teamsters, Local 630, be certified

as the exclusive representative of the bargaining unit employees.

IV. The Objections

“The burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show, *inter alia*, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election.” *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (internal quotations omitted); *Affiliated Computerizing Services*, 355 NLRB 899 (2010)(Objecting party must prove that the specific conduct in question had a reasonable tendency to affect the outcome of the election).

A. Employer’s Objections

1. Employer Objection 1

The employer objected to the timing of the election as follows in Employer Objection 1:

The Region did not give the Employer sufficient notice of the election. The election was noticed on Monday, January 29, 2018 and took place on Tuesday, February 6, 2018. Two previous elections had been noticed by the Region in this case. The first was set for September 19, 2017 where the Employer received twenty (20) days’ notice and, a second election was re-set for January 9, 2018 and the Employer received thirty one (31) days’ notice. The Employer was prejudiced by not having sufficient time to conduct a campaign. The average number of days between the

filings of a petition and the holding of an election since the revised election rules were implemented by the Board in 2015 has been twenty three (23) days.

The Board issued an order on February 6, 2018, denying the Employer's request for review of the Regional Director's decision setting the election date. (R Exhs. 84-85.) The evidence is clear that Wismettac consistently spoke to employees regarding the Employer's position on the union, employing hired labor consultants continuously from the September 2017 until after the second election. There is no evidence showing any prejudice to Wismettac due to lack of time to conduct a campaign in furtherance of its position on the Union. Employer objection #1 is overruled.⁸³

2. Employer Objection 2

Employer objection 2 concerns the August 21, 2017, delegation, alleging:

During the critical period prior to the first election on September 19, 2017 the Union and/or its agents/supporters threatened and coerced employees with the intention of making employees vote in favor of the Union by conducting a demonstration during work time on Company premises. The impact of such demonstration continued to have a coercive impact upon voters participating in the re-run election of February 6, 2018

83 Employer objections 3 and 4 were withdrawn at the hearing. (Tr. 1605.)

I find the delegation was protected activity and did not have a coercive impact upon voters. The act of requesting voluntary recognition from an employer is obviously protected concerted activity and union activity under the Act. The delegation was peaceful, and the videos of it do not depict any behavior inherently offensive or intimidating. I find it did not have a coercive impact on voters in the second election, and overrule the objection.

3. Employer Objection 5

Employer objection 5 states:

During the critical period prior to the election on February 6, 2018, the Union and/or its agents/supporters threatened, coerced and intimidated employees by making threats of physical harm if employees voted for the Employer during the election.

The Employer cites to the testimony of Mack to support this objection. (R Br. 148.) There is no evidence any union agent was involved. The evidence shows Mack relayed a conversation he heard about second-hand to management. The problems related to this evidence are detailed in the unfair labor practice portion of the complaint concerning Alberto Rodriguez' suspension and termination. In any event, the alleged conduct by the employees was not "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). Employer objection 5 is therefore overruled.

4. Employer Objection 6

The employer's sixth objection states:

During the critical period prior to the election on February 6, 2018, the Union and/or its agents/supporters used racially derogatory language to intimidate voters who supported the Company.

The credited evidence, detailed above, shows that Rodriguez played music with racist lyrics that offended Mack on January 11, 2018. I find, however, this single incident which lasted no more than a couple of minutes and was not widely disseminated among employees was insufficient to interfere with employees' free and untrammeled choice in the election. Employer objection 6 is overruled.

B. Union's Objections

In light of my ruling on the challenged ballots, the Union's objections could not affect the election results and are moot. *See Texas Meat Packers*, 130 NLRB 279 (1961). I will nonetheless briefly address them in the event a reviewing authority disagrees.

1. Union Objection 1

The Union's first objection states:

Pursuant to the Direction of Election and Section 102.67(1) of the Board's Rules and Regulations, the Employer was to provide a voter list to the Union which included contact information of voters (including home addresses, available personal email addresses, and available home and personal cell telephone numbers of all eligible voters). The

voter list included at least sixteen (16) wrong addresses. This conduct reasonably tended to coerce or interfere with employees' free choice in the election.

Employers are required to provide complete and accurate information as required by *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). Pursuant to the Board's Rules and Regulations at 29 CFR § 102.62(d), an employer must provide a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters. An employer's failure to provide the list in proper format shall be grounds for setting aside the election upon timely objection. 29 C.F.R. §§ 102.62(d), 102.67(l).

On the original voter list, Quinonez noticed many incorrect addresses. Many of the temporary employees' addresses were for Horizon temporary agency. (Tr. 1633–1634; U Exhs. 54, 61.) With regard to the voter list for the second election, Quinonez was asked about Union Exhibit 61, which refers to a "route 8":

Q What is this document?

A This document I created for different purposes. We-we make routes-different routes of people that live in the same area and everything. And-and the same thing- when we have bad addresses, I-I create the bad addresses so we don't keep going to the same address that they no longer live there.

(Tr. 1676–1677.) It is unclear which addresses on this exhibit were deemed invalid.⁸⁴ Quinonez’ testimony does not address the matter, nor does any other record evidence. While there were some deficiencies as they pertained to the first election, the evidence does not establish these same deficiencies for the second election. As such, this objection is overruled.

2. Union Objection 2

The Union’s second objection states:

The Employer suspended at least one (1) unit employee, Alberto Rodriguez, prior to the election in order to later challenge his vote. The employer identified Mr. Rodriguez as a Union supporter and intended to prevent him the chance to cast his ballot. The Union filed an Unfair Labor Practice Charge (ULP) over the suspension prior to the Election. The Employer has objected to Mr. Rodriguez’ vote. The Employer’s conduct has potentially jeopardized this employee’s vote. This conduct reasonably tended to coerce or interfere with employees’ free choice in the election.

For the reasons set forth in the unfair labor practice allegation regarding Rodriguez’ suspension,

⁸⁴ The cases to which the Union cites are distinguishable. In *Chromalloy Am. Corp.*, 245 NLRB 934 (1979), there was evidence of returned mail showing bad addresses. In *Custom Catering, Inc.*, 175 NLRB 9 (1969), the original list omitted names and addresses of half the eligible voters, and a later list omitted known names and addresses of striking employees. Finally, in *Merchants Transfer Co.*, 330 NLRB 1165 (2000), the list contained employee addresses the employer knew were so inaccurate that it no longer used them for its own purposes.

I sustain this objection. The act of suspending Rodriguez, a known Union advocate, just four days before the election likely tended to coerce employees' free choice in the election.

3. Union Objection 3

The Union's third objection covers a variety of conduct, and states:

Following the original election on September 19, 2017, which the Union overwhelmingly won, the Employer engaged in the following conduct which interfered with voter's free choice by, among other things, terminating multiple temporary employees; terminating multiple employees who were identified as pro-union; circulating or causing its agents to circulate a "vote no" petition; retaliating against pro-union employees by changing their schedules and/or suspending them; filing a meritless lawsuit against the Union and the Union's Secretary-Treasurer after employees engaged in protected concerted activity, which lawsuit was filed in an effort to chill employees' rights; and posting false memos. This conduct reasonably tended to coerce or interfere with employees' free choice in the election.

Many of the allegations in this objection are covered in the unfair labor practices portion of the complaint. To the extent an unfair labor practice has been found relating to any portion of this objection, that portion is sustained. The Union made no argu-

ment regarding a “vote no” petition, so this portion of the objection is not sustained.⁸⁵

The filing of a civil suit in bad faith for the purpose, for example, of retaliating against those who exercise statutory rights is unlawful *Geske & Sons v. NLRB*, 103 F.3d (7th Cir.), *cert. denied*, 522 U.S. 808 (1997); *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983) (prosecuting an unmeritorious lawsuit for retaliatory purposes constitutes unlawful activity by the employer).⁸⁶ I find President and CEO Kanai’s December 1 letter to all employees announcing and disparaging the lawsuit is strong evidence it was done at least in part to thwart the Union’s organizing efforts.⁸⁷ As the Union points out, the letter misstates, in underlined print, that the first election was set aside “due to the misconduct of the teamsters local 630 and the National Labor Relations Board.”⁸⁸ I also find the December 1 letter about the lawsuit and the first election was clearly aimed at coercing employees not to vote for the Union. Coming from Wismettac’s highest-ranking officer, the letter would tend to coerce employees’ free choice in the election.

⁸⁵ While a form letter to revoke authorization was distributed, the record does not support a “vote no” petition.

⁸⁶ I am not deciding whether the lawsuit or the communication in its aftermath constitute an unfair labor practice, but am rather citing to the legal paradigm as a frame of reference.

⁸⁷ I am specifically not deciding whether or not non-employee organizers trespassed under State law, as the lawsuit alleges.

⁸⁸ One of the Employer’s objections to the first election was that a Board agent was seen playing ping pong with Wismettac employees known to support the Union. (GC Exh. 47.)

Based on the foregoing, the Union's third objection is sustained except for the alleged circulation of a "vote no" petition.

4. Union Objection 4

The Union's fourth objection states:

Prior to the election the Employer, intentionally changed the job titles of multiple office clerical employees in an effort to increase "no" voters and in an effort to cause the stipulated challenged ballot voters to be determinative. This conduct reasonably tended to coerce or interfere with employees' free choice in the election.

The evidence supporting this objection is detailed in the section regarding challenged ballots, above. The Union received 7 lists, which grew over time. (Tr. 1648–1649.) The numbers of employees on eligible voter list grew between the first and second election, from 145 to 178. (Tr. 1663; U Exhs. 56, 59, 62.)

The addition of multiple employees to the "logistics office clerk" position when the evidence, including testimony from Fujimoto, made it clear many of the employees never held this position, is sufficient to sustain this objection.⁸⁹ 29 C.F.R. §§ 102.62(d), 102.67(l); *See also Advanced Masonry Systems*, 366 NLRB No. 57 (2018). The misclassifications incorrectly stacked employees in a position included in the bargaining unit. This objection is sustained.

⁸⁹ The evidence also shows that employees were misclassified in other positions.

5. Union Objection 5

The Union's fifth objection states:

Prior to and during the election the Employer placed large and oversized anti-Union posters throughout the warehouse that said "Vote No," and included a check box with the box checked, along with other words, including, but not limited to, "No Dues" and "No Fines," which propaganda the Employer refused to take down when asked to do so at the pre-election conference. The employee voters were subjected to the obnoxiously large posters prior to and during the election, which corrupted the laboratory conditions. This conduct reasonably tended to coerce or interfere with employees' free choice in the election.

Quinonez saw large anti-union banners in the hallway visible when going to vote. There was anti-union propaganda on the wall before entering the safety room. During the pre-election conference, the Union objected to the banners. (Tr. 1677–1679.) One poster said "Don't pay for Union Dues." Another said, "Vote no for dues strikes union rules." (U Exhs. 42, 63.) Luis Lopez saw banners saying "Vote No" and some with photos of Villalvazo. (Tr. 1470.) Carlos Katayama and Rolando Lopez saw the banners on election day. (Tr. 1519, 1566.)

The Union cites to *Peerless Plywood Co.*, 107 NLRB 427 (1953), and other cases prohibiting captive audience speeches within 24 hours of an election. These cases, however, do not apply to posters or campaign literature. *Pearson Education, Inc.*, 336 NLRB 979 (2001). When determining allegations of

objectionable electioneering, the Board considers factors including the nature and extent of the electioneering, whether it was conducted by a party to the election or by employees, whether it was conducted in a designated “no electioneering” area, and whether it was contrary to the instructions of the Board agent. *See Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118–1119 (1982), enfd. 703 F.2d 876 (5th Cir. 1983). Here, the Employer hung numerous large posters throughout the warehouse in close proximity to the voting area. While the Board agent did not prohibit posters at or near the polls, Union Representative Quinonez expressly warned the Respondent at the pre-election conference that the Union considered the poster objectionable. *See Pearson Education, supra* (single poster near polling area that Union objected to was objectionable).

Here, there were multiple posters displayed near the voting area on the day of the election that employees testified they in fact saw on election day. The Union’s fifth objection is sustained.

6. Union Objection 7

The Union’s seventh objection⁹⁰ states:

Immediately prior to the first election, and since then including during the election, the Employer hired armed guards and posted them at all entrances to the facility. This conduct reasonably tended to coerce or interfere with employees’ free choice in the election.

⁹⁰ The sixth objection was withdrawn.

A show of force by hiring armed guards without justification can interfere with the employees free choice in voting for a collective bargaining agent. *Manufacturing and Machine Works, Inc.*, 174 NLRB 661 (1969), enfd. 439 F.2d 395, 398 (8th Cir. 1971)). The only explanation for the armed guards offered at the hearing was Matheu's testimony that Narimoto told him employees were scared following the August 21 delegation.⁹¹ No employee testified he or she was scared by the delegation. This rationale also fails to explain why there were armed guards at the meeting the Respondent's managers held September 18 to discourage support for the Union, attended only by drivers. The hiring of armed security guards immediately following the petition for election and their retention through and presence at the second election would tend to interfere with employees' free and untrammeled choice in the election. This objection is sustained.

7. Union Objection 8

The Union's eighth objection states:

During the counting of the ballots, the Employer allowed anti-union employees to enter into the voting area to witness the ballot count, while pro-union employees felt that they could not enter because an armed guard stood directly outside the voting area.

91 Narimoto was not called as a witness and Matheu's hearsay testimony is uncorroborated and not inherently reliable, particularly considering not a single employee testified they were scared on August 21 and beyond. I therefore do not accord it weight.

Not a single employee testified about this objection. Quinonez' testimony never states that employees felt they could not enter the ballot count area because of an armed guard. This objection is unsupported and is overruled.

8. Union Objection 9

The Union's ninth objection states:

During the election and while polls were open the Employer failed and refused to turn off or cover cameras located directly outside the Election room. This conduct constituted surveillance of employee voters at or near the polling area.

The unrefuted evidence shows the Respondent refused to turn off or cover up cameras around the voting area on the date of the election. I agree with the Union that employees would reasonably believe they were being recorded coming to or leaving the voting area while exercising their Section 7 right of voting in the election. This objection is sustained.

9. Union Objection 10

The Union's tenth objection states:

During the election and while polls were open, two (2) supervisors voted despite their status as excluded from the unit. These supervisors had no legitimate purpose for being in the polling area. This conduct constituted surveillance of employee voters at or near the polling area. This conduct reasonably tended to coerce or interfere with employees' free choice in the election.

This objection was addressed above in the section on challenged ballots of Kirby and Rosas. It is overruled.

10. Union Objection 11

During the election and while polls were open multiple office clerical employees voted despite their status as excluded from the unit. These office clerical employees had no legitimate purpose for being in the polling area.

These employees are addressed in the challenged ballots section. I have determined they were not included in the stipulated unit because they were excluded in the catchall “all other employees” and therefore it is unnecessary to determined whether they were also “office clerical employees.” In the event this finding does not hold up, however, I will briefly address this objection.

Office clericals have generally been excluded from production and maintenance bargaining units because of their “special interests” and different working conditions. *General Electric Co. (River Works)*, 107 NLRB 70 (1953); *Beech Aircraft Corp.*, 170 NLRB 1595 (1968). The front office employees described in the challenged ballots section sit in offices adjacent to corporate managers and supervisors set apart from the warehouse and enter through a door the warehouse employees and drivers cannot open. They perform clerical work as opposed to manual labor. The record is replete with testimony of multiple employees and the former assistant warehouse man-

ager⁹² that front office workers did not interact at work with the warehouse employees and drivers. I find the employees who were not in the disputed job categories under the stipulation other than the food safety coordinator and the warehouse clerks were office clerical employees. This objection is therefore sustained.

Because several of the Union's objections have been sustained, even if resolution of the challenged ballots rendered the Employer the winner of the election, it would need to be set aside.

CONCLUSIONS OF LAW

By promising employees better benefits and improved terms and conditions of employment if they reject the Union as their bargaining representative, promising to give employees back their bonuses and retroactive pay if they reject the Union as their bargaining representative, and soliciting employees to revoke their union authorization cards, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

By disciplining Rolando Lopez, disciplining and demoting and changing the work shift of Ruben Munoz, disciplining, suspending and terminating Alberto Rodriguez, terminating Pedro Hernandez, and refusing to consider for re-hire Pedro Hernandez,

92 The Respondent asks me to strike Isidro Garcia's testimony. I find the argument in support of this unpersuasive, and find Garcia was a credible witness. Because he served as a warehouse employee, a supervisor, and a front office employee, he was uniquely situation to testify regarding interactions between the warehouse and the front office staff.

Fanor Zamora, and Jeremiah Zermenio, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

The Respondent has successfully challenged the ballots of John Kirby, Jose Rosas, Cheryl Johnston, Suguru Onaka, Mamoru Tagai, and Joseph Napoli, arguing they should be counted. The Union has successfully challenged the ballots of all other challenged ballot employees, arguing their ballots should not be counted. If the ballots of the employees the Respondent successfully challenged were counted and all voted in favor of the Respondent, however, it would be an insufficient number to change the results of the election.

The Respondent's conduct as alleged in Union objections 2, 3, 4, 5, 7, 9, and 11 was objectionable and tended to interfere with the election. Union objections 2 and 10 are overruled, and the Respondent's objections are overruled.

The Respondent's unfair labor practices and objectionable conduct would warrant setting aside the election if the Union did not end receive a majority of votes cast.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having promised employees better benefits and improved terms and conditions of employment if they reject the Union as their bargaining representative, promised to give employees back their bonuses and retroactive pay if they reject the Union as their bargaining representative, and solicited employees to revoke their union authorization cards, the Respondent shall be ordered to cease and desist from this action.

Having unlawfully issued Rolando Lopez a “verbal counseling record” the Respondent shall be ordered to rescind remove from its files all references to this discipline and notify him in writing that this has been done and the discipline will not be used against him in any way.

Having discriminatorily issued Ruben Munoz a written warning, the Respondent will be ordered to rescind and remove from its files all references to this discipline and notify him in writing that this has been done and the discipline will not be used against him in any way. Having demoted Ruben Munoz and changed his shift, offer him his former nightshift lead position, or if that position no longer exists, a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed and make him whole for any loss of pay in the manner described below regarding backpay.

Having discriminatorily terminated Pedro Hernandez, the Respondent shall rescind all reference to his termination, offer him immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. The Respondent shall

make him whole for any loss of pay in the manner described below regarding backpay.

Having discriminatorily disciplined, suspended, and terminated employee Alberto Rodriguez, the Respondent shall rescind and remove from its files all references to the unlawful discipline and notify him in writing that this has been done and the discipline will not be used against him in any way. The Respondent shall offer him immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. The Respondent shall make him whole for any loss of pay in the manner described below regarding backpay.

Having refused to re-hire and consider for re-hire Fanor Zamora and Jeremiah Zermenio, these individuals are entitled to the remedy for unlawful refusal to hire—instatement and backpay—which subsumes the remedy for the Respondent's unlawful refusal to consider them for hire. *Jobsite Staffing*, 340 NLRB 332, 333 (2003). The Respondent shall offer them full reinstatement in the positions for which they applied absent the Respondent's unlawful discrimination, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges they would have enjoyed, discharging if necessary, any employees hired in their place. The Respondent shall make them whole for any loss of pay in the manner described below regarding backpay.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283

NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Additionally, the Respondent shall be required to compensate Ruben Munoz, Pedro Hernandez, Alberto Rodriguez, Fanor Zamora, and Jeremiah Zermenno for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall also compensate Pedro Hernandez, Alberto Rodriguez, Fanor Zamora, and Jeremiah Zermenno for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons, supra*, compounded daily as prescribed in *Kentucky River Medical Center, supra*.

I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11 (2010).

The General Counsel has also requested a notice reading. I will also order that the Respondent hold a meeting or meetings, scheduled to have the widest possible attendance, at which the attached notice marked "Appendix" shall be read to employees in the presence of a Board agent. This remedial action is

intended to ensure that employees “will fully perceive that the Respondent and its managers are bound by the Act’s requirements.” *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹³

ORDER

The Respondent, Wismettac Asian Foods, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:
 - (a) promising employees better benefits and improved terms and conditions of employment if they reject the Union as their bargaining representative;
 - (b) promising to give employees back their bonuses and retroactive pay if they reject the Union as their bargaining representative;
 - (c) soliciting employees to revoke their union authorization cards;
 - (d) disciplining employees because they or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities;

⁹³ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (e) demoting employees because they or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities;
- (f) changing employees' shifts because they or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities;
- (g) terminating employees because they assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities;
- (h) refusing to consider for rehire or refusing to rehire employees because they or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities;
- (i) in any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act

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

- (a) Within 14 days from the date of the Board's Order, offer employees Ruben Munoz, Pedro Hernandez, and Alberto Rodriguez immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

- (b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Ruben Munoz, Pedro Hernandez, and Alberto Rodriguez, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.
- (c) Within 14 days from the date of the Board's Order, offer employees Fanor Zamora and Jeremiah Zermenio and immediate and full reinstatement in the positions to which they applied, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed, discharging if necessary, any employees hired in their place.
- (d) Within 14 days from the date of the Board's Order, remove any references to the unlawful refusals to re-hire Fanor Zamora and Jeremiah Zermenio and within 3 days thereafter notify the employees this has been done and the refusals to re-hire them will not be used against them.
- (e) Make employees Ruben Munoz, Pedro Hernandez, Alberto Rodriguez, Fanor Zamora and Jeremiah Zermenio whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

- (f) Within 14 days from the date of the Board's Order remove any references to the verbal counseling record issued to Rolando Lopez and notify him in writing that this has been done and the discipline will not be used against him in any way.
- (g) Within 14 days from the date of the Board's Order remove any references to the written warning and demotion issued to Ruben Munoz and notify him in writing that this has been done and the discipline will not be used against him in any way.
- (h) Within 14 days from the date of the Board's Order remove any references to the December 21, 2107, written warning and the February 2, 2018 suspension issued to Alberto Rodriguez and notify him in writing that this has been done and the discipline will not be used against him in any way.
- (i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (j) Within 14 days after service by the Region, post at its facility in Santa Fe Springs, California, copies of the attached notice

marked “Appendix”⁹⁴ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2017.

- (k) Read the Notice to Employees in English and in Spanish to assembled employees at

⁹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

its Santa Fe Springs facility referenced above in paragraph during paid working time.

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

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

/s/ Eleanor Laws
Administrative Law Judge

Dated, Washington, D.C., August 30, 2019.

**ORDER OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT
DENYING PETITION FOR REHEARING
(FEBRUARY 24, 2022)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WISMETTAC ASIAN FOODS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 20-73768

NLRB Nos. 21-CA-207463, 21-CA-208128,
21-CA-209337, 21-CA-213978
21-CA-219153, 21-CA-212285

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

WISMETTAC ASIAN FOODS, INC.,

Respondent.

No. 21-70142

NLRB Nos. 21-CA-207463, 21-CA-208128,

21-CA-209337, 21-CA-213978

21-CA-219153, 21-CA-212285

National Labor Relations Board

Before: GOULD, BENNETT,
and R. NELSON, Circuit Judges.

Petitioner's petition for panel rehearing is
DENIED.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 7 of the NLRA, 29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1):

It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Section 8(c) of the NLRA, 29 U.S.C. § 158(c):

[Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

**GUSTAVO FLORES
TESTIMONY, TRANSCRIPT
(OCTOBER 12, 2018)**

**OFFICIAL REPORT OF PROCEEDINGS BEFORE
THE NATIONAL LABOR RELATIONS BOARD
REGION 21**

IN THE MATTER OF:
WISMETTAC ASIAN FOODS, INC.,

Employer,

and

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 630,

Union,

and

ROLANDO LOPEZ,

An Individual,

and

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 630,

Petitioner.

Pages: 1028 through 1067, Volume: 8

Case Nos. 21-CA-207463, 21-CA-208128,
21-CA-209337, 21-CA-213978, 21-CA-219153,
21-CA-212285, 21-RC-204759

[October 12, 2018 Transcript, p. 1035]

DIRECT EXAMINATION

Q. BY MR. WILSON: Good morning, Mr. Flores.

A. Good morning.

Q. I would ask the court reporter to hand the witness General Counsel's Exhibit 20 and 21. So, Mr. Flores, are you currently employed?

A. Yes.

Q. And who do you work for?

A. I work for a firm by the name of LRSI.

Q. Okay. And what does LRSI do?

A. We are a consulting firm. Consult services.

Q. Okay. And—

A. Various clientele.

Q. Okay. Do you work for LRSI exclusively, or do you have other assignments?

A. No, sir. I work for—I have other assignments and other firms that I am affiliated or I become affiliated with.

Q. And that's to perform consulting services, correct?

A. That is correct.

Q. Okay. And did you perform consulting services for Wismettac Asian Foods?

A. I did.

Q. Okay. And do you recall the approximate dates that you performed such consulting services?

- A. August of 2017 through, I believe it was around February, maybe March of 2018.
- Q. Okay. And can you take a look at what's been marked as Employer Exhibit Number 20?

JUDGE LAWS: General Counsel.

- Q. BY MR. WILSON: General Counsel. I'm sorry.
- A. Okay.
- Q. General Counsel Number 20. Okay. And take a second and read that document.
- A. Do I read it out loud?
- Q. No, no. Just read it to yourself.
- A. Oh, okay. Okay.
- Q. Okay. Have you seen that document before?
- A. I have.
- Q. Okay, and do you recall the first time you saw that document; what month and year?
- A. It was in 2018, and I'm going to say between the times of January and March.
- Q. Okay.
- A. I can't say specifically.
- Q. Okay. And did you—and where did you first see that document?
- A. At the client, within the property of the client with—in—
- Q. Santa Fe Springs.

- A. —through the—through the management—through the management team, yes, at the Santa Fe Springs division, correct.
- Q. Okay. And did you conduct employee meetings sometime between January and March, 2018 as it relates to General Counsel Exhibit 20?
- A. I did.
- Q. Okay. And so let's start with the first paragraph where it states, "A number of employees have approached WLA management," stating—referencing revocation of authorization cards.
- A. Okay.
- Q. Did you have—at the time that you saw this document, and the first time at the company, did you have knowledge of employees approaching management about the issue that's referenced in the first paragraph of GC-20?

MS. SANCHEZ: Objection. Leading.

JUDGE LAWS: Overruled. Go ahead and answer.

THE WITNESS: Okay. Here's—going back to January, I believe January was their—there was a second petition filed for a second election. And so meetings were held to inform employees about the petition that had recently been filed.

MS. SANCHEZ: I'm going to object as nonresponsive.

MS. PEREDA: Same objection.

JUDGE LAWS: I assume you're getting to—

THE WITNESS: Yes.

JUDGE LAWS: He was asked when—

THE WITNESS: And—

JUDGE LAWS: Listen to the question, and if you're—if Counsel wants you to elaborate, he'll ask. But the question was, did employees approach management; did you know about that?

THE WITNESS: I did.

Q. BY MR. WILSON: Okay. And when did you first learn that employees had approached management?

A. I got a phone call.

Q. Okay. In January?

A. No.

Q. Okay. No, I'm talking about when was the very first—so you—in your previous testimony, you were referencing something that occurred in January of 2018 about employees, and you mentioned a second petition. Can you elaborate on what you're referring to?

A. Yes. Thank you. In January, as I was saying, there was a second petition filed.

Q. By who?

A. By the Teamers Local 630. Meetings were scheduled with employees that were going to be eligible to vote. So the information was shared with the employees about the second petition.

Q. Okay. Mr. Flores, and so what was your role as it relates to these meetings you refer to with employees who are eligible to vote? What role did you take in those meetings?

- A. As a consultant, it was to provide information pertaining to the election or information that employees can be privy to so they can make an informed decision of the—during the election.
- Q. Okay. And so the question was, was that your first knowledge of employees approaching management. I'm referring to January 2018.

- A. No.

MS. SANCHEZ: Objection. Vague—

THE WITNESS: No.

MS. SANCHEZ:—as to employees approaching management.

JUDGE LAWS: I assume we're still referencing the first sentence of General Counsel 20, so I'll allow it.

MR. WILSON: Yeah.

THE WITNESS: No.

MR. WILSON: Okay. So where are we starting from—

Q. BY MR. WILSON: So you mentioned some meetings. So we started off the questioning, asking you about if you had knowledge of the persons of General Counsel's 20. As I understand your testimony, you were trying to explain when you first became aware of that knowledge; is that correct?

A. Yes, and it was during a second round of meetings. It wasn't the first meeting, but I'm explaining—I'm trying—I'm leading to that. I just wanted to explain how the process led to that.

JUDGE LAWS: And I'm going to instruct you just answer the questions that are asked.

THE WITNESS: Okay. So during—

JUDGE LAWS: And if you're asked to elaborate on anything, do, but I—

THE WITNESS: Okay.

JUDGE LAWS:—I need you to understand how this works.

THE WITNESS: Okay.

JUDGE LAWS: You're asked a question, and you're to provide a response to that question and no other—

THE WITNESS: Okay.

JUDGE LAWS:—question.

THE WITNESS: So—

Q. BY MR. WILSON: Okay. So just so we're clear, so—

A Sorry.

JUDGE LAWS: It's okay.

Q. BY MR. WILSON: So—and I'm sorry it's not clear. Okay. So is the first knowledge you had about the first sentence of General Counsel 20, did that—did you come up on that knowledge in January of 2018?

MS. SANCHEZ: Objection. Leading. He could ask, when did you?

JUDGE LAWS: When, yeah. When did you first learn?

THE WITNESS: It was—

MR. WILSON: Well, he already said that. That's why I was trying to clarify.

THE WITNESS: It was—

JUDGE LAWS: Well, he didn't. He started—

THE WITNESS: It was—

JUDGE LAWS: Hold on. He—

THE WITNESS: Sorry.

JUDGE LAWS: He kind of narrated a back story. And really, the question is, when did you first become aware that employees had approached management asking how they can revoke—

THE WITNESS: During the—

JUDGE LAWS:—asking how they can revoke authorization cards? When?

THE WITNESS: It was during the meeting.

JUDGE LAWS: But when?

THE WITNESS: This was—I believe it was January of 2018.

JUDGE LAWS: Okay.

THE WITNESS: And—

JUDGE LAWS: That's it.

MR. WILSON: That's fine. Okay.

THE WITNESS: And—

JUDGE LAWS: And I'm going to ask you to stop, and now I'm going to—because you answered my question.

THE WITNESS: Okay.

JUDGE LAWS: I'm going to turn things back to over to Counsel.

MR. WILSON: Okay.

JUDGE LAWS: But please just try to listen to what is being asked—

THE WITNESS: Okay.

JUDGE LAWS:—and answer that for us.

Q. BY MR. WILSON: Okay. So what information did you become aware of then in January of 2018 about the topic referenced in the first sentence of General Counsel 20?

A. Employees raised the question how can I get rid of this union? How can I retrieve my union authorization card that I signed because I am tired of this?

Q. Okay. And did employees tell you that directly?

A. Yes.

Q. And that was in January 2018.

A. Correct.

Q. Okay. And did you respond to them?

A. I did.

Q. What did you say?

A. My response was, well, there is—there is a process that exists. You obviously have rights. And I did mention to the employees that they can google that question of information that they can find. And I gave them an example of an agency, the Right to Work Foundation.

Q. Okay.

A. Okay. They can gather information on how they can retrieve those cards or revoke them.

Q. And to your knowledge, if you know, did the employees act in response to that information that you gave to them?

MS. SANCHEZ: Objection. Calls for speculation.

JUDGE LAWS: I'll instruct answer if you know.

THE WITNESS: Yes. They googled it. They told me that they googled it. They were able to make contact with a particular counselor that provided them with information.

Q. BY MR. WILSON: Okay. And did—to your knowledge, did they do anything else in response to receiving that information?

A. According to several—

MS. SANCHEZ: Objection. Calls for speculation.

JUDGE LAWS: And I do—again, with anything, just answer if you know.

THE WITNESS: Yeah.

JUDGE LAWS: Go ahead.

THE WITNESS: According to employees, they followed through with the instructions that they were able to obtain from this counselor.

Q. BY MR. WILSON: And you say “followed through.” To your knowledge, what do you mean by “followed through”?

A. What I was informed with is that they were—they put a list together. They put a particular petition list together.

MS. PEREDA: Objection as to foundation.

JUDGE LAWS: I assume Counsel will get there.

Q. BY MR. WILSON: All right. So when you—when they told you about this petition, what exactly did they describe?

A. Well, it was in regards to the information that was instructed to them by this counselor, whoever it was that they made contact with at this foundation, at this—

Q. And so do you know—did they tell you what the purpose of this petition was?

MS. SANCHEZ: Objection. Calls for speculation. Hear-say.

JUDGE LAWS: I guess did they tell you?

THE WITNESS: Yes.

JUDGE LAWS: It's a yes or no question.

THE WITNESS: Yes.

JUDGE LAWS: Overruled.

Q. BY MR. WILSON: And what was—and did you learn what the purpose of the petition was from the employees?

A. Yes. The understanding was that by providing the Union and/or even the labor board with the list that they would—that they would adhere to it, that they would have, you know, the opportunity to have those cards revoked.

Q. Okay. And that's what this list was you're referring to.

A. Correct.

Q. Okay. And what was in mid January 2018 then?

A. Yes.

Q. Or in January 2018. Okay. So how long did you remain on assignment with the company after these meetings you discussed in January?

A. Well, there was a lapse. After the election—

Q. Okay. So let's start—was there a—you mentioned a second election. When was that held?

A. Early February.

Q. Okay. And did your assignment end after that election?

A. It did.

Q. Okay.

A. It did.

Q. Okay. And then did your assignment start again at a later date?

A. Yes.

Q. Okay. And when—okay. And when was that date that you returned to the company then?

A. Approximately a few weeks, maybe a month later.

Q. Okay. So would that be in March of 2018?

A. Yes.

Q. Okay. And who assigned you to return to the company?

- A. Well, I was, I guess, dispatched by my firm—
- Q. Okay.
- A. —letting me know that the client would like to have me spend some more time at the facility and working with them to assist them.
- Q. Now, between the end of the election and the time your firm dispatched you back, did you have any conversations with Wismettac employees?
- A. Yes.
- Q. Okay. And do you recall who you spoke to?
- A. Yes. Walter.
- Q. Do you—do you mean—what is Walter's last name?
- A. Walter Vargas.
- Q. Okay. And can you tell me about the conversation with Mr. Vargas?
- A. Well, he called. Actually, I was a little surprised to hear from him, but basically told me that he is getting reports from fellow employees that there's a scheduled strike that they all need to participate in, and that there is a—there's a meeting. I believe he mentioned that it was at the Union hall. That was to be held so they can discuss this particular strike.
- Q. Okay. Do you—as best as you can recall the date of Mr. Vargas' telephone call to you?
- A. Probably a few weeks after the election.
- Q. Okay. Okay. And so how did you respond to Mr. Vargas?

- A. I suggested that he speak to his management.
- Q. Did Mr. Vargas raise any concerns about the strike?

MS. PEREDA: Objection. Relevance.

JUDGE LAWS: Overruled

MS. PEREDA: Calls for speculation.

- Q. BY MR. WILSON: I'm just asking him if he raised any concerns about—

A. Yes. Yes, he did.

Q. What did he say?

A. He was very concerned. Made it very clear to me that he wanted no part of that. He was—seemed afraid. He felt that if he—he was being—he actually told me that he was told that they must attend and they must participate, or there would be some form of retaliation. His—

Q. And who did he say told him that?

A. He didn't specifically say, some of his coworkers at work on his shift.

Q. Okay. But who was it that was going to discipline or retaliate against him? Did he say that?

A. The union.

Q. Okay. The Teamsters Union.

A. And/or his fellow employees that were supporting the Union.

Q. Okay. And so when he told you this, then what did you tell him to do?

- A. I instructed him right away to let management know.
- Q. Okay.
- A. To make them aware of the situation.
- Q. Okay. Now, to your knowledge, did the conversation with Mr. Vargas a few weeks after the second election relate to you being sent back to the company by your firm?
- A. Yes.
- Q. Okay. And what was it you were supposed to do when you were dispatched back?
- A. I advised them of their rights. You know, they—obviously, you know, they needed to be informed of what their rights were.
- Q. Okay. And so when you went back to the company sometime in March, is that—as I understand your testimony, that's the first time you saw General Counsel Exhibit 20; can you look at that?
- A. That is correct.
- Q. Okay. To your knowledge, was that document posted or distributed at Wismettac?
- A. I did not distribute it. I do believe that it was posted.
- Q. Okay. So can you—let's turn your attention to Exhibit 21.
Now, so as part of your assignment when you went back to the company, was that to meet with employees about General Counsel Exhibit 21?
- A. Yes.

Q. Okay. And can you explain to me how you went about that process?

A. There were some scheduled meetings with various groups over a couple—three days. And, you know, there were—they were separated, English versus Spanish, and they were advised based on information—

Q. Okay. So—

A. —that had been raised.

Q. Okay. So let's back up a little bit. So do you recall when the first meeting was held, approximately?

A. Probably in March.

Q. Okay. And do you recall who else—who from management was at that meeting besides yourself?

A. Well, initially in the first meeting, Frank.

Q. Frank Matheu?

A. Yes.

Q. And who else?

A. And trying to remember her name. New HR representative.

Q. Okay.

A. I forget her name.

Q. Okay.

A. But she was being introduced to the—to the group.

Q. Okay. And how many of the meetings did Frank attend?

- A. There were only one. There was only one, the first one.
- Q. Okay. And the new HR lady, how many of the meetings did she attend?
- A. She was—she was present at several of them.
- Q. Okay.
- A. For introduction only.
- Q. And how many days did these meetings last?
- A. To my recollection, maybe two or three days.
- Q. Okay. Did you conduct all of the meetings?
- A. I did.
- Q. Okay. Did you say basically the same thing in each meeting?
- A. I did.
- Q. Okay. Can you tell me what you said?
- A. Based on information, reports that have either come to my knowledge or through management, employees have expressed their desire to want to either revoke authorization cards and/or retrieve them—
- Q. Okay.
- A. —indicating that they were no longer interested in pursuing the Union any further.
- Q. So did you advise employees about your rights—their rights in retrieving those cards?
- A. I did.
- Q. Okay. What did you tell them?

- A. They have just as much right to support it and the same right they have to not support it. And—
- Q. Okay. So can you look at General Counsel Exhibit 21?
- A. Yes.
- Q. Okay. So how did General Counsel 21 figure in to your presentation at the meeting?
- A. Well, I read it to them. I read it to them, and I explained that this was in no way, shape, or form something that they were obligated to do. It was simply a choice and a right that they have. And based on certain individuals raising the questions and the desires, management felt it was very important to make this available to them.
- Q. Okay. So you said “make available.” So how was General Counsel 21 made available?
- A. By—at the end of the meeting, there was a stack at the end of the table which they were advised, if they chose to want to take one, it was completely up to them.
- Q. Okay.
- A. They were under no obligation. And later—and they were advised also that there were all—they were also made available in lunchrooms, just—never was it ever distributed to them directly.
- Q. Okay. And you’re the one that—you’re the only person who gave—were you the only person who gave the presentation at these meetings regarding this revocation issue?
- A. Yes.

Q. Was there any roster or check-off sheet, to your knowledge, as to who took these letters that were made available to them at the meetings?

A. Not at all.

MR. WILSON: Okay. All right. I have no further questions.

JUDGE LAWS: Okay. Do we have—I assume, Union Counsel wants to see any affidavits, as has been her practice.

MS. SANCHEZ: I do. Thank you.

JUDGE LAWS: All right. Let's go off the record, and we can figure out how much time we want to take with that. Off the record.

(Off the record at 9:36 a.m.)

JUDGE LAWS: And whenever General Counsel is ready, you can proceed with cross.

MS. PEREDA: Thank you, Your Honor.

CROSS-EXAMINATION

Q. BY MS. PEREDA: Good morning, Mr. Gustavo. My name is Elvira Pereda, and I'm going to be ask—I'm the attorney for the government, and I'm going to just ask you some questions about your testimony.

Mr. Gustavo, currently—is it okay if I call you by your first name?

A. Of course.

Q. Currently, are you retained by Wismettac as a consultant?

A. No.

Q. Is the company paying you for being here today?

A. Well, we haven't discussed it.

Q. Okay. Let me ask you, when did your assignment with this company first start?

A. August of 2017.

Q. And after the first election, which took place on September 19, 2017, did you stop providing services for this company?

A. No.

Q. Has your—have your services for this company been continuous, meaning there has been no break in your consulting services to this company?

MR. WILSON: Objection. Vague as to time.

JUDGE LAWS: Well, he discussed on direct, one break, so we don't need to reiterate that.

Q. BY MS. PEREDA: So there—you mentioned that there was a break after the second election. Between the first—between August and the second election, which was in February of 2018, was there a break in your consulting services with this company?

A. Not really. There were maybe a few days here and there, but not really. Maybe a few days in between, here and there.

Q. Mr. Gustavo, you're fluent in Spanish, correct?

A. Yes.

Q. You testified earlier that employee Walter Vargas called you. Do all of the employees at Wismettac

have your contact—your cell phone number or your phone number?

- A. No, ma'am.
- Q. The meetings that were conducted with employees that took place sometime around March of 2018, those meetings happened during work hours, correct?
- A. Correct.
- Q. And you mentioned that they—the meetings, they went for about two to three days. About how many meetings did you have each day?
- A. Don't remember exactly, but it did vary based on the workload. One day may have consisted of three or four meetings, three or four groups, and—versus maybe a couple based on the workload. So made it, you know, much easier to spread it out over a few days.
- Q. To your knowledge, did all of the eligible voters attend one of these meetings?
- A. Yes.
- Q. At these meetings with employees in March where you discussed General Counsel Exhibit 21, the revocation of the authorization—the Union authorization cards, during those meetings, did you also tell employees that if they mailed in their application cards, that they should get it via certified mail?
- A. I did say that that's an option. That would be up to them. I didn't tell them to do so.
- Q. So what did you say about that? Can you tell us?

- A. Based on, you know, what, you know, the actual letter or the document indicated, you know, just you can mail it to them. You can hand deliver it. You can take it to the—you know, have it, as you mentioned, maybe have it certified. It gives you some assurance that it arrived and somebody has received it.
- Q. Mr. Gustavo, regarding the services that you provided for Wismettac, you were contracted specifically to help the company to fight the Union campaign, correct?
- A. To provide information. That's how I would describe it.
- Q. But more specifically to get employees to get employees to vote no against the Union, correct?
- A. No, I wouldn't describe it that way.
- Q. Mr. Gustavo, during the course of the services that you provided for this—for Wismettac, which began in August of last year, you also met individually with employees to talk about employee complaints, correct?
- A. During the time that I was there, at times, yes. They would—upon their request.
- Q. Isn't it true that you went—that you went to Jose Rosas' house in October of last year to talk about some employee complaints?

MR. WILSON: Your Honor, I'm going to object as beyond the scope of direct.

JUDGE LAWS: It is beyond the scope. I do think it's relevant, so I'm going to, in my discretion, allow some questioning about those meetings because

they are in evidence, and I think it's relevant. I don't want to belabor it or spend too much on it because it is beyond the scope, but I think some follow-up is appropriate.

**WISMETTAC NOTICE TO LOS ANGELES
EMPLOYEES REGARDING REVOCATION
AND RESIGNATION FROM UNION
(MARCH 12, 2018)**



Wismettac Asian Foods, Inc.

13409 Orden Drive
Santa Fe Springs, CA 90670
Tel: +1-562-802-1900 Fax: +1-562-229-1720
www.wismettacusa.com

To: Wismettac Los Angeles Employees
From: Wismettac Asian Foods, Inc. Management
Date: March 12, 2018

Re: *Revocation of Union Authorization/Resignation from Union Membership*

To WLA Employees:

A number of employees have approached WLA management asking how they can revoke authorization cards they may have previously signed and/or resign their membership in Teamsters Local 630. Attached is a sample letter that can be sent to Local 630 for card revocation/membership resignation.

Sending this letter is your individual choice. There will be no adverse job consequences whether you send or do not send such a letter. WLA does not discriminate against employees based upon their Union affiliation or support.

Should you have questions you may contact NLRB Region 21 NLRB (213-894-5254 or 888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449) and/or the National Right to Work Legal Defense Foundation (800-336-3600 or www.nrtw.org/free-legal-aid).

FORM LETTER FOR REVOCATION AND RESIGNATION FROM UNION

TEAMSTERS LOCAL 630
750 South Stanford Avenue
Los Angeles, CA 90021

Attention:

Frank Afoa | President
Lou Villalvazo | Secretary-Treasurer

Re: Revocation of Union Authorization/Resignation from Union Membership

Gentlemen:

I write to inform you that I do not want to be “represented” by your Union, do not wish to be a member of your Union, and do not support your Union in any manner. Please consider my opposition to representation by your Union to be permanent and continuing in nature.

I hereby revoke and rescind any Union “authorization” card, or any other indication of support for your Union, that I may have signed in the past. Any such card or indication of support for your Union is null and void, effective immediately. To the extent I may have become a member of the International Brotherhood of Teamsters/Teamsters Local 630, I hereby resign such membership.

Please return to me any Union authorization card that I may have signed. Alternatively, please inform me in writing that you are honoring this revocation and rescission of support for your Union.

Please be aware that refusing to honor my card revocation/resignation of membership will violate my rights under the National Labor Relations Act. Moreover, representing to my Employer, Wismettac Asian Foods, Inc., that I support representation by your Union will similarly violate my legal rights.

Sincerely,

Signature

Dated

Name