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

2 SISTERS FOOD GROUP, INC.

and

Cases 21-CA-38915
21-CA-38932

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 1167

2 SISTERS FOOD GROUP, INC.

Employer

and

Case 21-RC-21137

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 1167

Petitioner

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO EXCEPTIONS OF 2 SISTERS FOOD GROUP, INC. TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

On June 10, 2010, Administrative Law Judge Lana H. Parke ("ALJ") issued her decision in these cases, making findings of fact and conclusions of law that 2 Sisters Food Group, Inc. ("Respondent") violated Section 8(a)(1) and (3) of the Act by terminating employee Xonia Trespalacios ("Trespalacios"), and violated Section 8(a)(1) of the Act by maintaining overbroad work rules and a mandatory arbitration rule that requires employees to waive their rights to file charges with the Board. The ALJ also found that Trespalacios' termination constituted objectionable conduct warranting that the election for union representation conducted on July 17, 2009, be set aside. Thus, the ALJ recommended that Case 21-RC-21137 be remanded to the Regional Director of Region 21 for the purpose of conducting a rerun election.

On July 23, 2010, the Respondent filed 35 exceptions to the ALJ's decision, and a brief in support, challenging essentially all of the ALJ's findings of fact, credibility resolutions, and legal conclusions. However, the record and relevant Board precedent establish that the ALJ's decision is well-founded. Respondent's exceptions are without merit and should be rejected.

II. ISSUES PRESENTED

1. Whether the ALJ was correct in finding that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining the following overbroad work rules:

   > Rule 11: Leaving department or the plant during a working shift without a supervisor's permission.
   >
   > Rule 12: Stopping work before shift ends or taking unauthorized breaks.
   >
   > Rule 28: Unauthorized soliciting of contributions on [Respondent's] premises.

Rule 33: Distributing printed matter on [Respondent's] premises without permission.

Rule 35: Inability or unwillingness to work harmoniously with other employees.

2. Whether the ALJ was correct in finding that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a mandatory arbitration rule that requires employees to waive their right to file charges with the Board.

3. Whether the ALJ was correct in finding that Respondent violated Section 8(a)(1) and (3) of the Act by terminating Xonia Trespalacios.

4. Whether the ALJ was correct in finding that Trespalacios' termination warrants that the July 17, 2009 election be set aside.

III. STATEMENT OF FACTS

A. Background.

Respondent is a food processing and packaging company with a facility located in Riverside, California ("the Riverside facility"). This facility opened in about September 2008. Before that date, Respondent's facility was located in Corona, California ("the Corona facility"). In 2008, United Food and Commercial Workers International Union, Local 1167, ("the Union"), initiated a campaign at the Corona facility to organize Respondent's employees. The campaign continued when Respondent moved to Riverside.

On May 28, 2009, the Union filed a petition to represent a unit composed of about 186 production, maintenance, technical/quality assurance, sanitation, shipping and receiving, and plant clerical employees at Respondent's Riverside facility. A representation election was held on July 17, 2009, where the Union received 66 votes, and 87 votes were cast against representation. There were 2 void ballots and 24 challenged ballots. The Union timely filed objections to the conduct of the election. One

of those objections is that Respondent unlawfully terminated employee Xonia Trespalacios ("Trespalacios") during the critical period.

B. Respondent's business operations.

Respondent's main departments include shipping and receiving, cooked and breaded, red meat, home-meal replacements (HMR), and poultry. (Tr. 344).[1] At all relevant times Tracey Reilly ("Reilly") was Respondent's Vice President of Operations, and Veronica Vega was the Poultry Department Supervisor. (Tr. 343-344, 398, 448).[2] During the course of the organizing campaign Respondent hired labor-relations consultants named Luz Ceballos, Fernando Rivera, Jim Needles, and Carlos Restrepo. (Tr. 382, 386, 388-389, 913).

C. Respondent's Rules of Conduct.

At all relevant times, Respondent maintained in effect a list of 50 "Rules of Conduct." (JX 1; Tr. 11-12). The Rules of Conduct are issued to employees on the first day of employment, and employees are required to sign a document acknowledging receipt of these rules. (JX 1). The preamble to the Rules of Conduct states:

> Progressive Discipline Policy
>
> The purpose of a progressive discipline system is to ensure that discipline is imposed consistently and fairly, with an eye toward correcting deficient performance and securing compliance with work rules, not toward punishing employees. The philosophy of corrective discipline requires that discipline not be unduly severe (disproportionate to the offense), and that employees be afforded at

[1] Throughout this brief, citations to the ALJ's Decision will be referred to as ALJD followed by the appropriate page and line number. All references to the hearing transcript will be referred to as "Tr." followed by the page number. References to the exhibits presented at trial will be cited as "GCX" for General Counsel's exhibits, "RX" for Respondent's exhibits, "UX" for the Union's exhibits, and "JX" for joint exhibits, followed by the exhibit number.

[2] In its answer to the complaint, Respondent admitted that at all relevant times Reilly and Vega have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

least a measure of due process. Progressive discipline serves a dual purpose, namely, the discouragement of repeated offenses by employees and the protection of the right of the company to indefinitely separate the relationship with any employee if her/his behavior shows to be irresponsible.
(JX 1, Exhibit C).

Following the preamble is a list of 50 rules, including:

Rule		First Violation	Second Violation	Third Violation
1	Assault on a supervisor or another employee	Discharge		
11	Leaving department or the plant during a working shift without a supervisor's permission	Suspension	Discharge	
12	Stopping work before shift ends or taking unauthorized breaks	Written Warning	Suspension	Discharge
28	Unauthorized soliciting of contributions on [Respondent's] premises	Written Warning	Suspension	Discharge
30	Threatening other employees or a supervisor	Discharge		
33	Distributing printed matter on [Respondent's] premises without permission.	Written Warning	Suspension	Discharge
34	Fighting or attempting to provoke a fight on company property	Written Warning up to Discharge		
35	Inability or unwillingness to work harmoniously with other employees	Written Warning up to Discharge		

D. <u>Respondent's disciplinary policy.</u>

Respondent's written disciplinary policy, which has been in effect since September 16, 2008, states, in part: (GCX 14; Tr. 313, 325).

<u>Determining the Need for Discipline</u>

Prior to imposing any disciplinary action, the supervisor must first determine if there are sufficient reasons to initiate the disciplinary process, and if so, at what level of discipline.

> 1. *Adequacy of notice:* The Supervisor must first determine whether the employee was given fair notice of the consequences of misconduct. . . . Supervisors should not assume that employees learn rules by word of mouth. Supervisors should consider whether communication of the rules was reinforced in policy manuals or employee handbooks.
>
> 2. *Investigative facts:* Supervisors are responsible for investigating each incident as soon as possible. They should obtain all facts, interview available witnesses, and review the information fairly and impartially before initiating disciplinary action. **Employees should always be given an opportunity to explain their actions.** (emphasis added).
>
> 3. *Classify disciplinary violation:* Supervisors must determine if a particular act is a major or minor problem, an isolated incident, or a recurring problem. (GCX 14)

Angie Sandoval, the Human Resources Manager, is responsible for investigating violations of work-rule violations.[3] (Tr. 330). Sandoval testified that Respondent has a practice of interviewing employees who are accused of misconduct before imposing any discipline. (Tr. 331, 313). Sandoval also stated that she has always given employees accused of misconduct an opportunity to explain their side. (Tr. 325).

Documentary evidence in the record also demonstrates that Respondent's normal disciplinary procedure includes obtaining an employee's response to the alleged wrongdoing. For example, employee Yamile Fonseca ("Fonseca") received a verbal written warning on November 18, 2008, for telling a supervisor, "this is bullsh__," after being instructed to perform a task. (UX 10, p. 1). Fonseca was allowed to provide a written response to the incident. There, she stated that the reason she was disrespectful was because she was upset for not being allowed to leave early. (UX 10).

Another employee, Juan Mauricio ("Mauricio"), was issued a written warning on

[3] Sandoval testified at the hearing for Respondent, and identified herself as the Human Resources Manager. (Tr. 289-290). She also testified that she made the decision to suspend and to discharge employee Jesus Guzman. (Tr. 292, 308). Thus, her duties meet the definition of a supervisor under Section 2(11) of the Act.

July 1, 2009, for writing an offensive note to a coworker that stated, "Today you got to do the one day concession N____!!" (UX 8, p. 4). Before being disciplined, Mauricio was questioned by the supervisor who issued the warning about the offensive note. (UX 8, p. 6). And Mauricio provided an explanation for his conduct. (UX 8).

A third employee, Tomas Rodriguez ("Rodriguez"), received a 2-day suspension on August 19, 2008, for sexual-harassment. (UX 5, p. 1). Sandoval wrote a letter, dated August 19, 2008, to Rodriguez with specific details of the accusations against him, including the name of the alleged victim. (UX 5, p. 2). Sandoval wrote this letter after interviewing Rodriguez concerning all allegations against him. (UX 5).

E. Respondent requires its employees to enter into an arbitration agreement waiving their right to file charges with the Board.

At all relevant times, Respondent has required employees to sign an arbitration-agreement form attached to Respondent's job application before being hired. (JX 1). The agreement states, in part:

> I agree to submit to binding arbitration all disputes and claims arising out of this application and, in the event that I am hired, all disputes and claims arising out of my employment. This agreement includes every type of dispute that may be lawfully submitted to arbitration, including claims of wrongful discharge, discrimination, harassment, or any injury to my physical, mental or economic interests. This means that a neutral arbitrator, rather than a court of (sic) jury, will decide the dispute. As such, I am waiving my right to a court or jury trial. I agree that any arbitration will be conducted in accordance with 2 Sisters Food Group employee handbooks, or the rules of the American Arbitration Association. (JX 1, Exhibit E).

In addition, Respondent required its employees to sign written offers of employment that include the following language:

ARBITRATION OF DISPUTES:

> Any dispute arising between you and 2 Sisters Food Group Inc, (sic) will be resolved by arbitration in accordance with 2 Sisters Food Group Inc, (sic) Arbitration Policy, which is included in the Employee Handbook that you will receive. By accepting this offer of employment, you agree to waive your right to a court or jury trial, and you acknowledge that all claims that may be lawfully be (sic) resolve (sic) by arbitration will be decided by a neutral arbitrator whose decision will be final and may not be appealed. (JX 1, Exhibit A).

F. Xonia Trespalacios becomes involved in the union-organizing campaign.

Trespalacios was first hired by Respondent in October 2007. (Tr. 24). She worked there until December 2007. From April 2008 to about August 2008, Trespalacios worked at the Respondent's facility via an employment agency named Rally. (Tr. 24-25). In about August 2008, she was hired directly by the Respondent, and she continued working there until her termination on July 13, 2009.[4] At the time of her termination, Trespalacios worked in the poultry department, cutting, weighing, and packaging chicken. (Tr. 26-27). During the entire time she worked at Respondent's facility, she received no warnings. (Tr. 42).

Trespalacios first became involved in the Union-organizing campaign in May when she joined the organizing committee. (Tr. 29). From May to July, Trespalacios attended Union meetings and distributed Union flyers at the main entrance of Respondent's facility. (Tr. 29-35). She distributed flyers with other workers about twice per week, before the start of her shift. (Tr. 30-31). Some of these flyers had photographs of Trespalacios. (Tr. 34-35; GCX 5, GCX 6). At the hearing, Reilly admitted that Trespalacios was among the group of employees passing out flyers at the facility, and

[4] Unless otherwise noted, all dates that follow are in 2009.

acknowledged that she was aware that Trespalacios was a Union supporter. (Tr. 416-417, 360).

G. Yolanda Flores initiates a conversation with Xonia Trespalacios in the lunchroom on July 9.

1. Background.

Various witnesses at the hearing, who are familiar with Trespalacios, described her as a happy, friendly individual with a good sense of humor.[5] (Tr. 77, 101, 155, 211). They also testified that she has a habit of touching people, patting them on the back or on the shoulder, and grabbing their arm when she talks to them. (Tr. 77-78, 155, 211, 213, 493-494). For example, employee Sonia Vicente ("Vicente") stated, "she touches with a lot of trust," "she gets close [to other people], talks in their ears and the others break up laughing." (Tr. 92-93, 126). Trespalacios is also known to use a lot of hand gestures to communicate with others. (Tr. 78, 493-494).

Employee Yolanda Flores ("Flores") and Trespalacios have never been friends; but, according to Vicente, they did get along. (Tr. 251-252, 238-239). Trespalacios and Flores generally did not talk to each other at work other than to exchange ordinary pleasantries such as, "good morning." (Tr. 55). Vicente is a friend of both Flores and Trespalacios. (Tr. 80, 101). Vicente interacts with both women outside of work. She has visited each of them at their home, and has met some of their family members. (Tr. 80, 101).

[5] These witnesses include Sonia Vicente and Maria Garcia (current employees of Respondent), Gregorio Luque (a former employee of Respondent), and Union Representative Maria Perez.

2. The July 9 interaction between Flores and Trespalacios.

On Thursday, July 9, during her lunch break at around 10 or 11 a.m., Trespalacios was leaving the lunchroom on her way to clock back in. (Tr. 44-45, 74). She was greeted by Vicente who was sitting at a table with Flores and employee Martha Castillo ("Castillo"). (Tr. 44-45). Trespalacios stopped by their table to talk to Vicente. (Tr. 44-45). Vicente and Trespalacios both testified that as they exchanged pleasantries, Trespalacios asked Vicente about her son. (Tr. 45, 75-76). Trespalacios was standing to Flores' left at the time. Flores then initiated a conversation with Trespalacios. Trespalacios testified that Flores looked up and told her that Trespalacios was no longer talking to Flores now that Trespalacios was with the Union. (Tr. 45). Vicente testified that Flores asked Trespalacios, "Are you not talking to me because I'm not in your Union?" (Tr. 76). According to Trespalacios, she softly touched Flores on the arm once and, in a normal tone of voice, told her, "With the union or without, I continue to be the same." (Tr. 46, 70).[6] Trespalacios then went to clock in to return to work. (Tr. 47).

Flores admitted that she initiated the conversation with Trespalacios by asking her if she was upset at Flores because of the Union. (Tr. 234). According to Flores, Trespalacios replied that she did not care, and that Flores did not know why the Union was good for people. (Tr. 234). Flores also testified that Trespalacios called her "silly" or "stupid," and told her that if she decided not to vote in favor of the Union that she should not vote. (Tr. 236). According to Flores, she told Trespalacios that it was her decision whether to vote in favor of or against the Union, and that she wanted to be left alone. (Tr. 236). Flores claims that Trespalacios then forcefully pushed against her

[6] Vicente testified that Trespalacios' response was, "Whether you're with the union or not, I will always be the same here." (Tr. 76). Vicente also testified that she saw Trespalacios touch Flores about three times, patting her on the shoulder. (Tr. 91-92).

shoulder five times. (Tr. 237-239, 259). Flores also claims that Trespalacios walked away, came back with her arms folded in front of her, and forcefully pushed Flores. (Tr. 237-239, 259).

On cross-examination, Flores admitted that she told a Board Agent during a deposition, where she was represented by Attorney Erik Rodriguez, that she only "moved a little bit" when she was touched by Trespalacios. (Tr. 256-260). Flores never demonstrated or described for Reilly or any other management official the manner in which she claims she was pushed. (Tr. 379). Flores also claims that as Trespalacios walked away she told her, "But you will see that when we will be here, we are going to kick your ass and throw you away." (Tr. 239).

Trespalacios denied all of the above accusations. She denied using any foul language, she denied threatening Flores with any physical harm, and denied telling her that when the Union came in she was going to get her "ass kicked out." (Tr. 47-50). Vicente testified that she did not hear the whole conversation between Trespalacios and Flores because she was talking to Castillo part of the time. During the entire incident, Vicente never heard Trespalacios use foul language toward Flores, nor did she hear Trespalacios threaten to "kick her ass," or to "kick her ass out" when the Union came in. (Tr. 78-79). Vicente also testified that Trespalacios did not touch Flores in an aggressive manner, and did not speak to her in a hostile way. (Tr. 115). Vicente viewed the incident as an ordinary conversation in the lunchroom. (Tr. 77).

3. Flores did not immediately report her interaction with Trespalacios.

After Trespalacios left the lunchroom, Flores remained at the table for another 20 minutes having lunch with Flores and Castillo. (Tr. 79-80, 107). During that time, Flores

did not mention anything to Vicente or Castillo about her conversation with Trespalacios. (Tr. 79-80). Flores did not appear upset or happy. Vicente observed that Flores was in a "serious" mood both before and after her conversation with Trespalacios. (Tr. 107-108).

After lunch, Flores did not approach any supervisor to report her interaction with Trespalacios. Instead, she went back to work. Sometime thereafter, Florinda Sotelo ("Sotelo"), a lead employee in the poultry department and friend of Flores, approached her and asked her what was going on. (Tr. 240, 260). Flores told Sotelo about her conversation with Trespalacios in the lunchroom. (Tr. 240, 261-262). Flores did not ask Sotelo to report the interaction. (Tr. 262). Sotelo told Flores that she was going to report it to Vega. Vega's statement concerning the July 9 interaction states that Sotelo and Flores reported this matter to her at 2:04 p.m. on July 9. (RX 8).

According to Flores, on July 9, as she was talking to Sotelo about Trespalacios, Sotelo called Vega to come over. (Tr. 240). Sotelo then told Vega that Flores had had a problem with Trespalacios. (Tr. 240). On cross-examination, Flores admitted that at that point, she felt that she "**had**" to tell Vega about the incident. (Tr. 262). (emphasis added). Vega and Flores then went to an office. (Tr. 241). Flores told Vega that Trespalacios had pushed her, but did not tell her how or how hard she was pushed. (Tr. 243). Flores informed Vega that Castillo and Vicente were also present when this happened. (Tr. 243). No other management official spoke to Flores about the July 9 interaction. (Tr. 244). Flores never filed a police report concerning this matter. (Tr. 265). Respondent did not present Vega to testify at the hearing.

H. Veronica Vega gathers statements concerning July 9 from Yolanda Flores and Sonia Vicente, but fails to take statements from Xonia Trespalacios and Martha Castillo.

Reilly testified that on July 9, Vega came to her office and told her she had received a report that Trespalacios had pushed and abused Flores. (Tr. 345). Reilly instructed Vega to take statements from witnesses in the area. (Tr. 345).

Vega proceeded to get statements from Flores, Vicente, and Sotelo; but Sotelo did not witness the interaction.[7] However, Vega failed to obtain statements from Trespalacios and Castillo. Vega also wrote a statement even though she was not present during the interaction. Vega's statement, dated July 10, reads:

> Yesterday, 7/9/09 @ 2:04 p.m. Flor Sotelo and Yolanda Flores came to me in Sealing telling me that at lunch time Xonia Trespalacios pushed her and told her that when the Union comes in she will be fired with a kick up her _ _ s. I had Yolanda Flores and Flor Sotelo in the office today @ 9:30 a.m. 7/10/09 to give me a statement in writting (sic) on what had happened. (Please find attached 2 statements).[8] Yolanda tells me she feels really uncomfortable with the things Xonia Trespalacios told her. (RX 8).

In her statement, Sotelo's wrote:

> Yolanda Flores 7-9-09 coming from the lunchroom and she told me that a lady from poultry had told her a bad word and had pushed her. I told her that it needs to be reported to the supervisor because we cannot say bad words to people. And I told her that I was gonna communicate it to the supervisor, and I told Veronica. (RX 2; Tr. 221-222)

Flores' statement reads:

> Yesterday, on Thursday, [date][9], during my lunch hour, I asked Xonia why she was upset with me, if it was because of the union. And she told me that she didn't care, then she told me that she was gonna kick my ass out,[10] and she pushed me. And I am very upset for what she told me. I also told Xonia that it was my decision to vote in favor or against the union. All I want is to work comfortably and to be left alone." (RX 3; Tr. 242-243).

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[7] All three women wrote their statements in Spanish.
[8] Flores' and Sotelo's statements were attached to Vega's statement. (Tr. 350).
[9] The date on the statement is illegible.
[10] At the hearing, the interpreter agreed that the statement "gonna kick my ass out" is a correct interpretation of this section of Flores' statement. (Tr. 242-243).

Vicente wrote two statements regarding July 9. The first statement reads:

> 7-9-09
>
> Xonia approached Yolanda and Xonia touched her shoulder. And Yolanda said, she told her you're angry because I'm not in your union. And Xonia said aside from that I am another person here. (GCX 7; Tr. 83).

Vicente's second statement is undated, and it reads:

> Xonia approached Yolanda touching her on her shoulder. And Yolanda told her are you angry because I don't support your union. (sic) And Xonia told her I am another person here. The union is something very apart from this. (GCX 8; Tr. 84-85).

I. Without interviewing Xonia Trespalacios, on July 10, Tracey Reilly decides to terminate her.

1. Reilly receives statements from Vega's incomplete investigation.

Around 11 a.m. or 12 p.m., on Friday, July 10, Vega submitted the above five statements to Reilly, and orally translated the statements by Sotelo, Flores, and Vicente—which were all written in Spanish. (Tr. 346-351, 376-377, 407, 409). Reilly did not obtain written translations of the statements before terminating Trespalacios. (Tr. 376).

On cross-examination by the Union's counsel, Reilly acknowledged that only two of the witnesses who provided statements (Flores and Vicente) were present during the incident. (Tr. 407-408). Reilly further acknowledged that Vicente's statements do not contain any assertions of any threats. (Tr. 426). And she admitted that she would have to conclude from Vicente's statements that no assault had taken place. (Tr. 426). In addition, Reilly testified that she understood from Vega's translation of Flores' statement, that Flores said she was threatened with getting her "ass kicked out" when the Union came in. (Tr. 437). Reilly further stated that she understood this threat to mean that when the Union came in, Trespalacios was going to get Flores terminated. (Tr. 437).

Despite the policy requiring supervisors to give employees the opportunity to explain their actions, Reilly chose not to speak about the alleged incident with Trespalacios or any of the other eyewitnesses. (Tr. 263, 379, 427). Reilly also did not question Vega regarding her failure to obtain a statement from Trespalacios. (Tr. 409). Although Reilly was aware that there was a fourth person (Castillo) at the table, she did not ask Vega to get a statement from that individual either. (Tr. 408-409). Reilly admitted that she violated the disciplinary policy by: (1) failing to interview all available witnesses to the July 9 interaction; (2) failing to obtain all the facts relevant to Trespalacios' discipline, (3) failing to give Trespalacios the opportunity to explain her side; and (4) failing to determine whether Trespalacios had been notified of the consequences of the alleged offense. (Tr. 412-418). In addition, Reilly disregarded the disciplinary policy's requirement that supervisors examine whether the alleged behavior was "a major or minor problem, an isolated incident, or a recurring problem." (Tr. 411-413).

2. Reilly repeatedly reviewed a videorecording of the July 9 interaction between Flores and Trespalacios.

Respondent has two surveillance cameras in the lunchroom, and about 13 more throughout the facility. (Tr. 378, 399). After receiving the above statements, Reilly proceeded to view a video of the Flores/Trespalacios interaction on her office computer. (Tr. 353, 379-380).[11]

The video has no audio, and is 44 seconds long. It shows a lunchroom with about 16 round tables and many individuals, about 30, eating at those tables. Each table seats about four people. The third row of tables (on the right side of the screen) has six tables.

[11] This videorecording is in evidence as RX 1. It was admitted into evidence as the video footage that was reviewed by Reilly in her hard drive when making her decision to terminate Trespalacios, and which video was shown to employees at a meeting on July 13. (Tr. 89, 357-359, 462).

A close view of the video shows that there are two other individuals seated at Flores' table.

At the start of the video, Trespalacios is standing next to Flores, to her left. Flores remains seated. About 10 seconds into the video, Trespalacios touches Flores' left-shoulder area about five times with her right hand. Flores' upper body moves slightly to her right during the first four touches. She does not seem to move on the fifth touch. As Trespalacios touches Flores in the shoulder area, a man walks across the back of the lunchroom from right to left, in the area immediately behind Flores and Trespalacios. The man does not stop to observe them.

Trespalacios then walks about four steps away from Flores toward the right of the screen. She walks back and stands next to Flores. Trespalacios gestures with her right hand for a few seconds and then leans in towards Flores. As she leans in, Trespalacios appears to touch her own face or mouth with her right hand. Because both women are wearing black-colored clothing, it is not clear from the video whether Trespalacios made contact with Flores as she leaned in toward her. After leaning in toward Flores, Trespalacios walks away.

About 36 seconds into the video, as Trespalacios is gesturing with her right hand, a woman walks across the lunchroom, in the area immediately behind Flores and Trespalacios. When she first appears walking in from the right side of the screen, she seems to take a quick look in the direction where Trespalacios is standing. However, the woman continues walking across the room without stopping at Flores' table. None of the approximately 30 other employees in the lunchroom approach the table where the interaction is taking place. (RX 1).

Reilly testified that she, "looked at the video most of the day," pausing it as she watched it, and viewed it at least five, six, or seven times before being convinced that Trespalacios had "violently" assaulted Flores. (Tr. 422, 430).

Reilly also testified that before leaving work on July 10, she, on her own,[12] decided to terminate Trespalacios based on the written statements she received from Vega, and the video recording in RX 1. (Tr. 359, 381). Reilly never requested anyone from Respondent's technical support to manipulate the video in order to obtain a view with better resolution. (Tr. 429).

J. Xonia Trespalacios is terminated by Tracey Reilly on July 13.

Following the July 9 interaction, Trespalacios continued working the remainder of that day without any manager or supervisor speaking to her about it. (Tr. 50). Trespalacios also worked the next 2 days, Friday, July 10, and Saturday, July 11. (Tr. 51). Nobody spoke to her about Flores' accusations on either of those days. (Tr. 51). She had the day off on Sunday, July 12. (Tr. 51).

Upon returning to work, around 6:00 a.m. on Monday, July 13, Trespalacios was sent to an office where she met with Reilly. (Tr. 39-40). Plant Manager Helen Marquez ("Marquez") was also present to translate. (Tr. 40). Reilly told Trespalacios that she had assaulted a coworker and that she was being terminated as a result. (Tr. 40). Both Reilly and Trespalacios testified that Trespalacios requested to know the name of the coworker that she was accused of assaulting, but Reilly refused to give her any names. (Tr. 40-41,

[12] Reilly testified that she did not consult with anyone regarding this decision, not even with the law firm Seyfarth Shaw that was representing the Respondent at the time. (Tr. 382, 420-421). However, Erik Rodriguez, attorney with Seyfarth Shaw, testified that before Trespalacios was terminated, he had discussions with Reilly concerning an alleged rule violation by Trespalacios. (Tr. 919).

380). Reilly admitted that she told Trespalacios that she was not going to give her any of that information, and then told her, "The interview is over. Can you please leave?" (Tr. 362).

Trespalacios asked if she was being terminated because she was a Union supporter, but Reilly did not answer. (Tr. 41, 362). Reilly did not give Trespalacios any further details about the accusations against her. (Tr. 41). Trespalacios was then escorted by an employee who works in the office to get her lunchbox. That same person escorted her out of the facility where a taxi was waiting to drive her home. (Tr. 41).

As previously mentioned, Reilly told Trespalacios that she was being terminated because she assaulted someone. However, the reason put on the termination form, which was signed by Reilly and maintained in Trespalacios' personnel file, states that she was terminated for violating Rule 30—the rule against threatening other employees or a supervisor. (GCX 3; JX1, Exhibit C).

At the time of her termination, Trespalacios did not know who had made accusations against her. (Tr. 42). Later that same day, she spoke to Vicente on the phone and learned that the July 9 conversation with Flores led to her termination after Vicente told her that the Respondent had shown a video to all employees about that incident. (Tr. 43-44).

K. Immediately after terminating Trespalacios, Reilly held a meeting with the majority of employees and showed a video of the July 9 interaction.

Immediately after terminating Trespalacios, Reilly conducted a meeting in the lunchroom with the majority of the employees. (Tr. 141-142, 382). About 100-150 employees were present. (Tr. 142). Labor Relations Consultant Jim Needles was at a table with a projector. (Tr. 143). Reilly read the following speech to employees in

English, and Labor Relations Consultant Luz Ceballos ("Ceballos") read a Spanish-version of the speech:

> Good Morning.
>
> I called this meeting because I'm very concerned with something I've seen happening here lately as the union election gets closer.
>
> But before we talk about that let me say that this type of behavior has been going on since last year. In fact last year we had to terminate another employee for **threats of physical harm** against another employee who did not support the union. (emphasis added)
>
> Although the union claims that these types of actions do not occur the truth is that they do and things are actually getting worse, allow me to show you. Here is a video of what happened here last Thursday. After you see it, I'll tell you more.
>
> **[VIDEO PLAYS]** [13]
>
> The video clip is of an employee threatening, intimidating, and physically assaulting another employee who used to be her friend because she changed her mind and decided to vote against the union.
>
> This [is] one example of the mistreatment some employees have shown their coworkers who disagree with them on the union question.
>
> I'm here to tell you that I won't tolerate that kind of behavior here in our plant.
>
> I want you to know that you're all free to have your own opinions about the union or anything else without worrying that someone else is going to abuse you because you disagree with them.
>
> That's not the type of business I'm running here. No one will be hassled or intimidated for having a different opinion from another employee. I won't allow that.
>
> You have my word that 2 Sisters will protect your right to decide how you want to vote without being intimidated or threatened.
>
> The conduct you saw in this video clip forced me today to make a decision about someone's employment here. It's a decision I take very seriously.
>
> I think you'll agree with [me] after watching the video that this type of behavior cannot be allowed here. It doesn't matter who does it.

[13] At this point, the video recording in RX 1 was projected on a wall in the lunchroom.

> I called this meeting because I want you to know the truth, and see it for yourselves. But I also want to tell you that I'm saddened by what I've seen these past few days.
>
> I'm upset that people who used to be friends are now divided over the union question. I'm asking you today to put aside your differences and respect each other.
>
> We all have something important in common. We're part of the 2 Sisters team. And we all work very hard to earn a living here together to support our families.
>
> Being divided over the union question is getting in the way of us working together in peace and that troubles me.
>
> I'm asking you all to please put aside your feelings on the union questions and work together to make this a place we can all be proud of.
>
> Our future is bright, but we must put this union thing behind us and move on. We must convince our customer that we produce a great product here—one that is clean and safe.
>
> By working together and treating each other with respect and dignity, we can make this a great place to work. I hope I've made myself clear. Now, let's get back to work. Have a great day. (Tr. 150; GCX 4). [14]

This was the first meeting that Reilly had ever conducted to show employees a video of another employee accused of misconduct. (Tr. 383-384, 393). And it was the first time that she held a group meeting with employees to talk about the termination of another worker. (Tr. 393).

Reilly testified that she considered the July 9 incident to be the most serious assault at work since the Riverside plant opened in September 2008. (Tr. 420). Reilly also testified that before July 9, she was aware of only two other incidents where an employee was terminated for assault. (Tr. 431). Both incidents happened at the Corona

[14] Reilly testified that on Saturday, July 11, she called Labor Relations Consultant Carlos Restrepo, and instructed him to write this script for her use in the meeting with employees. (Tr. 382-383). She told him what she wanted to say, and after he wrote it, she read it and confirmed that it was what she wanted it to say. (Tr. 383, 444).

Facility. (Tr. 431). One was the termination of employee Jesus Guzman (which is discussed below). Reilly acknowledged that she knew that the events surrounding Guzman's termination had nothing to do with the Union-organizing campaign. (Tr. 431-432).

When Reilly was asked by the Union's counsel if she was aware if the other prior incident had anything to do with the Union, her response was: "The other one, I am not clear of." (Tr. 432). However, Reilly admitted that that was the incident she was referring to during her speech when she said that, "[T]his type of behavior has been going on since last year. In fact, last year, we had to terminate another employee for threats of physical harm against another employee who did not support the Union." But, in reference to her knowledge about this incident, she testified, ". . . that is the one I am not a hundred percent close on." (Tr. 432). Ultimately, Reilly acknowledged that the individual involved in that incident was one of the alleged discriminatees in the prior Board hearing involving the Respondent. (Tr. 432-433).[15]

L. Vicente has a conversation with Reilly about the video that was shown at the July 13 meeting.

About 2 days after the July 13 meeting, Vicente had a conversation with Reilly in the lunchroom. (Tr. 93-94). Ceballos translated during this discussion. (Tr. 98-99). The conversation began when Reilly asked Vicente what she thought about the meeting conducted that morning by the owner, Ranjit Singh. (Tr. 97).[16] Vicente replied that she

[15] On June 10, an unfair labor practice hearing in Cases 21-CA-38480 and 21-CA-38563 commenced. The complaint in those cases alleged as unlawful the termination of four employees by Respondent. On September 28, the ALJ presiding in that hearing approved a settlement in those cases.

[16] That morning, Ranjit Singh, conducted a meeting about the Union. (Tr. 95-97). During the meeting, employees stood up, simultaneously started asking questions, and interrupted the owner as he was speaking. (Tr. 95, 97). Although on direct examination Reilly testified that Singh was not at the facility on July 13, on cross-examination by the Union's counsel, she testified that Singh "flew in" on the night of July 14, and he came to the facility later that week. (Tr. 364, 443-444).

thought it was a lack of respect when employees stood up and interrupted the owner. Vicente, who was present at the July 13 meeting, then asked Reilly if she could ask her a question, and Reilly said yes. (Tr. 97). In reference to the video shown at the July 13 meeting, Vicente told her, "what had happened in the video was not what it seemed." (Tr. 97). Reilly asked her why, and Vicente replied, "I was present when what they showed in the video happened. It wasn't the way it was broadcasted." (Tr. 98). Reilly told Vicente that she was not going to allow people at the company to be assaulted. (Tr. 98). Vicente told Reilly that she respected her opinion, but that she thought it was unfair. Reilly did not say anything further after that. (Tr. 98). Reilly did not deny having this conversation with Vicente. (Tr. 366-367).

M. Mark Slade was not disciplined for aggressively grabbing and pulling employee Ricardo Lopez by the collar.

Ricardo Lopez ("Lopez"), a sanitation employee also known as "Richie," has worked at Respondent for over a year. (Tr. 175). In about January or February 2009, shortly after taking a rest break, his supervisor, Mario Limon ("Limon"), told him to report to Production Manager Mark Slade ("Slade") in the red-meat department. Lopez was wearing a ski mask covering his head and ears due to the cold temperatures in the plant. (Tr.177-178, 180). When Lopez approached Slade, Slade asked him why he was wearing that ski mask. Lopez explained that he wore the mask to avoid getting sick. Slade said, "Why the f - - k are you wearing that. You don't need to be wearing that." (Tr. 177-178). Slade said "f - - k" multiple times. (Tr. 180).

Lopez noticed that Slade's face turned red, and he looked at Lopez with a mean look. (Tr. 179, 181). In an angry manner, Slade grabbed Lopez by the collar with both hands, and forcefully pulled him upwards. (Tr. 178-179, 181). Slade then proceeded to

adjust Lopez' collar. (Tr. 179). Lopez testified that it seemed like Slade tried to cover up his aggression by acting as if he was simply adjusting his collar. (Tr. 179). Lopez asked Slade whether he could still wear the ski mask, but Slade did not reply. (Tr. 179). Lopez then walked away. (Tr. 179). Before leaving, Lopez saw Plant Manager Helen Marquez ("Marquez") walk in as Slade was getting ready to take his hands off of Lopez. In an email, dated March 10, Marquez informed Sandoval that:

> About a week to 10 days ago I came into the Red meat room and saw mark (sic) with his hands on the colar (sic) of Richie, the young man who works in sanitation. He proceeded to pull up on his colar (sic) in a (sic) upwards motion. I did not know what the discussion was about as I came in at the tail end of it. All I remember was the look on Richie's face, he appeared to be scared, this is my opinion only. (GCX 12)

Lopez complained to Marquez and he requested to speak to human resources. (Tr. 182). A couple days after the incident, Lopez met with the human-resources representatives, including Sandoval. (Tr. 182-183). Lopez told them the details described above regarding his problem with Slade. (Tr. 183). Nothing was resolved at that meeting.

Reilly testified that Sandoval informed her about Lopez's complaint by telling her that they had received reports that Lopez "had been picked up off his feet by Mark Slade," and that "[Lopez] was very frightened that [Slade] just went and picked him off his feet." (Tr. 368). Reilly claims that she saw a videorecording of this incident and then spoke to Slade to investigate the complaint. (Tr. 369). According to Reilly, Slade told her that he did not intend to frighten Lopez and that he asked Lopez to cover his outer clothing.[17] (Tr. 369-370). Reilly then asked Slade to apologize to Lopez. (Tr. 370).

[17] Reilly testified that employees are required to cover their outer clothing for safety reasons. (Tr. 373-374).

A few days later, Lopez had another meeting with the human resources representatives. Slade, Reilly, and Marquez were also present. (Tr. 185). The human resources representatives played a videorecording of the incident. (Tr. 187).[18] After watching the video, Reilly said that she knows that Slade is not a mean person, and that he would not do something like that in an aggressive way. (Tr. 188). Slade then apologized to Lopez. He told Lopez that he did not intend to grab him in an aggressive manner. (Tr. 187-189). Angie and Christine asked Lopez whether he was satisfied with Slade's apology. (Tr. 189). Lopez felt like he had no other choice but to accept it. (Tr. 189). Slade received no discipline for grabbing Lopez by the collar. (Tr. 373; GCX 11). In a position statement to Region 21 of the NLRB, the Respondent stated that it determined that Slade did nothing inappropriate. (GCX 11).

N. Employee Jesus Guzman's termination.

At the hearing, Respondent adduced testimony from employee Ryan Maher ("Maher"), who testified about being physically attacked by employee Jesus Guzman. Guzman was a night stock supervisor or lead. (Tr. 267). Maher testified that in early August 2008, he noticed that his Angels baseball cap was missing from his desk. (Tr. 267-268). On about August 9, 2008, Maher saw Guzman wearing his hat and asked him to give it back, but Guzman refused. (Tr. 267-268; RX 7). Later that day, Maher reported to a security guard at Respondent's facility that Guzman stole his hat and refused to return it. (Tr. 269-270; RX 7).

That same day, toward the end of his shift, Maher was working at his desk when Guzman walked in and instigated a fight. Guzman began yelling at Maher, calling him a

[18] This video is in evidence as GCX 9.

"punk ass rat," and asking Maher what was he going to do about it. (RX 4) Maher then stood up and told Guzman that he simply wanted this hat back. (RX 4). Guzman then forcefully pushed Maher with both hands causing Maher to fall backwards into his chair, and the chair rolled backwards until it hit the wall. (Tr. 272-273). Guzman then took off Maher's hat and, at close range, threw it at his face. (Tr. 274). The security guard then separated both men. (RX 4). Vega and the security guard witnessed the incident. The security log maintained by the guard described the incident as follows:

> Supervisor Gordy arrives on-site wearing [Maher's] Angels hat. Advised Gordy [Maher] has reported a theft and could he return [Maher's] hat to him. Gordy went straight to operations room and confronted [Maher] sitting at QA's desk. Gordy called Ryan a "punk-ass rat" and threatened him. [Maher] stood up and Gordy with both hands pushed him and challenged [Maher] to fight. I was able to separate the two but not before Gordy took the Angels hat and smashed it on top of [Maher's] head. Gordy then exited office.... (RX 7, p. 3).

On about August 10, 2008, after being informed about the incident by Slade, Sandoval told Slade to suspend Guzman. (Tr. 290-292). Sandoval then conducted an investigation. As part of her investigation, she spoke to Maher, and received a copy of an email from Maher describing the altercation, and a copy of the security officer's log. (Tr. 305). She also received Guzman's suspension notice signed by Slade and Guzman, which states, "I was provoked" underneath a section that reads "Employee Response." (GCX 13; RX 6). After reviewing the above information, Sandoval terminated Guzman on August 13, 2008. (Tr. 308-209.) Sandoval testified that during his termination meeting, Guzman acknowledged that he "messed up" and stated that should not have behaved that way. (Tr. 309). Guzman's termination form indicates that Guzman's last day of work was on August 9, 2008—the date of the altercation. (GCX 15).

Sandoval also testified that before terminating Guzman, she was aware that Slade had obtained his side of the story, and that Guzman's response to Maher's accusations was that he was provoked. (Tr. 311-312, 322-323).

IV. ARGUMENT

A. The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining overbroad work rules.

The mere maintenance of a work rule constitutes a violation of Section 8(a)(1) of the Act if it "would reasonably tend to chill employees in the exercise of their Section 7 rights." Lafayette Park Hotel, 326 NLRB 824, 825 (1998). When analyzing whether a rule is unlawful, the Board must give the rule a reasonable reading, it must not read particular phrases in isolation nor must it presume improper interference with employee rights. Lutheran Heritage Village-Livonia, 343 NLRB 646, 646 (2004).

Work rules that explicitly restrict activities protected by Section 7 are unlawful. Id. at 646. "If the work rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. Also, rules that require employees to obtain approval before engaging in protected activity are unlawful. Crowne Plaza Hotel, 352 NLRB 382, 387 (2008).

1. Rule 11 and Rule 12: The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by maintaining overbroad rules that prohibit employees from walking off the job to engage in protected concerted activities.

Respondent excepts to the ALJ's findings that the rule prohibiting employees

from leaving the plant during a working shift without permission (Rule 11), and the rule prohibiting employees from stopping work before the end of their shift or taking unauthorized breaks (Rule 12) are overbroad, in violation of Section 8(a)(1) of the Act.

Respondent argues that the intent of the rules is to maintain production, order, and safety. The case relied upon by Respondent, Wilshire at Lakewood, 343 NLRB 141 (2004), is distinguishable. The employer in that case was a nursing home responsible for the care for many elderly and ill patients. Given this context, the Board found that a rule prohibiting employees from leaving their job without permission was lawful because employees would construe the rule as intended to ensure that the patients were not left abandoned and without proper care, which the Board viewed as "imminent danger." There is no comparable "imminent danger" in the instant case. Accordingly, Wilshire at Lakewood is inapposite.

Contrary to Respondent's contentions, Rules 11 and 12 could reasonably be interpreted by employees as requiring consultation with supervisors before engaging in a protected work stoppage. Rule 11 explicitly requires supervisory permission before employees can engage in protected activity. Both rules subject employees to discipline, including termination for walking off the job. The maintenance of such overly-broad rules violates Section 8(a)(1) of the Act. Labor Ready, 331 NLRB 1656, 1659 (2000)(rule that stated "employees who walk off the job will be discharged" was found to be unlawful). See also Crowne Plaza Hotel, 352 NLRB at 386-387 (holding that rules that prohibit "walking off the job" and "leaving your work area without authorization before the completion of your shift" are unlawful).

2. Rule 28: The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining an overbroad no-solicitation rule.

In its post-trial brief, Respondent failed to cite to any authority to support its argument that Rule 28 (unauthorized solicitation of contributions on Respondent's premises) is lawful. However, on page 19 of its brief in support of its exceptions, Respondent cites to Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB, 253 F.3d 19, 28 (D.C. Cir. 2001)—a District of Columbia Circuit decision which is not binding on the Board—and to Lutheran Heritage Village, 343 NLRB at 647, a distinguishable case, to argue that employees are unlikely to construe Rule 28 to prohibit Section 7 activity. Both of those cases dealt with rules different than Rule 28; the rules at issue in those cases banned the use of abusive or profane language. Therefore, neither of those cases is applicable in the instant case.

Rules prohibiting solicitation on employees' own time are presumptively invalid. Our Way, Inc., 268 NLRB 394 (1983); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). Respondent's Rule 28 bans, "unauthorized soliciting of contributions on Company premises." A reasonable reading of the rule forbids employees from seeking funds from coworkers to form an employee organization for their mutual aid or protection without first obtaining management approval. The rule, on its face, also limits the collection of Union dues and Union initiation fees. And as the ALJ noted, the rule would proscribe solicitation of a financial contribution to cover the costs of protected literature. (ALJD 10: 48-49). By prohibiting such activity "on Company premises," the rule effectively bans protected activity even during nonworking time in all areas of its facility. Accordingly, the ALJ properly found that this overly-broad restriction on solicitations constitutes a violation of Section 8(a)(1) of the Act.

3. Rule 33: The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining an overbroad no-distribution rule.

Respondent argues that it did not enforce Rule 33 as it is written. Rule 33 prohibits the distribution of printed matter on Respondent's premises without permission. According to Respondent, the rule only applied to work time and work areas. However, there is no evidence that Respondent ever notified employees that Rule 33 only applied to work time and work areas.

An employer may restrict oral solicitation during working times, and it may restrict distribution of literature during both working times and in working areas. But it may not prohibit all solicitation and distribution on company property. Stoddard-Quirk Mfg. Co., 138 NLRB 615, 621 (1962). Rule 33 explicitly restricts activity protected by Section 7 by banning distribution of literature in nonworking areas during nonworking times without first obtaining permission from Respondent. There is no evidence that this rule, or any of the rules at issue here, were established to maintain production and discipline. The maintenance of such overly-broad rule by the Respondent is a violation of Section 8(a)(1) of the Act. Formosa Plastics Corp., 320 NLRB 631, 632 (1996), citing Stoddard-Quirk Mfg. Co., 138 NLRB at 616 and 621.

4. Rule 35: The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining an overbroad rule prohibiting employees from refusing to work harmoniously with others.

Respondent contends that Rule 35, which prohibits the "inability or unwillingness to work harmoniously with other employees" is lawful because its purpose is to maintain order in the workplace. However, the rule does not explain what working "harmoniously" means. Such ambiguity must be construed against the Respondent as the promulgator of

the rule. Lafayette Park Hotel, 326 NLRB at 828 (overly-broad and ambiguous rules that infringe on the Section 7 rights of employees are unlawful).

In Flamingo Hilton-Laughlin, 330 NLRB 287 (1999), the employer maintained a rule that banned "using loud, abusive, or foul language" and "disorderly conduct . . . including fighting, horseplay, threatening, insulting, abusing, intimidating, coercing or interfering with any guests, patrons, or employees." In that case, the ALJ reasoned, and the Board found, that "propaganda during a union campaign is protected and does not lose the protection of the Act even when it includes 'intemperate, abusive and inaccurate statements' during attempts to organize employees." Id. at 295, citing Linn v. United Plant Guards, 383 U.S. 53 (1966). The ALJ also noted that it is unlawful for an employer to ban the distribution of literature that is "libelous, defamatory, scurrilous, abusive or insulting or any literature which would tend to disrupt order, discipline or production with the plant." Flamingo Hilton-Laughlin, 330 NLRB at 295, citing Great Lakes Steel, 236 NLRB 1033, 1036-1037 (1978). The ALJ in Flamingo Hilton-Laughlin found that since the rules did not define abusive or insulting language or conduct, under Great Lakes Steel, they could reasonably be construed as banning lawful union-organizing propaganda. Flamingo Hilton-Laughlin, 330 NLRB at 295.

In this case, an employee could reasonably conclude that what others might construe as an insult, a defamatory comment, or abusive literature, constitutes a lack of harmony with other employees, and that such conduct is proscribed by Respondent's Rule 35. However, as noted above, the Board and the Supreme Court have found such speech during an organizing campaign to be lawful and not subject to prohibition.

Furthermore, in Crowne Plaza Hotel, "[inciteful] actions against fellow employees, supervisors or department heads" were not permitted. The Board found that

this policy constituted an overbroad ban on inciting "actions," and determined that employees could reasonably view this rule as prohibiting them from exercising their Section 7 right to initiate or induce group action. 352 NLRB at 387. Similarly, employees could reasonably conclude that Respondent's Rule 35 bars them from initiating a group action because such activity could be viewed as a refusal to work harmoniously with others. Therefore, the ALJ in the instant case properly concluded that Rule 35 is overbroad and is a violation of Section 8(a)(1) of the Act.

B. The ALJ properly concluded that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a mandatory arbitration rule that requires employees to waive their right to file charges with the Board.

Respondent asserts that its arbitration rule was not intended to interfere with employee access to the Board. It also argues that unless the Respondent seeks to enforce the arbitration agreement in a manner that restricts employee access to the Board, the Board should not find the arbitration rule to be unlawful.

However, Respondent's intent is irrelevant where the plain meaning of the language contained in the arbitration agreement interferes with the rights of employees to seek redress at the Board. Employees have a statutory right to report work-related complaints to individuals and entities other than the employer, such as a union or the Board. Kinder-Care Learning Centers, 299 NLRB 1171, 1172 (1990). Respondent's arbitration agreement requires that employees submit to arbitration **all** disputes arising out of their employment with Respondent, "including claims of wrongful discharge, discrimination, harassment, or any injury . . . ." (emphasis added).

In addition, Respondent's offer-of-employment letter states that, "[a]ny dispute arising between you and [Respondent], will be resolved by arbitration in accordance with

[Respondent's] Arbitration Policy. . . ." The document goes on to state that employees agree to "waive [their] right to a court or jury trial, and . . . acknowledge that all claims that may be lawfully [resolved] by arbitration will be decided by a neutral arbitrator whose decision will be final and may not be appealed."

This waiver precludes employees from seeking redress with the Board, and it reasonably tends to inhibit employees from invoking their right to raise employment-related complaints with entities other than the Respondent. Such waiver requirement violates Section 8(a)(1) of the Act. Id. See also Great Lakes Chemical Corp., 298 NLRB 615, 621 (1990) (employer's requirement that its employees sign a statement wherein they agreed to waive all their legal rights to bring action against the employer for layoffs and terminations was found to be unlawful). Therefore, the ALJ properly found that Respondent's arbitration policy violates Section 8(a)(1) of the Act. (ALJD 11: 10-31).

C. The ALJ properly found that Respondent violated Section 8(a)(1) and (3) of the Act by terminating Trespalacios.

The General Counsel has the initial burden of establishing that antiunion sentiment was a motivating factor in the employer's adverse employment decision. Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The elements commonly required to support such a showing are employee union activity, employer knowledge of that activity, and antiunion animus by the employer. Wal-Mart Stores, 340 NLRB 220, 221 (2003). Indicators of unlawful motivation include, "expressed hostility toward the protected activity, abruptness of the adverse action, timing, failure to conduct a full and fair investigation, disparate treatment, and/or departure from past practice." Sara Lee, 348 NLRB 1133, 1154 (2006).

Respondent excepts to the ALJ's findings and conclusions that Respondent violated Section 8(a)(1) and (3) of the Act by terminating Trespalacios. There is no dispute that Trespalacios engaged in Union activities and that Respondent had knowledge of those activities. Rather, Respondent argues that the ALJ, (1) did not properly analyze the termination according to Wright Line, and (2) erred in finding animus. With respect to animus, Respondent asserts that the ALJ incorrectly found that Respondent failed to fully investigate the accusations against Trespalacios, and that Respondent rushed its decision to terminate Trespalacios. Respondent also claims that the ALJ improperly relied on Reilly's July 13 presentation to support her finding of animus. However, the record evidence wholly supports the ALJ's findings and conclusions.

1. The ALJ properly analyzed the termination under Wright Line, and properly concluded that Respondent did not have a reasonable basis to believe that Trespalacios had engaged in misconduct warranting termination.

Contrary to Respondent's assertions, the ALJ properly applied Wright Line, and analyzed the evidence to determine whether Respondent had a reasonable basis to conclude that Trespalacios had engaged in misconduct. (ALJD 13: 18-23). And the ALJ properly concluded that Respondent did not because the video footage of the interaction is inconclusive, and because Respondent failed to fully investigate the allegations against Trespalacios.

a. The video does not show that a violent assault took place.

The ALJ first examined the video footage that Reilly reviewed of the interaction. (ALJD 11: 42-45). As noted by the ALJ, the video has no audio and "lacks high-quality clarity and definition." (ALJD 6: 2-3). The video does not show that Trespalacios

violently assaulted Flores, as Respondent contends. On the video, when Trespalacios touches Flores, Flores moves slightly to her right.

During the touching, a man walks across the room directly behind them, but he does not stop to observe. Likewise, the woman walking by when Trespalacios is gesturing with her hand, keeps walking without hesitation. In addition, nobody sitting at Flores' table gets up, walks away, or does anything to indicate that an altercation is taking place. Rather, they remain in their seats throughout the interaction. Furthermore, none of the approximately 30 other employees in the lunchroom come to the table to observe or to intervene. The video shows that when Trespalacios touched Flores' shoulder, nobody at Flores' table got up, no crowd gathered nearby, nobody come to intervene, and nobody stopped to observe. These are all indicators of a non-violent, non-threatening conversation between both women. Therefore, the ALJ properly concluded that the video footage alone was insufficient for the Respondent to unequivocally conclude that Trespalacios assaulted and violently pushed Flores. (ALJD 11: 50-52).

b. Reilly's perfunctory investigation shows that Respondent did not have a reasonable basis to believe that Trespalacios assaulted or threatened Flores.

After determining that the video is inconclusive, the ALJ properly proceeded to review the evidence regarding Respondent's investigation of Trespalacios to ascertain whether Respondent had a reasonable belief that Trespalacios violently assaulted Flores. (ALJD 11: 52 – 12: 23). The evidence amply demonstrates that Respondent failed to conduct an adequate investigation and violated various provisions of its own disciplinary policy.

Respondent's written disciplinary policy states that "[e]mployees should always be given the opportunity to explain their actions." And Sandoval testified that Respondent has a practice of abiding by this policy. The record evidence also established that, in the past, Respondent has interviewed employees accused of misconduct before taking action. Guzman, Slade, Fonseca, Mauricio, and Rodriguez all had the chance to explain their side when they were accused of wrongdoing. Yet, the undisputed evidence shows that neither Reilly nor Vega ever interviewed Trespalacios concerning Flores' accusations. Reilly admitted that she violated the disciplinary policy by failing to question Trespalacios about the alleged misconduct.

Respondent's disciplinary policy also requires supervisors to "obtain all facts," and to "interview available witnesses." However, even though Vega only submitted statements from two out of the four witnesses who were at the table on July 9, and despite realizing that the statements were contradictory, Reilly never asked Vega to interview Trespalacios or the other eyewitness, Castillo. Reilly acknowledged that she violated company policy by failing to interview all available witnesses and failing to obtain all the relevant facts regarding the accusations against Trespalacios.

Furthermore, Reilly failed to follow the disciplinary policy by neglecting to ascertain whether Trespalacios had received fair notice of the consequences of misconduct, and whether the alleged misconduct was an isolated incident or a recurring problem.

Contrary to the Respondent's contentions, its departures from prior practice and from established disciplinary policies are substantial and significant. The Board has held that an employer's failure to follow its normal disciplinary procedure, as Respondent has

done here, shows that the employer's proffered justification for its conduct is pretextual. See Stoody Co., 312 NLRB at 1183; Marriott Corp., 310 NLRB 1152, 1159 (1993).

As to the statements submitted by Vega, Reilly admitted that she would have to conclude from Vicente's statement that there was no assault and no threat. Yet, Reilly did not bother to seek any additional statements. Nor did she bother to speak directly to any of the four witnesses. Also, at the time of her termination, Reilly refused to provide Trespalacios with any information about the accusations against her. When Trespalacios asked her for the name of the person whom she was being accused of assaulting, Reilly told her that she would not give her any of that information, and instructed her to leave. Reilly's conduct demonstrates that she lacked any true interest in determining whether any alleged wrongdoing actually occurred.

Respondent's limited investigation demonstrates that Respondent did not have a reasonable basis to believe that Trespalacios assaulted and threatened Flores, and it supports an inference of unlawful motivation. See Handicabs, Inc., 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681 (8th Cir. 1996)(failure to fully investigate an incident supports a conclusion of discriminatory motive); New Orleans Cold Storage & Warehouse Co., 326 NLRB 1471, 1477 (1998)(finding unlawful motive where there was a failure to give employee the opportunity to explain actions).

Thus, the record evidence shows that contrary to Respondent's claim, the ALJ correctly applied Wright Line, and appropriately found that Respondent did not have a reasonable belief that Trespalacios was guilty of the alleged offense. (ALJD 13: 18-29).

c. Respondent's own conduct shows that it did not perceive Trespalacios to be a danger or a threat.

Notably, Respondent's own conduct upon learning of Flores' accusations demonstrates that Respondent did not perceive Trespalacios to be a threat to Flores or to anyone else. Unlike Gonzalez, Trespalacios was not suspended or sent home when the Respondent first heard about Flores' accusations. Trespalacios continued working the rest of the day on July 9 without any further mention of the incident. She also worked on July 10 and July 11. Nobody said anything to her about Flores on either of those days.

Trespalacios had the day off on July 12, and on July 13, she was abruptly terminated. In finding that an employer did not meet its burden of proof, the Board considers the employer's failure to act at the time of the alleged misconduct, and that the employer mentioned nothing to the employee at the time of the alleged misconduct. Abbey Transportation Services, 284 NLRB 698, 699 (1987). Here, Respondent failed to take any action against Trespalacios on the day it became aware of the alleged misconduct. Respondent also never mentioned anything to Trespalacios about Flores' accusations when Trespalacios returned to work on the following 2 days. Respondent waited until the fourth day to notify Trespalacios about the alleged misconduct. This sequence of events casts doubt on Respondent's claim that it believed a severe assault had taken place. Had Respondent really been concerned that Trespalacios was a threat and that she had behaved violently toward Flores, Trespalacios would not have been allowed on remain on the premises at all.

2. The ALJ properly concluded that Respondent harbored anti-Union animus.

a. Reilly's limited investigation shows that Respondent was motivated by anti-Union animus.

Respondent argues that the ALJ was wrong in relying upon the incomplete investigation conducted by Respondent to conclude that it harbored anti-Union animus. As discussed above, Respondent conducted a cursory investigation of Trespalacios' alleged misconduct. It is well established that an employer's failure to fully investigate an incident supports a conclusion of discriminatory motive. Handicabs, Inc., 318 NLRB at 897, enfd. 95 F.3d 681 (8th Cir. 1996); New Orleans Cold Storage & Warehouse Co., 326 NLRB at 1477.

Respondent's claim that it was unnecessary to interview Trespalacios because Reilly had seen the videorecording of the interaction, should be rejected. As discussed earlier, the video has no audio, it lacks clarity, and it does not show that Trespalacios violently assaulted Flores.

In addition, Trespalacios' termination form states that she was terminated for violating Rule 30, the rule against threatening others in the workplace. The rule implies that it concerns oral threats since other work rules already address physical threats: such as Rule 1 (assault on a supervisor or employee), and Rule 34 (fighting or attempting to provoke a fight). However, in making her decision to terminate Trespalacios, Reilly relied on a videorecording that has no audio, and on Vicente's statement, which makes no references to any threats. A video with no audio does not support Flores' contention that she was threatened. Moreover, the video does not show what, if anything, happened before the interaction that may have precipitated the encounter.

Lastly, as discussed above, Respondent maintained both a written policy and a past practice of interviewing employees accused of misconduct, but it deviated from both without a reasonable explanation. (ALJD 13: 23-25). Accordingly, the ALJ properly concluded that Respondent's investigation deficits are evidence of antiunion animus. (ALJD 12: 17-23).

b. Cases relied upon by Respondent to support its argument that there was no need to interview Trespalacios are inapposite.

Respondent cites to an ALJ decision, Eldorado, PCC Specialty Prods, Inc., JD(NY)-104-97, to support its argument that there was no need to interview Trespalacios. Since that decision is only a recommendation and not a Board decision, it is not binding authority in this proceeding.

Furthermore, that case is distinguishable. The employer in that case was not aware of the employee's union activities. Id. at 6. Here, Reilly was well aware that Trespalacios was an active and open Union supporter. In Eldorado, the discipline took place more than a year after the employee's protected activity. Here, Trespalacios was terminated about 2 months after she openly began engaging in Union activities, and 4 days before the Union election. In addition, the employer in Eldorado gave a very favorable evaluation and several wage increases to the employee after his protected activity. Id. Trespalacios received no similar benefits. Lastly, unlike the Respondent, the employer in Eldorado did not have a written policy or prior practice of interviewing employees before issuing discipline.

Respondent also refers to Society to Advance the Retarded & Handicapped, Inc., 324 NLRB 314 (1997) to argue that it was unnecessary to confront Trespalacios about Flores' allegation. But, that case is also distinguishable. In that case, an employee

accused of sexually harassing other workers was terminated without being first questioned about those allegations. Id. at 314. The Board concluded that the sudden decision to discharge the employee after a limited investigation was suspect, but not enough to warrant a finding of a violation where there was no direct evidence that the employer was aware of the employee's union activities. Id. at 315. In contrast, here it is undisputed that Reilly was well aware of Trespalacios' involvement in the Union.

Respondent's reliance on Sara Lee, 348 NLRB 1133 (2006), is likewise misplaced. In that case, the Board found that an employee's termination was not unlawfully motivated even though not every potential witness was interviewed. Id. at 1154. But, unlike the instant case, the timing of the termination in Sara Lee was not significant. Here, the timing of Trespalacios' termination his highly suspicious as it took place just 4 days before the Union election, and shortly after she became an open Union supporter. Pro-Spec Painting, Inc., 339 NLRB 946, 950 (2003).

In Sara Lee, the employer provided the discharged employee with information regarding the nature of the misconduct and gave him the opportunity to explain his actions. Here, Trespalacios was never interviewed, and Reilly refused to give Trespalacios any information about the alleged misconduct.

In addition, in Sara Lee there was no evidence of disparate treatment or evidence of departure from past practice. Here, the evidence demonstrates that Trespalacios was treated differently than Slade, who received no discipline for aggressively grabbing and pulling Lopez by the collar. Even though Respondent was aware that Lopez was frightened by Slade's hostility, Slade was allowed the opportunity to explain his conduct

and to apologize to Lopez. Trespalacios was not given a similar chance.[19] Furthermore, as previously discussed, Respondent deviated from its past-practice of interviewing all employees accused of misconduct.

The cases cited by Respondent to support its assertion that the ALJ erred in finding animus based on deficiencies in investigation are inapplicable in the instant case. Therefore, Respondent's argument should be rejected.

c. The ALJ properly noted that Reilly rejected Vicente's account of the interaction "without plausible explanation."

Respondent does not dispute that Reilly ignored Vicente's account of the Flores/Trespalacios interaction without providing a plausible explanation. Rather, Respondent alleges that this observation by the ALJ is "unjustified" because Reilly was never asked at the hearing why she rejected Vicente's description of the events. Respondent's counsel had ample opportunity to question Reilly in this regard. Thus, what is unjustified is Respondent's objection to the ALJ's reference to an undisputed fact.

Vicente, a current employee of the Respondent, and a friend of both Trespalacios and Flores, corroborated Trespalacios' account of the July 9 events. Vicente credibly testified that Trespalacios did not threaten, curse at, yell at, or physically attack Flores. Vicente admitted that she did not hear the whole conversation between the two women because she was talking with Castillo part of the time. However, it is likely that if any

[19] Guzman's termination is not comparable to Trespalacios' situation. Gonzales not only stole Maher's hat, he instigated a physical fight and forcefully shoved Maher with both hands, causing him to fall backwards into his chair. He then threw the hat directly at Maher's face. A security guard had to intervene to separate both men. Trespalacios touched Flores' shoulder with one hand. As Flores described, she only moved "a little bit." There was no need for anyone to intervene during Flores' interaction with Trespalacios, and nobody did so. In addition, unlike Trespalacios, Guzman was given the opportunity to explain himself. And Guzman's misconduct was so severe that he was not permitted to work after the altercation. Trespalacios, on the other hand, continued working for more than 2 days without anyone questioning her about the interaction with Flores.

threats or foul words were uttered, that such language would have caught Vicente's attention since all four women were sitting in close proximity to each other at a small, round table that seats four people. Nevertheless, since Reilly never spoke to Vicente about the July 9 interaction before terminating Trespalacios, Reilly was not aware that Vicente did not hear the entire conversation.

Vicente also testified that Trespalacios touched Flores' shoulder about three times in a non-aggressive manner. Vicente stated that the incident was nothing out of the ordinary. Vicente's testimony regarding the severity of the incident is consistent with what she told Reilly a couple of days after the July 13 meeting. During that conversation, Vicente tried to explain to Reilly that the interaction was not an assault as it was portrayed during the July 13 meeting. Specifically, Vicente told Reilly that she, "was present when what they showed in the video happened. It was not the way it was broadcasted." Reilly did not deny having this conversation with Vicente.

Vicente's status as a current employee of Respondent who testified adversely to the Respondent supports the inference that her testimony is not likely to be false. Federal Stainless Sink Div. of Unarco Industries, 197 NLRB 489, 491 (1972); Gateway Transportation Co., 193 NLRB 47, fn. 12 (1971). In addition, as a friend of both Trespalacios and Flores, Vicente has no motive to lie. Vicente's testimony and the videorecording, which is discussed below, support Trespalacios' denial of any threats or physical assault directed at Flores.

Contrary to Respondent's contention, Vicente provided the Respondent with a full account of what she observed with respect to the Flores/Trespalacios interaction. Furthermore, had Reilly really been concerned about conducting a complete

investigation, she could have spoken directly with Vicente herself. But, she did not bother to speak with Vicente or any other witnesses before terminating Trespalacios.

Moreover, despite acknowledging that she would have to conclude from Vicente's statement that there was no assault and no threats, Reilly failed to explain why she disregarded Vicente's account. Therefore, the ALJ properly considered this deficiency to support her finding of animus. (ALJD 12: 17-23).

d. Trespalacios' abrupt termination indicates discriminatory motive.

Without citing any case authority, Respondent argues that the ALJ's finding of "disciplinary haste" does not support a finding of animus. However, the record evidence and Board precedent show otherwise.

On the afternoon of Thursday, July 9, Vega first informed Reilly that she had received a report that Trespalacios pushed and abused Flores. Reilly asked Vega to get statements from the witnesses in the area. The following day, at about 11 a.m. or 12 p.m., Vega submitted to Reilly statements from herself, Avila, Vicente, and Flores. Out of the four individuals, Vicente and Flores were the only eyewitnesses to the alleged misconduct. Flores, the accuser, claimed that Trespalacios pushed her and threatened to get her fired when the Union came in. But, Vicente, a neutral witness, contradicted Flores' accusations. Nevertheless, by about 3 p.m. that same day, without ever speaking with Trespalacios or the second neutral eyewitness, Reilly decided to terminate Trespalacios. The abruptness of the decision evidences unlawful motivation. See Dynabil Industries, 330 NLRB 360, 363 (1999); Toll Mfg. Co., 341 NLRB 832, 833 (2004).

Respondent argues that Reilly spent significant time reviewing the video footage of the interaction. Indeed, Reilly testified that she watched the video multiple times on July 10. But, had the video clearly shown that an assault occurred, it would not have been necessary to repeatedly watch the video, pausing it along the way, as Reilly testified she did. Trespalacios was at work on July 10. Reilly could have easily called Trespalacios into her office, along with the other witnesses, to get everyone's explanation of the video. Instead, Reilly remained in her office and repeatedly watched an inconclusive video without asking anyone to manipulate it to try to get a better resolution of the images.

Respondent also notes that the actual termination did not take place until the following Monday, July 13. The record demonstrates that the only reason Reilly waited until July 13 was to effectuate the termination in the same week as the Union election, and to ensure that all preparations were in place for the July 13 presentation where Reilly announced Trespalacios' termination and seized on the opportunity to make an example out of her. Therefore, Reilly's rushed decision to terminate Trespalacios is another indicator of unlawful motivation.

e. The ALJ properly concluded that Reilly's post-termination speech on July 13 evidences antiunion animus.

Respondent asserts that Reilly's post-termination speech on July 13 should not have been considered by the ALJ to support her finding of animus because her statements are protected by Section 8(c) of the Act. However, this argument has consistently been rejected by the Board. See Mammoth Coal Co., 354 NLRB No. 83, JD slip op. at fn. 27 (2009), and cases cited therein. The Board has long held that "antiunion statements, even

if not themselves alleged to be violations of the Act, are nevertheless evidence of antiunion animus or motivation." Id. [20]

Immediately after terminating Trespalacios on July 13, Reilly, with the assistance of Labor-Relations Consultants Luz Ceballos and Jim Needles, conducted a meeting with the majority of employees at the plant to discuss Trespalacios' termination and to show a video that purportedly shows a physical assault by Trespalacios. At this meeting, Reilly delivered a speech replete with inaccuracies and exaggerations.

Reilly began her speech by stating that there was a recurring problem at the facility that involved employees threatening other workers with "physical harm" because they did not support the Union. Reilly mentioned that Respondent terminated someone "last year" for this kind of behavior. Reilly went on to say that ". . . things are actually getting worse." However, the record evidence shows otherwise. Reilly's testimony established that she does not know much about the incident from "last year" referenced in her speech. When Reilly was asked by the Union's counsel if that incident had anything to do with the Union, she answered, "[t]he other one, I am not clear of." (Tr. 432). In fact, the individual involved in that incident was an alleged discriminatee in the prior Board hearing involving Respondent. And Reilly admitted that she was aware of that fact.

As to Trespalacios, Reilly admitted that the threat attributed to her was a threat to get Flores fired—not a threat of physical harm. Respondent failed to proffer evidence to

[20] Respondent relies on E.J., Medeco Sec. Locks, Inc. v. NLRB, 142 F. 3d 733, 744 (4th Cir. 1998) and other circuit court cases to support its contention that speech protected by Section 8(c) of the Act cannot be used to establish animus. However, since those cases are not Board decisions, they do not constitute binding authority in this proceeding. The Board is not obligated to acquiesce in the adverse decisions of the Federal appellate courts, and it has a duty to apply uniform policies under the Act. See Tim Foley Plumbing Service, 337 NLRB 328, 329 fn. 5 (2001).

substantiate Reilly's claims that workers were being threatened, and that this situation was worsening. Therefore, Reilly's alleged concerns about ongoing threats of violence directed at employees who did not support the Union are unfounded. And her distorted assertion that things were "getting worse" was simply a tactic to scare the workers.

After playing the video at the July 13 meeting, Reilly stated that the video showed "an employee threatening, intimidating, and physically assaulting another employee who used to be her friend because she changed her mind and decided to vote against the union." In her speech, Reilly also stated, "I'm upset that people who used to be friends are now divided over the union question." However, the record evidence reveals that Trespalacios and Flores have never been friends. In addition, Flores never claimed that she supported the Union and that she later "changed her mind."

Reilly's negative and inaccurate characterizations of the both the Union and of Union supporters shows that Respondent harbored anti-Union animus. Stoody Co., 312 NLRB at 1182 (animus can be based on conduct that is not necessarily in violation of the Act).[21] Also, this was the first time that Respondent held a meeting to show employees a video of a worker accused of misconduct. Never before had Reilly assembled employees in a group meeting to discuss the termination of a worker. Both the timing of this meeting (immediately after Trespalacios was terminated and 4 days before the election), and its content support an inference of animus by Respondent. Thus, the ALJ correctly concluded that Reilly's speech along with the showing of the video are indicative of antiunion animus. (ALJD 12: 25-13:5).

[21] Contrary to Respondent's claim, the instant case is not analogous to Sara Lee. The Board in Sara Lee reversed the ALJ's findings of certain 8(a)(1) violations, holding that statements made by the employer were protected by Section 8(c) of the Act. The question of whether speech protected by Section 8(c) of the Act can be relied upon to demonstrate animus was not at issue in Sara Lee. Therefore, that case is not applicable in this proceeding.

In summary, the record shows that Trespalacios was a well-known open Union supporter. There is no dispute that Respondent had knowledge of her Union activities. Respondent received accusations against Trespalacios, but failed to conduct a meaningful investigation of her alleged miscount. It violated various aspects of its own disciplinary policy, including failing to interview all available witnesses and neglecting to confront Trespalacios about the claims against her. Respondent also ignored, without a reasonable explanation, the statement of a credible and neutral witness who contradicted Flores' allegations. In addition, Reilly refused to provide Trespalacios' with any information about the accusations against her, and proceeded to abruptly terminate her 4 days before the Union election.

Immediately thereafter, Reilly conducted a presentation for most employees where she announced Trespalacios' termination, and showed the ambiguous video of the July 9 interaction, claiming that the video depicted an employee threatening, intimidating, and physically assaulting another because that employee did not support the Union. Reilly also warned that threats of physical harm against non-Union supporters was getting worse, even though Respondent presented no evidence to substantiate this claim.

This sequence of evidence fully supports the ALJ's conclusions that Respondent: (1) harbored antiunion animus; (2) was motivated by such animus in its decision to terminate Trespalacios; (3) had no reasonable basis to believe that Trespalacios had engaged in misconduct; and (4) failed to meet its burden under Wright Line. The ALJ properly relied on the above evidence in reaching her conclusion that Respondent violated Section 8(a)(1) and (3) of the Act.

D. The ALJ properly concluded that the termination of Trespalacios 4 days before the Union election interfered with the holding of a fair election and warrants that the July 17 election be set aside.

The Board may set aside an election and direct a new one when unfair labor practices are committed during the critical period, unless the violations are de minimis.[22] To determine whether the misconduct is de minimis, the Board considers factors including "the number of violations, the severity, the extent of their disseminations, the number of employees affected, the size of the bargaining unit, the closeness of the election, and the violations' proximity to the election." PPG Aerospace Industries, 355 NLRB No. 18, slip op. at p. 4 (2010), citing Bon Appétit Mgt. Co., 334 NLRB 1042, 1044 (2001).

Based on the above, the discharge of Trespalacios constitutes objectionable conduct that warrants setting aside the July 17 election. Trespalacios was terminated 4 days before the election. Respondent seized on the opportunity to announce Trespalacios' termination shortly before employees cast their ballots. On the same day as the termination, Respondent called the majority of its employees to a meeting in the lunchroom. There, Reilly and Ceballos, a labor-relations consultant, discussed Trespalacios' termination and even played a video, which they said showed, "an employee threatening, intimidating, and physically assaulting another employee who used to be her friend because she changed her mind and decided to vote against the union." Thus, the violation was disseminated by Respondent to the majority of the petitioned-for unit.

Trespalacios was a well-known Union supporter at the facility. She was also

[22] The critical pre-election period is the time from the date the petition is filed to the day the election is held. Ideal Electric & Mfg. Co., 134 NLRB 1275, 1278 (1961).

known among coworkers as a friendly, talkative individual with a good sense of humor. Various witnesses described her as someone who has a tendency to touch people, pat people on the back, and often uses hand gestures when talking to others. When employees watched a video showing Trespalacios behaving in what they perceived was her ordinary way of interacting with others, it would be reasonable for them to suspect that the real reason for her termination was not because she assaulted someone, but because of her Union activities.

Respondent claims that it did not mention Trespalacios by name during the July 13 meeting. Nevertheless, employees were explicitly told during the meeting that the worker accused of misconduct was a union supporter, and her alleged misconduct was in relation to her union sentiments and activities. It is reasonable to conclude that under these circumstances, the unlawful termination interfered with employees' exercise of free choice, and that such interference affected the results of the election. Accordingly, the ALJ properly recommended that the July 17 election be set aside and that a new election should be ordered.

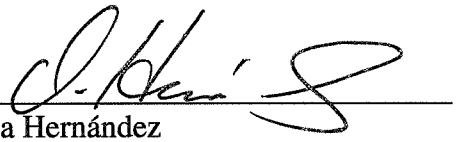
V. CONCLUSION

The record and Board precedent provide abundant support for the ALJ's credibility determinations, findings, and conclusions that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining overlybroad work rules, and by maintaining an arbitration rule that requires employees to waive their right to file charges with the Board; and violated Section 8(a)(1) and (3) of the Act by terminating Xonia Trespalacios. The record and Board law also support the ALJ's finding that

Trespalacios' termination constitutes objectionable conduct that warrants setting aside the July 17 election.

Accordingly, it is recommended that the ALJ's rulings, findings, and conclusions be affirmed and that Respondent's exceptions be rejected. It is further recommended that the ALJ's recommended Order be adopted as modified by the recommended modifications in the Acting General Counsel's limited exceptions.[23]

Respectfully submitted,



Irma Hernández
Counsel for the Acting General Counsel
National Labor Relations Board
Region 21

Dated at Los Angeles, California, this 30th day of August, 2010.

[23] The Acting General Counsel is excepting only to the ALJ's failure to recommend that the Notice to Employees also be posted in Spanish, and to the ALJ's inadvertent failure to order that Respondent rescind and revoke its overbroad work rules and its arbitration rule that requires employees to waive their right to file charges with the Board.

STATEMENT OF SERVICE

I hereby certify that a copy of **Counsel for the Acting General Counsel's Answering Brief to Exceptions of 2 Sisters Food Group, Inc. to the Administrative Law Judge's Decision** in Cases 21-CA-38915, 21-CA-38932, and 21-RC-21137 was submitted by E-filing to the Office of the Executive Secretary of the National Labor Relations Board, on August 30, 2010. The following parties were served with a copy of the same document by electronic mail.

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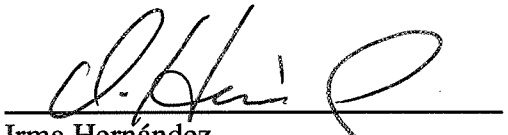

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National Labor Relations Board
Region 21

Dated at Los Angeles, California, this 30th day of August, 2010