UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 21

MARQUEZ BROTHERS ENTERPRISES, INC.

and Case No. 21-CA-39581

ALFONSO MARES, an Individual

and Case No. 21-CA-39609

JAVIER AVILA, an Individual

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. Introduction.

Marquez Brothers Enterprises, Inc. ("MBE" or "the Company" or "the Employer"), submits this Brief in Support of Exceptions to the Administrative Law Judge's Decision. MBE is a distributor of Mexican food products throughout Southern California from its warehouse distribution facility in the City of Industry. Among the overall facility staff are approximately 30 perishable sales representatives ("sales reps") who deliver perishable grocery items such as yogurts, creams and cheeses to local markets on their assigned routes. Alfonzo Mares ("Mares") and Javier Avila ("Avila") each worked as a sales rep, and each was terminated in 2010 for job performance reasons after a course of corrective action to gain their job improvement had failed.

On October 6, 2010, MBE received notice of a Representation Petition (GC Ex. 19)[1] which named Teamsters Local Union 63 ("the Union") as seeking to represent MBE sales reps at its City of Industry facility. The Union failed to gain a sufficient number of votes for representation—by a count of 17 for and 20 against Union representation— in a November 19, 2010 election (GC Ex. 22). The Union did not challenge the election results which were certified on November 29, 2010 (CG Ex. 23).

Mares was terminated on June 2, 2010 and filed his original Charge in this matter on November 17, 2010 (GC Ex. 1(a)). He now alleges that his termination was the result of his union organizing activities in violation of Section 8(a) (3) of the Act. Avila was terminated on December 2, 2010 and filed his original Charge on December 8, 2010 (GC Ex. 1(d), also raising Section 8(a) (3) allegations. Also at issue in the matter are separate allegations of employer misconduct under Sections 8(a)(1) of the Act against Mares, Avila and other employees by

[1] GC Ex refers to the exhibits submitted by the General Counsel; R Ex refers to the Respondent's exhibits; and Tr.__ refers to pages in the official hearing.

allegedly "interfering with, restraining, and coercing employees in the exercise of rights" under Section 7 of the Act (Consolidated Complaint, Paragraph 10).

According to the clear and compelling evidence in this matter, no Employer manager, supervisor, or representative had any knowledge of any union activities at its City of Industry facility until after the receipt of the election Petition on October 6, 2010. Based upon admissions by each Charging Party, Mares and Avila did not engage in any open or notorious union conduct, at any time relevant, nor did their Union activities ever become known to management. Mares and Avila received corrective counseling prior to their termination based on poor performance. MBE tried to help remedy their poor performance. However, in the end they were unsuccessful and Mares and Avila were terminated.

In an attempt to show knowledge of the employer of union activities and Union animus, despite the lack of any evidence, the General Counsel also challenged the provision of information to employees regarding their right to request return of signed union authorization cards. There was no evidence that this resulted in Union animus or other independent knowledge of any employee's union activities. The Employer's provision of card-return information was within its rights under Section 8(c) of the Act and is not a violation of Section 8(a) (1) of the Act, nor probative of anti-union animus.

II. STATEMENT OF FACTS

A. The Employer's policies require a commitment to customer service and failure to do so may lead to employment termination.

MBE services grocery stores, and the sales reps are the key liaison between the Company and its customers with respect to perishable products. Sales reps are expected to be well groomed, courteous, on time, and to diligently rotate product on store shelves and remove expired product to avoid spoils. In fact, this "freshness guarantee" is pivotal to MBE's

operations and customer relations. Sales reps are indoctrinated with this guarantee from the beginning of employment, and the sales supervisors discuss this important policy on a regular basis during monthly sales meetings (Tr. 228-230).

During the hearing, Mares and Avila each initially gave ambivalent testimony on the issue of product rotation, but each eventually acknowledged that they were required to remove any perishable product from a store on their respective routes which would expire before their next visit to the store, and each employee also acknowledged that a failure to do so is a serious job infraction. (Mares Testimony; Tr. 68-73; Avila Testimony Tr. 161-163). Specifically, Mares testified that failure to properly rotate product in this fashion may have serious consequences for customer relations, and may also pose potential health problems if consumed by a store customer (Tr. 73-76). MBE's Controller Arturo Perfecto was clearer in describing the negative effects of failure to rotate product and fully stock shelves. First adulterated product not only violates the Company's freshness guarantee, but could lead to public health consequences and a possible government health agency investigation (Tr. 227-230). Moreover, and as Perfecto further testified, failure to fully stock shelves also poses a serious job problem, as empty shelves demonstrate a "lack of service" to the customer as well as missed sales opportunities. (Tr. 232-233).

Moreover, and during the hearing, all witnesses concurred with the basic premise expressed by Vice President Francisco Lara that "we live off the customer" and must "all provide positive service and convey a positive image" (Tr., 451-452). On the other hand, and as Lara also made clear, MBE recognizes the rights of employees to engage in union activities and to seek union representation (Tr. 454) and during the union election campaign, employees were free to voice pro-union sentiments, and some did precisely that (Tr., 476-477).

There is simply no evidence in this matter that the Company based any personnel decision upon anyone's participation in protected concerted activities. To the contrary, and in addition to the discipline given Mares and Avila, between October 2008 and the present, the Company also administered disciplinary action and terminated the employment of other sales reps who also failed to provide adequate customer service (Tr. 396-405; R Ex. 6-8) and also recently terminated the employment of sales rep Julio Ponce, identified by Avila as a pro-Company supporter in the union election matter, for Ponce's violation of Company rules. (Tr., 154-155, 390-392). Therefore, MBE has demonstrated a pattern of dealing with job infractions by sales reps in an evenhanded and non-discriminatory manner, and not in relation to union conduct or any other protected characteristic (Tr. 454).

B. Alfonzo Mares was terminated for lawful reasons related to the Employer's important business goal of providing quality customer service.

Mares was fully aware of the Company polices which related to customer service, including his responsibility to remove product before his next store visit if the expiration date would pass (Tr. 70). Mares was also aware of his other customer service obligations as contained in the Employee Handbook, specifically his obligation to be courteous and respectful to customers (Tr. 78; R. Ex. 2).

Mares' claims that his union activities commenced in May, 2010 (Tr. 27) but his job performance problems began much earlier, dating back to February, 2006, and on July 3, 2007 he received his first formal warning for customer service issues (CG 15). He also received formal warnings on January 18 2008, March 17, 2008, and June 5, 2009; and then on October 23, 2009 Mares received a formal warning for not "rotating perishable items and removing and issuing credit for all expired product." (GC Ex. 15).

Notwithstanding this disciplinary action against him, Mares continued to have issues with customer service and expired product and his immediate supervisor, Andres Veloz, spoke with him on a number of occasions about these issues and about the expired product that Mares left on store shelves, as personally observed by Veloz himself. (Tr. 283-285, 304). Then in March, 2010, Veloz spoke with General Sales Manager Javier Granados who brought the matter to the attention of Lara, who suggested a meeting to try to help Mares improve (Tr. 376-378; 450-451). According to Lara and Granados, during this March 2010 meeting Mares said he would "try harder" (Tr. 450-451; 376-378).

However problems persisted and on June 1, 2010 Veloz discovered expired perishable product at Superior Warehouse store #110, the same day Mares had serviced the store. This same day Veloz also received a complaint from Gloria Tinajero, co-owner of La Sabrosa market that Mares had acted aggressively and rudely toward her. (GC Ex. 5; Tr. 291-292). When Veloz questioned Mares about this incident, Mares bluntly responded, according to Veloz, that "perhaps she doesn't like me" (Tr. 291).

The next day, June 2, 2010 revealed yet more problems as Veloz found additional expired product left by Mares on the shelves of two (2) more customer stores (CG 6 and Tr. 284-289) and when Veloz questioned Mares about this, Mares flatly admitted that he "missed it" (Tr. 288-289). Based upon these events Veloz recommended to Javier Granados that Mares be terminated (Tr. 292-293), and Granados reviewed Mares' personnel file and concurred with the recommendation, which was also approved by Francisco Lara. (Tr. 379-368; 450-451).

During his testimony, Mares did not dispute the importance of rotating product before the expiration date and he freely acknowledged that sales reps should received discipline if they fail to do so (Tr. 68, 72-73). He also acknowledged that at least some of the product he left on

shelves may have expired (Tr. 70-71) and that it is the responsibility of the sales supervisors to visit stores and look for and remove expired perishable product from the shelves and put the product in the back of the store for later pick up (Tr. 73).

In this latter regard, the General Counsel elicited time consuming and irrelevant testimony from Mares about "credit memos" he issued during store visits, apparently to show that these do not match the description of expired product on the dates and at the stores listed on the final warning and termination notice (GC Ex 8-15 and Tr. 51-64), and to further create an inference that Veloz lied about the expired product. However, and as Perfecto testified and as Mares also admitted on cross examination, removal of the expired product generates a same-day credit memo by the sales rep only if the sales rep himself finds and removes the product during a store visit. On the other hand, if a supervisor discovers and retrieves the expired product, the supervisor will place the product in the back of the store for later pick, and a credit memo will be issued at some later time. (Tr. 74-75, 229-230).

Another key reason triggering Mares' termination was his poor service to the La Sabrosa store. During the hearing Mares provided self-serving and inaccurate testimony about his conduct at the store, again apparently to create an inference that Veloz and the Company contrived this as a partial basis for his termination. During his direct examination, Mares professed to have had a good working relationship with La Sabrosa owners Gloria Tinajero and her husband, and that he never heard about any complaint from them (Tr., 42-43). He also testified that Tinajreo wrote a note exonerating Mares from any negative dealings with Tinajero, or problems at the store, and this note calls the stated reasons for his termination as a "lie" (R. Ex. 3). At the hearing Mares testified, under oath, that Tinajero "was the one who asked my wife

to write this letter (Tr. 86), which Mares claims "proves that I was never aggressive and that I never had any problems with her." (Tr. 82, Resp. Ex. 4).

Tinajero appeared as a rebuttal witness and obliterated Mares's testimony about their dealings, and corroborated Veloz and confirmed her strong dissatisfaction with Mares' service to her store, asserting that Mares "always gives me a bad attitude" and that other La Sabrosa store employees also complained about him (GC Ex. 5; Tr. 258-259). Tinajero also corroborated Mares' final warning which described that Mares had dropped a cooler full of yogurt in her store and left abruptly without plugging it in, nearly spoiling the contents (GC Ex 5, Tr. 260-261); and Tinajero also confirmed that even before this event she had complained directly to Veloz about Mares' behavior in her store (Tr. 261). Further contradicting Mares' testimony, Tinajero explained that she signed but did <u>not</u> write the typewritten narrative exonerating statement referred to by Mares (Resp., 4) and that the statement was instead written by Mares' wife. Tinajero originally refused to sign this document when asked by Mares (Tr. 263-265), and she later signed this document only because Mares told her that she was the reason he was fired and that he would use the document only to seek unemployment benefits to support his family (Tr. 264).

Therefore, it is respondent's position that Mares' testimony about the note (R. Ex. 4) and his dealings with Tinajero are simply false. However, Mares did admit that he submitted an unemployment claim based upon an assertion that he was fired from MBE because "I made a mistake and they have a zero tolerance policy" (R. Ex. 3), Mares further admitted that he did receive State unemployment benefits based upon his submission of this claim form and his later submission of the inaccurate note containing false facts which he pressured Tinajero to sign.

In this later regard, Tinajero further explained that she later wrote, in her own handwriting and in Spanish, a clarification to the letter Mares' used to gain unemployment benefits, and during the hearing Tinajero translated this passage for the record:

> "I Gloria Tinajero, signed this letter for Alfonzo Mares, written by his wife saying that he wanted to have—to get unemployment. And I trusted in him and I did read the letter in detail, which says that they terminated him—it says that it's a lie that they fired him because of me. I did complain to the supervisor, Andres Veloz" – or whatever his last name is, I can't read by own writing—"a few times about his service.

(Tr. 265-266; R. Ex. 4). Thus, and based upon the testimony of Mares and Tinajero noted above, it may be reasonably concluded that Mares lied: (1) to Tinajero about the note he asked her to sign (R. Ex. 4); (2) to the California Employment Development Department about his reasons for termination in order to get unemployment benefits; and (3) during the Board hearing in this matter about his service to La Subrosa, his dealings with Tinajero, about the origination of the note, and how he leveraged Tinajero to sign it.

Finally, and in further contradiction to Mares' testimony, Tinajero also professed to have "felt unsafe" around Mares and that he used bad language including referring to the Marquez brothers as "pendejos" or stupid, which she felt was "inappropriate" (Tr. 277-279). Based upon the strong contradictions between Mares' self-serving testimony and the credible rebuttal testimony given by Tinajero, Mares' testimony about store service to La Sabrosa should be discredited. Mares's testimony is made even more implausible based upon his admission that he received state benefits based upon a signed note, gained under duress, and in which Mares falsified the facts.

C. Javier Avila was also terminated for lawful reasons related to the Employer's important business goal of providing quality customer service.

Prior to his termination on December 2, 2010, Javier Avila received a series of disciplinary warnings based upon serious job infractions; having received six (6) formal disciplinary warnings in the final two (2) years of his employment, (GC Ex. 26), including two disciplinary suspensions, which Avila finally admitted were "serious events" (CG Ex. 26; Tr. 164-165). In fact, Avila served disciplinary suspensions on December 1, 2009; and again on October 5, 2010; and the corresponding warnings for this latter suspension contains the strong admonishment that the next infraction "will result in additional disciplinary action, up to and including termination" (GC Ex. 26).

Avila's supervisor, Cesar Barajas, recounted each of these six (6) warnings and suspensions as well as his periodic job counseling with Avila regarding the seriousness of his job conduct (Tr. 322-334). At one point, Avila seemed to acknowledge the urgency of improving his job performance; on May 19, 2009, and in response to discipline he received that day, Avila offered to take a job demotion to a relief driver position. However, Barajas declined and Avila promised to take steps to "correct my work ethics" (GC Ex. 26, page 2; Tr. 324-326).

Therefore, by the time of his final disciplinary suspension, Avila was well aware that his employment with MBE hung in the balance of his prompt job improvement and sustained effort. The October 5, 2010 warning/suspension was for leaving empty shelves at one of his stores and also for misrepresenting his whereabouts while servicing stores on his route (GC Ex. 26; Tr. 328-330). Significantly, during his testimony Avila admitted that he signed the warning, took this warning seriously, and knew he could be terminated for further infractions (Tr. 168-169). However, on November 29, 2010, or a mere six (6) weeks after this preceding disciplinary suspension, the same genre of job infractions surfaced again, leading to Avila's termination.

Notwithstanding his accumulated poor job history, the General Counsel seeks to find fault in Barajas assessment of the genuineness and seriousness of the events of November 29, 2010. On that day, Barajas was together with Avila at Superior store #110 when Barajas received a call from the deli manager of Northgate store #119 who complained that his store shelves were empty of El Rancho Grande product, which had been offered on sale as a promotion over the preceding Thanksgiving holiday – Thursday November 25th (CG Ex. 7, 25). Barajas asked Avila how much Rancho Grande product Avila had left at the store during his last visit on Friday November 26 and Avila said that he had filled the shelves and left an additional two (2) boxes in the back storage area, in case these were needed. However, upon Barajas' visit to Northgate #119 and his further investigation, he determined that the shelves were indeed empty and Barajas reasonably concluded that Avila had lied and had left no Rancho Grande product at the store on the 26th, or boxes of Rancho Grande product in the back of the store (CG Ex. 25, Tr. 331-332).

Barajas reasonably believed that Avila was not truthful about leaving product at the store, and Avila himself gave conflicting accounts of this during the hearing. On direct examination by the General Counsel Avila testified as follows about his in-person conversation with Barajas on November 29 at the Superior store:

> Q And then what happened?
> A And then he asked me if --
> Q Is this continuing in Spanish?
> A Yes.
> Q Okay.
> A **"Did you leave product for the special at Northgate 19?" And I told him, "No, because the shelf was already all full."** And he tells me, "Oh, because they ran out. I need or you to go take them more." And I said, "Okay. That's fine." And so, I went on with my day.
> Q And what did Cesar do at that point?

A At that point he asked me if I could go ahead and deliver products at Northgate 19.
Q **Did he say what product?**
A **"Rancho Grande** fresh cheese, Panela cheese and cream."

(Tr. 122-123). However, on cross examination, Avila contradicted his testimony about this same conversation with Barajas:

Q Okay. At any time on November 29th when you're having any conversation with Mr. Barajas, and prior to the time that you delivered the Rancho Grande product later in the afternoon after he told you to do that, did you ever tell him that you had already delivered product to the store?
A How could I deliver if it's not on my route for Monday?
Q **Well, did you tell him that you were there on the 26th, and you delivered product to the store?**
A **Yes, I did tell him I delivered product.**
Q Did you tell him you delivered Rancho Grande product to the store on the 26th?
A **No I didn't**

(Tr. 177-178).

Significantly, the comparison of these passages demonstrates the duplicitous and shifting nature of Avila's testimony in this matter. During his direct testimony, Avila admitted that he understood that during their exchange Barajas was asking <u>only</u> about Rancho Grande product and not some other perishable product, and he told Barajas that he had <u>not</u> delivered Rancho Grande product on the 26th because "the shelves were full." Then, during cross examination he admitted that he told Barajas "yes" he <u>did</u> deliver product, but then feigns ignorance about which product whether Barajas was asking about, Rancho Grande or some other product. It is inescapable that Avila offered two different stories about precisely the same conversation with Barajas; and the most reasonable interpretation of the combined testimony is that Avila indeed knew that Rancho Grande was the "product" Barajas asked about and that Avila misrepresented to Barajas that he had left this product at Northgate store #119. This interpretation of Avila's

combined testimony is also fully consistent with Barajas' account of the exchange between he and Avila on November 29, 2010 (Tr. 331-332).

In any event, and with or without this lie by Avila, it is undisputed that the shelves at the Northgate store were indeed empty, which was a job infraction in itself and something Avila had been warned about by Barajas at the time he was suspended six (6) weeks earlier (GC Ex 26). According to Arturo Perfecto, empty shelves are a rare occurrence and pose a significant customer relations problem for MBE, not to mention lost sales opportunities (Tr. 232-233, 242-243). Moreover the El Rancho cheese was a big seller for Hispanic shoppers, particularly during the holidays, and since the product was discounted nearly 30% at this time, Avila should have known to leave a surplus at the store to avoid the problem in the first place, as he had been previously warned to do (Tr. 243-244, 255). Avila's failure to follow the instructions he had been given is compounded by the fact that he lied to his supervisor about whether he left product on the customer's shelves.

Therefore, Avila's termination on December 2, 2010 was a natural consequence of his failure to heed the disciplinary warnings given him over time, and his blatant failure or refusal to take appropriate corrective action. As with Mares, Granados reviewed the information and spoke to Barajas before making his decision to end Avila's employment, which decision was also approved by Lara (Tr.444-445). During the termination meeting, Avila had no questions and did not dispute the reasons or bases for his termination (Tr. 428). In fact, he then filed for unemployment insurance and stated that he was terminated because he made a mistake and MBE has a zero tolerance policy. (Tr. 81).

D. The Employer had no knowledge of any protected union activities by either Mares or Avila, and there is no nexus between any such activities and any disciplinary action given to either of them.

1. Mares

Mares' limited union activities consisted of the following: (1) he spoke with a unionized driver at another company about the union; (2) he spoke with union representative Gary Smith ("Smith") 2-4 times over the phone; (3) he solicited signatures from sixteen (16) MBE sales reps and handed this list to Smith (Tr., 25-32; GC Ex. 2). There is no evidence that he did any of this in the open, or in view of management, or that any manager or supervisor of MBE otherwise became aware of any of these activities, at any time. In fact, there is evidence that Mares was specifically instructed by Smith to be secretive in this conduct (Tr., Tr., 19-20) and that Mares closely followed Smith's advice in this regard (Tr. 30-31).

Mares testified that his conduct was limited to May 2010 and finished on June 1, when Jesse Agosto was "the last person that I signed up" before he handed the list of names over to Smith. (Tr. 26-30). Subsequently, Mares claims he received a phone call from Jesse's mother Bertha, with whom Jesse was living, and Bertha asked him to take her son's name off the list; to which Mares replied that he did not know what Bertha was talking about and, in any event, did not remove Jesse's name (Tr. 32-33). This is the sum and substance of Mares' union conduct.

Although Mares did not know Bertha's last name, she is known to him as the "collections" person who helps make sure that stores pay on time, and not as a supervisor (Tr. 33-34). Moreover, Perfecto testified that Bertha Yontomo is indeed the "collections" person at MBE but that she has at no time possessed supervisory responsibilities (Tr. 236-237). There is also no evidence that Bertha was an agent of the Company or that she was doing anything more than acting on her own as a concerned mother. Moreover, there exists no evidence that any true

supervisor or management representative of MBE learned of any of Mares' union conduct from Bertha Yontomo, or any other person within or outside the Company, at any time (Tr. 32-33).

In addition, there is no evidence of any nexus between any of Mares' union activities and any disciplinary action taken against him. As explained above Lara and Granados each testified that they met together with Mares in March 2010 to discuss his customer service problems, well before Mares' claims he began union activities, and this meeting was the result of preceding job performance counseling by Veloz over a period of time. (Tr. 283-285, 376-378, 450-451). There is also no evidence that Veloz somehow contrived the expired product issues on June 1 and 2 at three (3) different stores (GC Exs. 5,6) or that Veloz visited those stores to set Mares up for termination. On the contrary, Avila and Mares testified that supervisors check for expired product as part of their job. Finally, it is simply beyond dispute that store owner Gloria Tinajero, had genuine concerns about Mares's customer service at her store, to the extent of feeling "unsafe" around him.

2. Avila

Javier Avila's union activities were even more limited than Mares', but just as secretive: (1) he contacted a union representative then spoke to his co-workers about the union; (2) he organized a union meeting and attended off-site union meetings on 2-3 occasions; and (3) he signed a union card on September 24, 2010 (GC Ex. 17; Tr. 98-102). Again, and as with Mares, the General Counsel has proffered no evidence that that any of these activities were ever in view of MBE management or that any MBE manager or supervisor ever learned of any such activities.

Avila provided hearsay testimony that Account Executive Mario Perez asked about his union activities but it is undisputed that Perez was not a supervisor (Tr. 236-237). There is also no evidence that Perez ever discussed Avila or his union activities with any other person and, in

keeping with his effort to conceal his union activities, he told Perez "no, I don't have time for that" (Tr. 112).

Avila also claims that Barajas asked about his union activities, but Barajas denied this and, in any event, Avila testified that he told Barajas that he did "not have time" for the union (Tr. 113, 335). Barajas also denied Avila's ambiguous testimony that he was "burnt with the lady" (Tr. 336-338) and Barajas provided testimony consistent with that given by other MBE management witnesses that he did not become aware of any union activities at the MBE facility until October 6, 2010, the day the Company received the NLRB election petition in this matter (Tr., 335, 240, 387, 457).

Indeed, several witnesses testified that Avila openly declared to management that he was a pro-Company supporter, and this is fully consistent with Avila's testimony that he openly disavowed interest in the union or union matters (Tr. 112-113). Barajas testified that Avila told him that he was "with the company" and that Avila never made any type of countervailing remark (Tr. 336). Lara testified that during some of the group informational meetings about the union election Avila said "don't worry about me boss. I am with you, I am with the Company" (Tr. 459); and Perfecto also testified that he heard Avila say during these meetings that he was "with the Company" (Tr. 473). Therefore, Barajas, Lara, and Perfecto each gave closely consistent descriptions of what they heard Avila say regarding his stance on the union. Avila, on the other hand, while denying these pro-company comments, does assert that he otherwise remained mute on the issue of his union activities and "said nothing" (Tr. 468). Therefore, based upon the overall testimony, Avila was either quiescent about his union activities, or self-identified as a pro-Company supporter, but took steps to conceal his union conduct and true union sentiments.

E. The employer acted properly when it informed employees about their right to return union authorization cards, and this was not designed to learn about employee sentiments regarding the upcoming union election.

The Company provided truthful information to employees about the return of union cards, and advised employees of their rights in this regard by distributing a handout which contained the following passage, underlined on the handout for emphasis:

> It is up to you whether you want to get your card back or not

(GC Ex. 24). In each fact, Avila admitted that no one at the Company said or did anything inconsistent with the above assertion (Tr. 152-153), as did former employee Able Gastelum (Tr. 215). In fact, the only evidence offered by the General Counsel of any remark urging that employees to seek return of signed cards was hearsay testimony by Avila that co-worker and non-supervisor Julio Ponce, who implored others to ask for their cards back "so we can get this over with, it's a big problem. It's not going to benefit anybody," views which Ponce attributed to no one but himself (Tr. 154-155), and which would have been lawful free speech under Section 8 (c) of the Act, even if uttered by a manager or supervisor.

Finally, the information given to employees about their right to get their union cards back was not used as a management tool to engage in unlawful surveillance or to gauge union sentiments or support. Managers were in the area where employees received the card-return handouts, but this was a common lunch and break area used by all, including by supervisors (Tr. 360-361). There is also no evidence that during this process any manager asked whether any employee had signed a card, or that any employee revealed that he had signed a card, or that he was a union supporter and refused to ask for his card back. Indeed, it appears that Avila and others followed the advice from union representative Carol Barnett who testified that at union meetings he urged Avila and others to simply keep quiet and sign and mail the card-return letter

"to stay covert" (Tr. 184), since the Teamsters normally don't comply with this request and do not rescind the card anyway (Tr.189).

III. ALJ Kocol's Decision.

Administrative Law Judge William G. Kocol ("ALJ Kocol") issued a decision on June 22, 2011 ("Decision") in which he found that MBE violated the National Labor Relations Act ("Act") by terminating Mares and Avila. He also found that MBE engaged in unfair labor practices by coercing employees to ask for their authorization cards back, interrogated an employee regarding union activity and threatened reprisals for engaging in Union activity. (ALJ Decision ("AD") 21:20-35). He then ordered MBE to reinstate Mares and Avila and cease and desist from engaging in the above mentioned unfair labor practices. (AD 22:10-23:25).

IV. MBE's Position.

ALJ Kocol erred in finding that the General Counsel met the required burden to establish employer knowledge and nexus between union activity and the terminations. MBE made a reasonable and lawful decision to end the employment of each Charging Party in this matter, based upon important customer service and operational considerations, and after corrective action for each had failed. The General Counsel has offered no persuasive evidence that the Employer acted with any mixed motive or pretext, and the Employer itself proffered uncontradicted evidence that it terminated other sales reps for similar reasons, and prior to, the termination of the Charging Parties. Further, MBE complied with the Act in providing employees with information regarding their ability to revoke their authorization cards and it denies that it interrogated or threatened employees.

V. MBE acted within its rights in terminating the employment of Mares and Avila.

In order to find a violation of Section 8(a) (3) of the Act with respect to the termination of the Charging Parties in this matter, the General Counsel must first establish a prima facie case by proving, by a preponderance of the evidence, four (4) elements:

> First the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employees' protected activity and the adverse employment action.

Tracker Marine L.L.C., 337 NLRB 644,646 (2002); Environmental Maintenance Solutions, 335 NLRB 58 slip opinion 5 (2010.); Wal-Mart Stores Inc., 349 NLRB 1095, 1104 (2007). The General Counsel has offered no evidence to support any finding of the first and fourth element above, and, as discussed above, the Respondent has made an affirmative showing that these two elements are not present.

Knowledge of union activities cannot be speculative, and it is incumbent upon the General Counsel to show actual knowledge of union activities. Zachary Co., 266 NLRB 1127, 1130 (1983). Speculation as to the employer's motive is insufficient and will not be upheld as substantial evidence as is required to uphold the decision. Modeco Security Locks v. NLRB, 158 LRRM 2065, 2071 (1998). Moreover, absent employer knowledge of union conduct, the termination of a union supporter must be upheld, even where the grounds for termination may be ambiguous or questionable, and absent employer knowledge the Board will not "second-guess" the employer's decision-making. For instance, in Titus Electric Contracting Inc., 355 NLRB No. 222, (2010), the Board held that even though an employee's termination was "mysterious"

without proof of knowledge by the employer of the employee's union sympathies, it could not be found that union affiliation played a part in the termination.

A. ALJ Kocol Erred in finding MBE had knowledge of Mares' Union activity based on mere speculation and hearsay.

ALJ Kocol found that MBE had knowledge of Mares' Union activity based on pure speculation and contradictory evidence. He found that Yontomo was not acting as an agent of MBE when she called Mares about her son. (AD 10:32-34). However, he then used her position, the fact her office is next to Controller Perfecto and the alleged acts she took as a mother in contacting Mares as the sole support for his conclusion that MBE must have been aware of Mares' Union activities. (AD 10:38-11:1). He later stated that MBE discovered Mares' Union status on June 1. (AD 11:8-9). As such, it is clear that other than the alleged knowledge of Yontomo, ALJ Kocol found there was no other knowledge by MBE. He cannot have it both ways. If she was not an agent of the employer then her knowledge is not attributable to MBE. As such, the charge should have been dismissed.

He also found knowledge despite crediting testimony by Smith that he told Mares to be careful that his identity as a union supporter was not known to management and to not let this fact be known.(AD 4:10-14). Mares followed these instructions exactly as MBE was unaware of his union activity. The fact that he spoke to employees, as relied on by ALJ Kocol, does not change the fact that his activities were still kept secret from MBE.

The fact is there was simply no evidence that MBE was aware of Mares' Union activity. ALJ Kocol based his decision on pure speculation and as such it should be overturned and the charge regarding Mares should be dismissed.

B. ALJ Kocol Erred in finding MBE had knowledge of Avila's Union activity based on mere speculation and hearsay.

Multiple witnesses testified that Avila clearly told the company that he was on their side and not a union supporter. In fact, at many meetings he said "Don't worry about me boss. I am with you; I am with the company. I know unions are a bad decision" (AD 12:20-23). The only testimony attempting to show that these statements did not occur was the self-serving testimony of Avila. Once again ALJ Kocol refused to follow the evidence presented. Instead, he said he found it exaggerated that someone would say this at each meeting. (AD 12:35-36). However, this makes perfect sense when looked at in the context of which it occurred. Smith informed him to keep his union activity secret. What better way to do so than to tell the employer that you are against the Union. MBE believed him and as such had no knowledge that he was engaging in Union activity.

ALJ Kocol found that there was knowledge by MBE based in part on MBE's generalized knowledge of Union activity after there was a petition filed and an election conducted. (AD 20: 28-30). There must be more than this. Based on this line of reasoning, MBE would have knowledge that all employees were engaging in Union activity. Clearly this is not what is intended by the provisions of the Act to protect employees from termination or union activity. He then claims there was specific knowledge based on MBE's actions in informing employees they can revoke their authorization cards and the hearsay testimony of Avila that Barajas said Avila was "burnt with the lady," a comment which is inherently ambiguous and strongly denied by Barajas himself (Tr. 114, 335). As provided below, MBE acted properly in informing employees of their right to revoke authorization cards. Additionally, the alleged comment of Barajas was only supported by the self-serving testimony of Avila. Weighed against the testimony of numerous witnesses that Avila made it clear he was not a union supporter or

engaging in Union activities, it is clear that there was no knowledge by MBE. ALJ Kocol erred in finding otherwise.

C. Regardless of whether it had knowledge of the Union activities, MBE had a right to issue legitimate disciplinary action to Mares and Avila. ALJ Kocol erred in finding otherwise.

In this matter, there was no evidence presented by the General Counsel to support any "reasonable inference" that either Charging Parties' Union activities were a "catalyzing factor" in the termination of either Charging Party. However even where such a *prima facie* inference may be drawn, the burden then shifts to the employer to show, by a preponderance of the evidence that it would have made the same decision even in the absence of union activities. Wal-Mart Stores Inc., 349 NLRB 1095, 1103-1104 (2007); See also Wright Line Inc., a Division of Wright Line, 251 NLRB 1083 (1980); Avondale Industries, Inc., 329 NLRB 1064 (1999); T&J Trucking, 316 NLRB 771 (1995). In this regard, the Board has validated any employer rule or policy bearing a reasonable relationship to its business and operational interests. ALJ Kocol admitted the strong policy of MBE regarding customer service and the need to ensure that it did not allow food to spoil. (AD 2:16-31).

For instance, the Board had held that an employer does not violate the Act when it disciplines and/or discharges a pro-union employee where the employee refuses to comply with the employer's supervisory instructions. U.S. Postal Service, 350 NLRB 441, 78 (2007). Wright Line Inc., a Division of Wright Line, 251 NLRB 1083 (1980). Similarly, in Wal-Mart Stores Inc., 349 NLRB 1095 (2007), the NLRB found that the employer did not violate the Act when it discharged a pro-union employee for giving union information to a co-worker in violation of the employer's no-solicitation and no-distribution policy. Additionally, the employer had previously warned the employee about violating its policy and no evidence was presented indicating the

employee was treated disparately. Wal-Mart Stores Inc., supra at 349 NLRB 1095, 1104-1105 (2007).

In W.E. Carlson Corp., 346 NLRB 431 (2006), the NLRB found that protected union activities were a motivating factor in the termination of the Charging Party. However, the Board found the employee had an extended history of tardiness, unscheduled absences, sleeping in his truck, excessive travel time and inappropriate personal use of company equipment. Additionally, the employer established it would have placed the employee on probation and discharged him even absent his union activity and regardless of his having furnished information to the NLRB. As a result, the Board upheld the employer's decision to terminate the employee's employment. W.E. Carlson Corp., supra at 346 NLRB 431, 434.

In Zachary Co., 266 NLRB 1127 (1983), the Board found the employer did not violate the Act when it discharged a boilermaker fitter and a boilermaker helper despite the contention that the employer wished to terminate the helper because he was a union activist and the son-in-law of a union official, and that the fitter was discharged so that the employer could rid itself of the helper. The Board found that the fitter was discharged for cause in that he failed to bevel pipe properly before it was welded, and the discharge of the fitter left the employee without work for the helper. Zachary Co., supra, at 266 NLRB 1127, 1131.

In Kaywood Div., Joanna Western Mills Co. and Electrical Workers, 244 NLRB 672 (1979), the Board found the employer did not violate Section 8(a)(3) of the Act when it discharged the union's vice president. The Board determined that notwithstanding the employee's overt and notorious union activities, he had engaged in a pattern of absenteeism for which he was repeatedly warned and which he failed to improve. The Board opined as follows:

> It is tragic when an employee with 21 years seniority is terminated by a company. It is clear that Respondent was not cooperating with it and was

> making little effort to improve his record. Unfortunately Langston's testimony demonstrates a cavalier attitude towards his job in making an effort to contact Respondent regarding his absences. **There does come a time when one more straw is too much.**

Kaywood, supra at 244 NLRB 672, 675 [emphasis added]. This is very similar to the cases of Mares and Avila. Each had a history of disciplinary action. As the Board stated above, there comes a time when on more action is too much and the employee must be terminated. That was what happened here.

In addition to refusing to follow the clear law on this, ALJ Kocol refused to acknowledge the fact that multiple employees had been terminated for similar instances in the past. (AD11:43-45). As such, MBE was following its established practice of terminating employees who were not performing their job as perishable sales drivers as expected. The fact that Mares and Avila were allowed to continue to fail in this aspect for a longer period of time than others before their termination shows the opposite of what the General Counsel claimed. MBE gave them extra opportunities and if anything treated them better than others. However, eventually there was a straw that broke the camel's back and they were terminated. As such, and based on the facts above and those addressed below, it is clear that they were not terminated based on Union activity. They were terminated based on their continued failure to perform their duties properly.

1. Mares

ALJ Kocol relied on a lack of evidence that discipline automatically occurs when a store runs out of a product or engaged in poor customer service (AD 3:42-50). However, MBE has not stated that there was automatic discipline as a result. In fact, it has stated that the discipline occurred as a result of the repeated failure of Mares to perform his duties properly, as evidenced by the corrective actions he received. ALJ Kocol then speculated that because there was no

evidence that discipline occurs automatically, MBE could not discipline Mares for his actions. An employer has a right to discipline an employee for his improper actions.

ALJ Kocol also focused on the fact that after returning to the warehouse Mares waited two to three hours before he was seen by Human Relations and terminated. (AD 6: 1-5). At that time he was provide with a final written warning regarding his conduct on June 1, 2011. (AD 6:12-38). Without any support other than speculation, ALJ Kocol determined that the fact this warning differed from the occurrence report meant that MBE knew the occurrence report was not sufficient to support the termination. (AD 7:7-9). However no evidence or testimony was provided to support this conclusion. The fact that a more detailed report, which included additional facts learned by MBE after the occurrence report, was then presented to him only shows that MBE was making sure to provide a fully detailed final warning. In addition, ALJ Kocol rejected the uncontradicted testimony of Tinajero regarding Mares' conduct on June 1st and that she provided the written statement to help Mares get unemployment benefits. (AD 7:37-8:7). However, he also credited her testimony that she had made complaints to Veloz about the conduct of Mares. (AD 8:16-17). Despite crediting the fact that she had complained about his performance, ALJ Kocol then found her unreliable and disregarded her testimony. (AD 8:17-18). It is clear from the testimony and documentation that she made complaints about Mares and that this, in addition to his other prior discipline and performance, resulted in his termination.

After rejecting this testimony, he then took issue with the fact that Mares was not given time to correct his actions as detailed in the June 1 final warning as he was immediately terminated. However, it is within MBE's right to terminate an employee for failing to properly perform the duties of the job. As detailed above, Mares repeatedly failed to do so. There were issues raised regarding his performance in quick succession on June 1 and then June 2nd. The

fact that MBE chose to document the first incident and then terminate him for the second does not change the fact it was a legitimate business reason to do so. To require it to wait to allow him to remedy continuing deficiencies that he had failed to remedy in the past, and then showed his inability by failing again the next day, would by ludicrous.

ALJ Kocol did not take issue with the fact that Mares had numerous prior reprimands and incidences where he failed to perform up to company standards. The latest of these prior to the June incidents was March 2010. As such, it is clear that Mares was lawfully terminated for his repeated failure to properly perform his duties. The charge should have been dismissed by ALJ Kocol.

2. Avila

ALJ Kocol credited the documents and testimony showing that Avila had received many corrective actions in the previous years. In fact, he admitted that Avila's work history is "checkered with disciplinary action." (AD 20:18). He then, without any evidence, takes issue with the final action by MBE based on nothing more than the fact that prior corrective actions stated failure to improve could lead to further disciplinary action, up to and including termination, yet he was not terminated in the past after being on final written warnings. (AD 21:13-14). He doesn't deny that there were empty shelves at those customers Avila was assigned to, and simply says MBE seized on this deficiency by Avila to terminate him. However, the fact that he was on a final written warning and admittedly committed another serious infraction shows that it was a valid business decision. Somehow, ALJ Kocol decided that despite his own statements, this was not the case.

3. The Employer's decision is entitled to deference when it is shown that it was a legitimate business decision.

While ALJ Kocol may have felt that Mares and Avila should have been given additional chances to remedy their deficiencies, this does not matter. The Company must be allowed to make business decisions regarding the performance of its employees. In fact, Mares and Avila were already given additional chances. At the time of his termination, Avila was on a final written warning. He was well aware that the next issue regarding his performance could lead to termination. Mares was also aware of his prior deficiencies.

4. The Respondent acted in accordance with its business interests and did not act upon a mixed motive or engage disparate treatment when it terminated Charging Parties.

As discussed above, there is no evidence of any "mixed motive" or "pretext" as it is beyond dispute in this matter that Respondent was unaware of the union activities of either Charging Party. However, even in cases where mixed motive is established, it then becomes incumbent upon the employer to proffer a legitimate reason for the discharge and to show, by a preponderance of the evidence, that the same action would have taken place even in the absence of the protected concerted activities. Merit Contracting Inc., 333 NLRB 562, 574 (2001).

In this matter, there is ample evidence that Respondent dealt with each Charging Party based upon acknowledged job-performance issues, and in a fair and non-precipitous manner after corrective action had failed. There is also no evidence that any other sales representatives committed similar infractions and that MBE or its supervisors abstained from giving discipline. See Wal-Mart Stores Inc., 349 NLRB 1095, 1103-1104 (2007). Moreover, in this case MBE offered affirmative proof that other sales reps who engaged in similar job misconduct also suffered involuntary termination. (Tr. 154-155, 390-392, 396-405; R Ex. 6-8). As detailed

above, once again ALJ Kocol improperly relied on mere speculation to support his conclusion that the decision was not a legitimate business decision.

5. The General Counsel offered no objective evidence of union animus.

At the hearing in this matter the General Counsel made no showing that the Respondent or its supervisors made any statement or engaged in any other conduct which objectively demonstrates union animus. In fact, the only statement offered by the General Counsel in this regard consists of hearsay testimony by Avila that Cesar Barajas told Avila that he was "burnt with the lady," a comment which is inherently ambiguous but also strongly denied by Barajas himself (Tr. 114, 335). Moreover, in order for conduct to support a violation of Section 8(a) (3) of the Act, an alleged comment offered as proof as union animus must be subject to objective interpretation and must also be non-attenuated and "alive and well" in relation to the termination decision itself. See Zachary Co., 266 NLRB 1127, 1131. In this matter, neither this isolated hearsay account or self-serving statements by Avila, nor any other alleged comment by MBE or its agents or supervisors constitutes evidence of anti-union animus.

D. ALJ Kocol Erred in making credibility determinations that disregarded uncontroverted testimony and accepting incredible testimony.

ALJ Kocol erred in failing to credit the uncontradicted testimony of many company witnesses as addressed above. Credibility determinations of ALJs are overturned when they show a clear showing of bias by the ALJ, an utter disregard for uncontroverted sworn testimony or the acceptance of testimony which on its face is incredible. Advance Transp., 979 F.2d 569, 573 (7th Cir. 1992). These findings are overturned when they are hopelessly incredible or they flatly contradict either the law of nature or undisputed documentary testimony." NLRB v. Gordon, 122 LRRM 2489 (2nd Cir. 1986).

As provided above, in making his determinations, ALJ Kocol relied on mere speculation and rejected credible evidence. He also repeatedly sought to use contradictory testimony and in fact contradicted himself. As an example, he credited the testimony about Yontomo as proof of MBE's knowledge while at the same time finding she was not an agent of the company. It is clear that ALJ Kocol disregarded uncontroverted testimony and accepted testimony that was not credible. It is also clear that he repeatedly took biased actions to assist the General Counsel to the detriment of MBE. For example, multiple times during the hearing when MBE's counsel asked questions, ALJ Kocol then prompted the General Counsel to object. (Tr. 277, 408). As a result, the Decision should be overturned.

VI. ALJ Kocol Erred in finding that MBE violated the Act by informing employees about the return of union cards.

Under Section 8(c) of the Act, the employer has the lawful right to communicate with employees about unions and lawful free speech does not constitute union animus:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The charge alleges that in providing this information MBE interrogated an employee regarding union activity The Respondent disseminated an informational handout to employees which described their right to seek return of signed union cards, and this handout contains the affirmation "it is up to you whether you want to get your card back or not" (GC Ex. 24); and there is no evidence that any manager, supervisor or agent of the Company made any comment contradictory to this. In accordance with 8 (c), employers have the right to instruct employees on this right. Saint Claire Memorial Hospital, 309 NLRB 708, 740 (1992) and remarks made by

non-supervisory employees during the provision of such information may not be attributed to the employer. Sparks Nugget, Inc., 289 NLRB 524, 529-530 (1990).

It is undisputed that the Company, through its supervisors, handed employees the information and let them read it and decide for themselves whether to send a letter to the Union requesting their cards back. Additionally, there is no evidence that the Company or its supervisors solicited views from employees about union sentiments during this process or that it demanded, under some job penalty, that employees sign and send the card return letter. In fact, supervisors Barajas and Augustin Vasquez denied that they actively solicited and collected signed letters and mailed them (Tr. 338, 360-361) Regardless, nothing about the provision of this information to employees constitutes a violation of Section 8(a) (1) or that it was designed to reveal employee union sentiments. See also Curwood, Inc. and Graphic Communications Union, 339 NLRB 1137, 1139-1140 (2003)).

VII. ALJ Kocol Erred in finding that MBE violated the Act by interrogating Avila and threatening him with reprisals.

ALJ Kocol found that Avila was terminated based on his self-serving testimony regarding a conversation with Barajas and the lawful information provided by MBE regarding revoking authorization cards. Avila claimed that Barajas stated Avila was "burnt with the lady," a comment which is inherently ambiguous and strongly denied by Barajas himself (Tr. 114, 335). There was no support for this conversation or any threat or interrogation other than Avila's testimony. ALJ Kocol disregarded the fact that Avila's testimony was contradicted by other MBE management witnesses that Barajas was not aware of any union activities at the MBE facility until October 6, 2010, the day the Company received the NLRB election petition in this matter (Tr., 335, 240, 387, 457). Additionally, as provided above MBE acted properly in

informing employees of their right to revoke authorization cards. As such there was no unlawful solicitation or interrogation of Avila.

VIII. Request for Oral Arguments.

In addition to filing this written brief, MBE respectfully requests oral arguments on these matters prior to the Board ruling on its Exceptions to the Decision of ALJ Kocol.

IX. Conclusion.

Based on the above, MBE requests that the Board grant its Exceptions to ALJ Kocol's Decision and find that there was not a violation of the Act.

Respectfully submitted,

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PROOF OF SERVICE

National Labor Relations Board (NLRB) – Region 21
Case No. 21-CA-39581 and Case No. 21-CA-39609

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of LOS ANGELES, State of California. I am over the age of 18 and not a party to the within action; my business address is 725 S. Figueroa Street, Suite 2500, Los Angeles, CA 90017.

On July 20, 2011, I served the foregoing document described as:

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

in this action by transmitting a true copy thereof enclosed in a sealed envelope addressed as follows:

National Labor Relations Board
Honorable Lester A. Heltzer, Executive Secretary
1099 14th Street N.W.
Washington, D.C. 20570
(E-filed)

James Small, Regional Director
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[XX] BY E-MAIL OR ELECTRONIC TRANSMISSION Based on a Court order or on an agreement by the parties to accept service by e-mail or electronic transmission, I caused the document(s) described above to be sent from e-mail address bandesr@jacksonlewis.com to the persons at the e-mail address listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[XX] BY FEDERAL EXPRESS OVERNITE I am "readily familiar" with the firm's practice of collection and processing correspondence for deposit with Federal Express Overnite. Under that practice it would be deposited with Federal Express Overnite on that same day with fees thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if date of receipt of the document by Federal Express Overnite is more than one day after date of deposit for mailing in affidavit.

[XX] FEDERAL I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed July 20, 2011, at Los Angeles, California.

Rick Bandes