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

A&L INDUSTRIAL SERVICES, INC.

and **Case 16-CA-25391**

FRANCISCO HURTADO, an Individual

and **Case 16-CA-25392**

CARLOS MOLINA, an Individual

and **Case 16-CA-25420**

LAZARO SAUCEDA, an Individual

and **Case 16-CA-25507**

ELVIN VATRES[1], an Individual

***Dean Owens, Esq.,* for the General Counsel.**
***David E. Bensey, Esq.,* for the Respondent.**

BENCH DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Houston, Texas, on August 13-14, 2007. The charges were filed and amended by the individual Charging Parties on various dates between January 18, 2007 and March 26, 2007.[2] Based upon these charges, a consolidated complaint issued on May 29, which was amended on June 8, alleging that A&L Industrial Services, Inc., the Respondent, violated Section 8(a)(1) of the Act by discharging the Charging Parties on January13 because they had engaged in protected concerted activities. On June 14, Respondent filed its answer to the complaint, denying the unfair labor practice allegations and disputing the employee status of Charging Party Vatres. At the hearing, General Counsel amended the complaint to reflect the alternative spelling of Charging Party Vatres' surname and to seek, as a remedy for any unfair labor practices found, that a copy of the Notice to Employees be mailed to the employees.

After hearing the testimony of the witnesses and considering the arguments made by counsel at the close of the hearing, I rendered a bench decision in accordance with Section 102.35 (a)(10) of the Board's Rules and Regulations. For the reasons stated by me on the record, I found that the four individual charging parties engaged in concerted activities with other employees of the Respondent on January 13 and that the Respondent discharged the four

[1] The parties stipulated at the hearing that Vatres was also known as Batres.
[2] All dates are in 2007 unless otherwise indicated.

employees the same day because of their participation in that activity. I concluded that the Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint, by discharging the four Charging Parties.

I hereby certify the accuracy of the portion of the transcript, pages 234 through 257, containing my bench decision. A copy of that portion of the transcript is attached to this decision as "Appendix A."

Conclusions of Law

1. Francisco Hurtado, Carlos Molina, Lazaro Sauceda, Elvin Vatres, a/k/a/ Batres, and other employees of the Respondent engaged in concerted activities protected by Section 7 of the Act when they staged a brief work stoppage on January 13, 2007 to demand a wage increase.

2. By discharging Hurtado, Molina, Sauceda and Vatres on January 13, 2007 because of their participation in protected concerted activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having unlawfully discharged the Charging Parties, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). As stated at the hearing, I shall recommend that any questions regarding the duration of the back pay period and the availability of reinstatement as a remedy, including whether the Charging Parties would have been terminated when the turnaround at the Shell refinery was completed or transferred to another job, are to be resolved at the compliance stage of these proceedings. Also as stated at the hearing, I shall recommend that the Respondent mail a copy of the attached Notice to all employees who were on the payroll for the Shell turnaround on January 13 because that project has ended and the employees may have dispersed to other projects or employers. Finally, because it appears that a number of the Respondent's employees speak Spanish as their primary language, I shall recommend that the Notice be printed in English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, A&L Industrial Services, Inc., LaPorte, Texas, its officers, agents,

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

successors, and assigns, shall

1. Cease and desist from

(a) Discharging, or otherwise retaliating against, employees for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Francisco Hurtado, Carlos Molina, Lazaro Sauceda and Elvin Vatres, a/k/a Batres full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Hurtado, Molina, Sauceda and Vatres, a/k/a Batres whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in LaPorte, Texas, copies of the attached notice marked "Appendix B"[4] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 14 days after service by the Region, mail copies of the attached notice marked "Appendix B" in both English and Spanish, at its own expense, to all employees who were employed by the Respondent at its Shell project in Deer Park, Texas at any time from the date of the unfair labor practice found in this case, January 13, 2007, until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the employees after being signed by the Respondent's authorized representative.

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

Dated, Washington, D.C., September 4, 2007.

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Michael A. Marcionese
Administrative Law Judge

APPENDIX A

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JUDGE MARCIONESE: Thank you all very much. I appreciate the closing arguments. They were very, you know, well organized and managed to summarize all the evidence fairly succinctly for me. Now, as I indicated, I did consider the issues overnight, and I've also now considered the arguments that I've heard.

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I've reviewed my notes of the testimony of the witnesses and considered whatever other evidence there is, although there isn't anything in the way of documentary evidence in this case, which is somewhat unusual to have a case with no documents.

So in any event, having considered all of that, I am now prepared to issue a bench decision under Section 102.35(a)(10) of the Board's rules and regulations. Now, under the Board's bench decision procedures, although it is a bench decision, I still am required to include all of the normal provisions that would be found in a written decision, so I will review the statement of the case, jurisdictional issues, et cetera, before turning to the actual unfair labor practice allegations.

Now, this case was initiated by the filing of unfair labor practice charges by the four individual Charging Parties, Francisco Hurtado, Carlos Molina, Lazaro Sauceda, and Elvin Vatres or Batres. We have two versions of his name. And those charges were filed and amended at various dates, beginning January 18, 2007, up through March 28 of 2007.

Based upon the charges as amended, the General Counsel, through the Regional Director, issued the complaint in this matter, which was dated May 29, 2007, which alleges that the Respondent violated Section 8(a)(1) by terminating the Charging Parties for engaging in protected converted activity, which is specifically described as a work stoppage over a pay raise.

The complaint was then amended on June 8 to change the

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date of the alleged termination to January 13 of 2007, and was further amended at the hearing before me to correct the various spellings of the name of Mr. Vatres and to seek the special remedy that General Counsel had argued for.

The Respondent filed its answer to the complaint on -- I'm not sure what the date was. I don't think I have that here, but in any event, in the answer, the Respondent denied all of the specific unfair labor practices that were alleged, and in response to one of the allegations dealing with jurisdiction and commerce, asserted that Mr. Vatres -- there was no record of his

employment.
Now, at the hearing, when we opened the hearing, Respondent did stipulate that having reviewed its records, it was prepared to agree that Mr. Vatres or Batres was, in fact, employed at the time in question and is the same individual.
Now, with respect to jurisdiction, the Respondent has admitted the complaint allegations that the Respondent is a Texas corporation with a place of business located in La Porte, Texas, where it has been engaged in the business as a refinery maintenance subcontractor, and that during the past fiscal year, the Respondent, in conducting its business operations, provided services valued in excess of $50,000 to Shell Oil Company, an enterprise directly engaged in interstate commerce, and that based upon these facts, that the Respondent is an employer is engaged in commerce within the meaning of the Sections 2(2), (6)

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and (7) of the Act.
Now, the evidence in this case shows that at the time in question, in December, January, early part of 2007, Respondent was working under a contract With Shell Oil Company during a turnaround at its Deer Park, Texas, facility, and that employed on that project were the four individual Charging Parties.
Now, turning to the unfair labor practice -- and also Respondent has admitted the allegations in the complaint that the project manager, Mr. Jose Chavez, and the superintendent, David Carmona, were, in fact, supervisors and agents of the Respondent at the relevant periods.
Now, turning to the unfair labor practice allegations, the first question which is actually not that difficult of one is whether the Charging Parties were engaged in concerted activities protected under the Act, and the testimony of the three Charging Parties who did appear here, Mr. Hurtado, Mr. Molina, Mr. Sauceda, clearly establishes this allegation, and, in fact, Mr. Bensey has acknowledged in his closing argument that the Respondent really doesn't dispute that the employees were engaged in concerted activity.
Just to summarize the evidence of the three witnesses, which was fairly consistent between them and which was not contradicted by Mr. Carmona, does indicate that the early part of this year, the employees were unhappy over rumors that they had that employees of other contractors were being given raises

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and that they were not to be given raises. There was even some rumors that some employees were promised raises and that the Respondent had not delivered on their promises, and that this dissatisfaction led to a work stoppage which originated in the

hydro processing unit and spread to the sulfur unit where the four Charging Parties worked.

And it appears that virtually all of the employees from the sulfur unit did, in fact, stop work on January 13 of 2007, and went over to the hydro unit where the employees there had already stopped work, in order to await Mr. Carmona and Mr. Chavez, so that they could confront them with their questions about a pay raise and demand that they receive a raise as they believed other employees had.

And it's also clear from the testimony that after the issue at the hydro unit had been resolved, that the employees, including the four Charging Parties, from the sulfur unit returned to their work area, but rather than returning to work, in fact, assembled in the lunch tent. And I credit the testimony of the discriminatees that they were told to gather there by Mr. Chavez when he told them to go back to the lunch tent so that he could talk to them separately from the hydro unit.

And the evidence shows that in the lunch tent, the employees did discuss with Mr. Chavez and Mr. Carmona was present the issues they had regarding the pay raise, as well as

from Mr. Molina's and Mr. Hurtado's testimony, other issues including some concerns about the gloves that they were required to purchase in order to perform work at that site, but that eventually they all did -- were instructed to return to work, and the four Charging Parties, in fact, did head back to work, and Mr. Molina himself testifies that he did, in fact, start work and worked for about 15 minutes before he was called to the office.

Now, and although there's some dispute about the length of time, I do not credit the testimony of Mr. Carmona that it lasted beyond at most an hour to an hour and a half. I agree with General Counsel. He did appear at this hearing to be attempting to exaggerate the length of time that the employees stopped work. I note that even Mr. Porterfield from Shell was closer to the work stoppage ending by about 1:30, which considering that the lunch hour ended at 12:30, would be only about an hour's stoppage of work.

So it's clear that at least the evidence here does not indicate that this work stoppage would have gone beyond what would be protected. There's no question, no allegation raised, that this was a sit-down strike or an intermittent strike or a partial work stoppage or anything else that would have been unprotected under the Act.

Now, the right of employees, unrepresented employees, to engage in this type of activity to secure higher pay is

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elemental, and in fact, the Board in California Gas Transport, Incorporated, 347 NLRB Number 118, slip opinion at page 6, in fact described this as protected activity in its most basic form. And as General Counsel says, the seminal case in this area is the 1962 Supreme Court decision in NLRB versus Washington Aluminum Company at 370 U.S. 9 which dealt with a group of unrepresented employees who stopped work because of the working conditions. I think it was a question of it being too cold in the work area.

And so certainly here, it is clear that the employees when they stopped work to present their demands regarding the wage increase, were engaged in protected concerted activity. Now, there was some evidence offered by the Respondent not cited in its closing argument that the employees may have been mistaken in their belief that other employees were being given raise or that Respondent for some reason, because of its contract with Shell could not have given them any more money despite their demands at that time.

But at best, this evidence goes to the reasonableness of the employees' demands and their decision to engage in a work stoppage, and in Washington Mutual itself, as well as in Board decisions since that time, it has been held that the reasonableness of the workers' decision to engage in concerted activity is irrelevant to the determination whether, in fact, the activity is protected and a labor dispute exists. And as

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long as there not other circumstances and the object of the strike is not illegal, it is still protected.

I also note here that the individual Charging Parties did not merely participate in a work stoppage, but the evidence which is undisputed shows that they took a leading role, at least among the sulfur unit employees, in terms of being the -- admittedly by the Respondent's witnesses, the four most outspoken among the employees in the sulfur unit during the meeting in the lunch tent.

So based on the undisputed evidence, I find that the Charging Parties were, in fact, engaged in concerted activity, protected by Section 7 of the Act on January 13 of 2007.

Now, having found that the Charging Parties and the other employees who participated in the work stoppage were, in fact, engaged in protected concerted activity, the next question is whether Respondent fired them, which as everybody seems to recognize is the -- really the key issue in this case, and whether or not if they were fired, it was because of their participation in concerted activity.

Now -- and the determination of that issue of whether they were fired turns almost exclusively on credibility. Now, also I

will note before turning to the credibility issue that regardless of whether the Respondent's action is characterized as a termination or merely a job reassignment or removal from a particular work location, it is clear that the motivation for

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that action was the employees' participation in protected concerted activity.

Carmona himself who was the superintendent in the sulfur unit and, in fact, was the individual who carried out the decision and informed him of what action Respondent was taking admitted, when General Counsel questioned him under Rule 611(c), that Mr. Chavez told him immediately after the meeting in the lunch tent, as they were leaving, that -- to get rid of the four individuals who were the most outspoken, and the four individuals were the Charging Parties in this case here.

And Mr. Carmona further admitted that had they not done all the talking or most of the talking in the lunch tent, that they would not have been removed from that job site, so clearly there's no dispute about the motivation behind Respondent's action, regardless of what it turns out to be.

Now, in terms of the ultimate question of whether they were fired or simply told to go back to the office for reassignment, I will note that there's no dispute that, as I said, the Respondent's action was taken because of their participation and their outspokenness in the meeting and that the decision was made almost immediately after the meeting in the tent.

And the General Counsel called three of the four Charging Parties to testify, and their testimony is fairly consistent. I found only one slight variation among the three. Mr. Molina,

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the first witness to testify, indicated that when he got to the trailer, when he was brought there by a foreman named Paul, along with Mr. Sauceda, that Mr. Hurtado and Mr. Vatres or Batres were already inside with Mr. Carmona and that as they entered the office, Mr. Hurtado said to Mr. Molina, They don't want us here; we're going to be terminated, and that when Molina turned to Mr. Carmona, Carmona told him in Spanish, We don't need you anymore, and used a word in Spanish, "corrieron," which Mr. Molina testified meant, You're fired.

Now, Mr. Hurtado corroborates Mr. Molina to the extent that he was already there with Mr. Vatres when Mr. Molina came in, and he also says that he is the one who then turned to -- well, that he did tell Molina, Would you believe it; they fired us. And then he testifies that Mr. Molina became angry and upset and began talking to Mr. Carmona, but he did not hear what

he was saying, because he was talking to Mr. Vatres at the time.
And Mr. Hurtado himself testifies that when he first arrived in the office with Mr. Vatres, that Mr. Carmona said the word -- he testified that Mr. Carmona said, I'm sorry, men; I got to let you go. And then when Hurtado asked him why, Carmona simply shrugged his shoulders and said nothing, and that when Hurtado asked him if the reason that they had spoken out -- that when he asked if the reason that they were being let go was because of what happened in the tent, that again Mr. Carmona simply shrugged his shoulders and did not respond.

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Now, Mr. Sauceda, the only discrepancy I found is that he testified that he went to the office alone with his foreman, Mr. Cruz, rather than -- no, not with Mr. Cruz, but with his foreman who he did not recall the name of, rather than saying that he was accompanied there with Mr. Molina. I don't see that discrepancy as being significant, particularly when determining what was said in the office once they got there, because Mr. Sauceda also testified that when they got to the trailer, Mr. Carmona said he had -- I had to let you go, which is very similar to what the other witnesses all testified about.
Now, all of the witnesses, all three, did also testify consistently that at one point after being told they were being let go, that Mr. Hurtado asked for a form or a paper, stating the reasons that they were being let go, and that Mr. Carmona, in fact, pulled out a form and started to write it out, until he made a phone call to someone who they all believed would be -- was Mr. Chavez, and that after speaking to the individual on the phone, that he then tore up the paper and did not give them one, and when asked again for a form or some other paperwork stating the reason, that he simply told the four individuals that they should go to the office and pick it up with their paycheck.
Now, one thing I will note in assessing credibility is that -- well, not in assessing credibility but in making my factual determination, I think if I were to credit the three witnesses, I think it's significant that when Mr. Hurtado asked

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specifically whether they were being fired and what the reason was, that Mr. Carmona simply shrugged his shoulders and did not respond.
I think if, in fact, they were simply being sent back to the office to be reassigned to another job, he would have said so, rather then he would have said, No, you're not being fired. And the fact that he remained silent was essentially acquiescence in what the employees believed was, in fact, happening.

I also note that Mr. Sauceda testified that before even going to the office, he retrieved his tools, because he believed that simply by the timing of the fact that he was called to the office, that he was about to be fired.

Now, looking at the testimony from Mr. Carmona, his version of what happened in the trailer, he testified, as I already indicated, that immediately after leaving the tent, he was instructed to remove the four employees from the plant. And then when he was questioned by counsel for Respondent, he said that it was the -- he was instructed by Mr. Chavez to remove the four.

But on examination as part of Respondent's case, he said it was the Shell turnaround manager, Mr. Porterfield, who had observed the meeting in the lunch tent, who asked Mr. Chavez after the meeting, Who were the employees doing most of the talking. And when Mr. Carmona identified the four, Mr.

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Porterfield said that the Respondent needed to make a move to get them out of the plant.

And this testimony was not corroborated by Mr. Porterfield, so I do not credit it. I believe his testimony on 611(c) was the more credible, that it was Mr. Chavez who made the decision and instructed him to remove the four employees immediately after the meeting in the tent.

Now, Mr. Carmona says that after he got back -- after the meeting, he instructed his general foreman to bring the four employees to the office, and that when they got there, Mr. Carmona said that he told that they were being removed and to go back to A&L's office, and that he meant in saying this that they were to report to the office for another job assignment. He denied that he specifically told the employees that they were being fired, and in fact, claimed that he did not have any authority to fire them, that at most he had the authority to remove them from the job and tell them to report back to the office.

But I note significantly in his testimony, although he said he meant by telling them to go back to the office, he meant to go back for reassignment, he never said specifically that he told the employees that that was the reason they were being sent back to the office, and in fact, all of the employees who testified denied that he at any point told them that they were being reassigned or transferred or to go back to the office for

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another job.

He corroborates the testimony of the three employees that he did, in fact, begin filling out a form, and he described it

as a form that he would normally use to transfer an employee, but that he stopped filling it out, because Chavez told him not to, and that while he denied tearing up the form and testified that he put it away, he claimed he did not know what happened to the form. It was never produced pursuant to subpoena, and the Respondent stipulated, in fact, that there was no document or record documenting a transfer of these four employees from that work location.

Now, in deciding credibility, I note, as I indicated previously, that there were some inconsistencies in Mr. Carmona's testimony between his examination by General Counsel and his examination by Respondent. The General Counsel had brought out some inconsistencies with his affidavit. I note that his testimony was contradicted not only by the three discriminatees who, as Respondent points out, might have a motive for not testifying truthfully, but also by Mr. Porterfield.

And although as Mr. Bensey points out, perhaps Shell would be concerned about liability, in this case they have not been named as a respondent. The period for going after them under Section 10(b) has long since expired, so there would be no reason really for Mr. Porterfield not to be truthful in his

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testimony, and certainly as opposed to Mr. Carmona. So I find him certainly much more credible.

And also, too, I note that in terms of the inconsistencies with his affidavit at the hearing here, Mr. Carmona indicates that he called the office and told them that he was sending someone -- sending the four employees back for reassignment, and at the hearing here, he testified that he spoke to Denise Gonzalez, whereas in his pretrial affidavit, given much more closer in time, he indicated that he did not recall who he spoke to, but he was specific that he did not speak to Ms. Gonzalez, who he identified as the person who he would normally speak to in sending someone back to the office.

Now, I also will note in determining credibility that Molina and Hurtado both testified that when they went to the office to pick up their checks the following Friday, almost a week later, that they asked again if they could have a form or a statement, indicating that they were terminated and what the reasons were, and significantly, at that time no one in the office attempted to disabuse them of the notion that they had, in fact, been fired.

It would seem to me if Respondent was merely reassigning them to another job and if they had appeared at the office to pick up their check, that they would have been told, No, you're not being fired; in fact, we have work for you. But no one in the office attempted to do that.

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And certainly if, as Mr. Carmona testified, he had, in fact, called the office and told them that he was sending these four individuals back for reassignment, it would seem that when they went -- finally did go to the office to pick up their check, someone at the office would have known that and said something to them about a possible reassignment.

Now, I also note that Mr. Swindoll, who was a founder and owner of the company, did testify about his experience in the industry and the amount of work that was available and the difficulties he was having in finding employees to fill all of the needs at the Shell plant and at other locations where they were performing contracts. Respondent argues that Respondent did not have any financial incentive in terminating the four employees.

Yet significantly, Mr. Swindoll never explained in his testimony why, if in fact there was a need for employees at the time, when the four employees did show up at the office to pick up their check, there was no effort made to reassign them to another job.

I also note that, in terms of the financial -- the argument that Respondent did not have a motivation to terminate the employees because it was in such need of employees at the time, that it certainly appears from Mr. Carmona's testimony regarding his conversation with Mr. Chavez immediately after the meeting in the lunch tent, that certainly Respondent would have

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been concerned about retaining in its employ four employees who had been perceived to be disruptive and outspoken and perhaps leaders in bringing about a work stoppage, and that that certainly would have been a motive in Respondent not wanting to send them to another job where perhaps the same conduct would have occurred, despite the need for any employees.

And I also note, too, one final note in resolving credibility that it appears that in taking the action that he did, that Mr. Carmona departed from his normal practice. He indicated if he were transferring employees back to the office, there was a form that he would fill out to do that, and in this case, although he started to fill out the form, he did not complete it at the instructions of Mr. Chavez.

And it would seem to me that if all that was happening is that the employees are being removed from this one job but were still being considered employees who could be used elsewhere, he would have done what he normally would have done, which would have filled out the form and sent it to the office, so that the reassignment could be effectuated.

And I think as General Counsel points out, an adverse

inference should be drawn from the fact that there was no such documentation, and that the inference is that Respondent attempted to conceal the actions it was taking by not having any record of either a termination or the reasons for it.

Now, the Board, as General Counsel points out, in dealing

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with the question of whether employees have been discharged -- and, again, it's clear that it is the burden of the General Counsel as an element of the case to, in fact, establish that a discharge occurred, and that's Nations Rent is the cite for that, 342 NLRB 179. But the Board has held that the fact of discharge does not depend on the use of any formal words of firing.

Quoting from the Board from the North American Dismantling Corporation case, cited by General Counsel, "It is sufficient if the words or action of the employer would logically lead a prudent person to believe his or her tenure has been terminated." And North American Dismantling was quoting another case, NLRB versus Trumbull Asphalt Company, 327 F.2d 841 at page 843, and Eighth Circuit, 1964, case. And another lead case dealing with the standard for determining whether an employee has been discharged is Ridgeway Trucking Company at 243 NLRB 1048, a 1979 decision, enforced at 622 F.2d 1222 by the Fifth Circuit in 1980.

And also the Board has held that the events must be viewed from the employee's perspective, and I'll quote from the decision of the Board in a case called Flat Dog Productions, Incorporated, 331 NLRB 1571, 2000, enforced by the Ninth Circuit in 2002 at 34 Fed. Appx. 548. The Board said, "In determining whether or not an employee has been discharged, the events must be viewed through the employee's eyes and not as the employer

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would have viewed them. The test to be used is whether the acts reasonably led the employees to believe that they were discharged.

"If those acts created a climate of ambiguity and confusion, which reasonably caused employees to believe that they were discharged or at the very least, that their employment status was questionable because of their protected activity, the burden of the results of that ambiguity must fall on the employer."

So here I think the best that could be said by the testimony even of Mr. Carmona, if I were to credit it, is that by telling the employees to go back to the office and removing them from the work site, he was creating an ambiguity with respect to their employment status, and certainly Respondent,

either Mr. Carmona, Mr. Chavez, and there was testimony from Mr. Hurtado that he did attempt to contact Mr. Chavez later to find out his status, that no one from the Respondent at any point attempted to clarify any ambiguity that was caused by Mr. Carmona's actions or statements in the office on January 13.

So based on my decision to credit the testimony of Mr. Molina, Mr. Hurtado and Mr. Sauceda, I conclude that Carmona's words and actions in the office on January 13 would reasonably lead an employee to believe that they were being fired. He told them they were no longer needed. He did not say anything to suggest that they could be reassigned if they went to the

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office, and when the employees did go to the office and Respondent did have an opportunity to clarify any ambiguity, when Mr. Molina and Mr. Hurtado asked for a written form clarifying their status, no one attempted to correct them and told them that they had not been fired.

Now, having found that Respondent, in fact, discharged the four Charging Parties and that in doing so, it was motivated by their participation in conduct that was protected under Section 7 of the Act, I must conclude as alleged in the complaint that Respondent has violated Section 8(a)(1) of the Act.

With respect to a remedy, ordinarily the remedy for an unlawful discharge would be reinstatement and a make-whole remedy. Now, although there was some discussion before the hearing when we were attempting settlement as to whether or not back pay would have been tolled when the turnaround at the Shell plant concluded in March of 2007, there was testimony in this proceeding from Mr. Swindoll that does suggest that Respondent does sometimes transfer employees from one job to another, and that particularly in 2007, that Respondent had a need for employees, not just at the Shell plant but at other projects that were ongoing.

Now, of course, the evidence is not clear as to whether or not these four individuals would have worked out the turnaround at Shell and then been transferred to another job. Of course, as the Board has routinely said in compliance proceedings, if

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there is any doubt, it's to be resolved against the wrongdoer. But suffice it to say, at this point in time, the evidence is not clear enough for me to limit back pay, so I will recommend that the traditional remedy for a discharge, which would be an offer of reinstatement and back pay.

But I will leave any question as to whether or not work was available to which they could have been reinstated and whether or not the back pay continued beyond the Shell job up to

the present time for resolution in a compliance stage when the question can be more fully investigated, and a determination made on the basis of all the evidence and not just the limited testimony I heard in this case.

Now, you had indicated, Mr. Bensey, that you wanted to comment on the notice. Was it just that portion of the notice, or was there anything else that you had an objection to?

MR. BENSEY: Well -- and I may have other issues that come up after I've had a greater chance to review this, but the one issue that does come up most quickly to mind is the issue of reinstatement. I think the testimony you have here already is the Shell job is ended. We did not get testimony as to how long the Lyondell or Valero jobs would have gone on. Since they were also, I believe, turnarounds, they also would have been of limited duration.

So it may well be that none of those positions are open at this time, because of the conclusion of the turnaround process,

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so it may be that reinstatement is, you know, just not possible.

JUDGE MARCIONESE: Okay. And that's why I indicated that I'm going -- although the order will say, Reinstate, I think generally -- I'm not sure if it says it here -- to their former jobs, usually it says, if they exist, or something like that.

MR. BENSEY: It does not in what's been proposed.

JUDGE MARCIONESE: I will consider revising the notice, but generally, as I said, that's why I'm leaving it to the compliance stage, so that once an order issues -- and, again, my decision here is not the final say in this matter. Once a final order issues on the unfair labor practice proceeding, if, in fact, my decision is upheld, then at that point at the compliance stage, a full examination can be made as to whether or not there was other work available or even if there is work available at the time there's a final order, so that whether reinstatement is available to the discriminatees at that time, and also as to the duration of any back pay period.

So you certainly will be free to litigate in subsequent compliance proceedings or even administratively with the compliance officer the whole question of reinstatement and back pay.

All right. Now, General Counsel has also asked for a special remedy, and I think from the evidence we've heard, I don't think there is any dispute that the job did, in fact, end at the Shell plant, and that all the employees who were there on

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January 13, or most of them perhaps, may have been dispersed to other jobs, either with the Respondent or with other employers.

And under those circumstances, it's normal for the Board to require that notices not only be posted by the Respondent at its facility, but also be mailed to any employees who were on the payroll at the time of the unfair labor practice, which would be as of January 13 of 2007.

And I will grant General Counsel that request in this proceeding.

MR. BENSEY: And I do request clarification on that point. Are we talking about all employees of A&L, or the ones who were at the hydro and sulfur units on that date?

JUDGE MARCIONESE: It would be all employees who were employed at the Shell facility, because although only the hydro employees and sulfur employees may have been directly involved in the concerted activity, as with any work location, I'm sure word got around to basically anyone who was working on that turnaround, so that it should be mailed to anyone on the payroll at that time.

Now, having decided the matter, basically the next step is once I receive the transcript, which will contain my decision, I am required to issue a decision or a formal document, certifying the transcript of my decision. That will also include the order and the remedy that we've talked about, and then that will be served in writing on all parties of record.

Now, at that point, any party who is unhappy with either my decision or any of the rulings that I've made at the hearing -- and that includes evidentiary rulings -- has a right to file exceptions with the Board in Washington. I will refer you to the statement of standard procedures and the Board's rules and regulations for how to go about filing exceptions, and I think there's a certain time limit for doing that, which will be spelled out in the order that issues from me.

And then the Board will review my decision and my rulings and findings, and they'll either affirm me or not, and then, of course, from that point, anyone unhappy with the Board's decision has a right of appeal to the Court of Appeals and beyond.

All right. I'm not sure if I indicated it in the hearing or previously, but certainly the parties are always free to discuss settlement right up until the entry of a final order. There were some discussions before the hearing. There's certainly nothing to prevent the parties from continuing to pursue whether settlement is possible at this point, and if you do so, certainly let me know.

Usually it will take me about two to three weeks from the time I get the -- between now and when I'll have the transcript and my order will issue, and then the appeal period will run starting from then.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise retaliate against any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Francisco Hurtado, Carlos Molina, Lazaro Sauceda, and Elvin Vatres, a/k/a Batres full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Francisco Hurtado, Carlos Molina, Lazaro Sauceda, and Elvin Vatres a/k/a Batres whole for any loss of earnings and other benefits as a result of our discharging them on January 13, 2007, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Hurtado, Molina, Sauceda, and Vatres a/k/a Batres, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

A&L Industrial Services

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24

Fort Worth, Texas 76102-6178

Hours: 8:15 a.m. to 4:45 p.m.

817-978-2921.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 817-978-2925.