Universal Truss, Inc., a Division of Universal Forest Products, Inc. *and* Cabinet Makers, Millmen and Industrial Carpenters, Local 721. Cases 31–CA–25477, 31–CA–25676, and 31–CA–25939

September 29, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The main issue presented in this case is whether the Respondent's discharge of 28 economic strikers for alleged strike-related misconduct violated Section 8(a)(3) and (1) of the Act.[1] The judge dismissed the unfair labor practice allegations regarding 18 strikers,[2] but found that the discharges of 10 others—Jose Becerril, Fidel Burciaga, Jose Ramon Flores, Juan Lopez, Enrique Luqueno, Eduardo Martinez Mejia, Rodolfo Navidad, Miguel Angel Padilla, Alfredo Raya, and Juan Carlos Vazquez—were unlawful.[3] Regarding Becerril, Flores, Lopez, Luqueno, Martinez Mejia, Padilla, Raya, and Vazquez, the judge found that their alleged misconduct was not sufficiently egregious to deprive them of the Act's protection. Regarding Burciaga and Navidad, the judge found that they had not engaged in the alleged misconduct for which they were discharged.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order, and we adopt the recommended Order as modified and set forth in full below.[4] For the reasons stated by the judge, we affirm his findings that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Flores and Navidad. For the reasons explained below, however, we reverse the judge's findings that the discharges of Becerril, Burciaga, Lopez, Luqueno, Martinez Mejia, Padilla, Raya, and Vazquez violated Section 8(a)(3) and (1).

A. Background

The Respondent, Universal Truss, Inc., operates a large outdoor lumberyard in Fontana, California. The Cabinet Makers, Millmen and Industrial Carpenters, Local 721 (the Union) represents a unit of about 300 employees at the Respondent's facility. The Union had a longstanding bargaining relationship with the Respondent's predecessor, Gang-Nail, Inc. When the Respondent's parent company, Universal Forest Products, Inc., purchased the facility in 2000, the Respondent assumed Gang-Nail's collective-bargaining agreement with the Union. On April 18, 2002,[5] during negotiations for a successor agreement, the Union called a strike. The strike lasted 2 weeks.

The Respondent continued to operate throughout the strike, relying in large part on unit employees who did not join the strike. To minimize confrontations with strikers, the Respondent established offsite pick up and dropoff points and transported workers into the facility by van or bus. Despite these precautions, nonstriking employees became a target for harassment and assault, and the strike was marred by egregious misconduct. Strikers threatened, verbally abused, and/or attacked nonstrikers, managers, and security guards, both outside the Respondent's facility and at the hotels and parking lots the Respondent used as pickup/dropoff points.

Four days into the work stoppage, several strikers and an associate followed a car carrying three nonstriking employees to an offsite parking lot. Once there, the strik-

[1] On August 28, 2003, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions, and the Respondent filed briefs in reply to each. The General Counsel filed cross-exceptions and a supporting brief, and the Charging Party filed a cross-exception. The Respondent filed answering briefs to the cross-exceptions.

[2] The Charging Party Union excepted to these dismissals. We find it unnecessary to address the judge's dismissals of these allegations because the Charging Party's cross-exception does not meet the minimum requirements of Sec. 102.46(b) of the Board's Rules and Regulations. The Charging Party merely asserts that all the judge's credibility determinations supporting these dismissals are incorrect and fails either to designate the portions of the record it relies on or to state any arguments in support of its cross-exception. In these circumstances, we find in accordance with Sec. 102.46(b)(2) that the Charging Party's cross-exception may be disregarded. See, e.g., *Thriftway Supermarket*, 294 NLRB 173 fn. 2 (1989).

There are no exceptions to the judge's dismissal of the allegations that the Respondent violated the Act by threatening employees Rafael Mandujano and Jorge Godinez-Meza with adverse consequences and by imposing more onerous working conditions upon them.

[3] The judge's remedy, recommended Order, and notice contain the name of an 11th alleged discriminatee, Ezequiel Santos Perez. In his decision, however, the judge found that the allegations concerning this individual should be dismissed. The Respondent moved for correction of the judge's decision. The Respondent's motion was unopposed. By Order dated September 19, 2003, the judge granted the Respondent's motion and struck the name of Ezequiel Santos Perez from the remedy, Order, and notice. There are no exceptions to this Order.

[4] The final issue presented in this case is whether the Respondent violated Sec. 8(a)(3) by discharging Union Steward Gerardo Garces. For the reasons stated by the judge, we affirm his dismissal of this complaint allegation.

We shall modify the judge's recommended Order to correspond with the violations found and in accordance with *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall substitute a new notice in conformity with the Order as modified.

[5] All dates are in 2002, except where otherwise noted.

ers assaulted the employees, and beat one of them, Luis Samayoa, so severely that he was knocked unconscious and required overnight hospitalization. Additionally, the strikers vandalized the nonstrikers' vehicle, flattening two tires, denting a door, and breaking the tail lights. The next day, other strikers endorsed the assault against Samayoa, asking employees as they arrived in vans to work, "[D]do you want what happened to [Samayoa] to happen to you?" One striker made this threat while aiming and shooting an imaginary gun at employees.

During the remainder of the strike, strikers threatened workers and their families with various acts of violence, including specific threats to follow workers home or to isolated areas and to beat them, rape female employees and the wives of male workers, "do" (i.e., rape or kill) an employee's daughter, as well as numerous other generalized threats of assault.[6] In another incident, a striker threatened to rape a driver of a transport van, bounced on the vehicle's bumper, and simulated sexual intercourse in front of the van. Other strikers sabotaged the padlocks on the Respondent's front gate in order to trap the arriving vans and intimidate the nonstrikers. A striker threw a spike strap in front of a van in an attempt to flatten the tires. Some strikers threw rocks at nonstriking employees. Other strikers followed nonstrikers to their homes or chased nonstrikers in their cars, weaving in and out of traffic in order to harass the nonstrikers as they drove home. One job applicant's windshield was smashed in the parking lot.

On May 2, the Union abandoned the strike and instructed employees to report for work on May 6. On May 6 and 7, the Respondent informed 28 of the returning strikers that they had been terminated.[7] The Respondent asserts that each of them was discharged because of strike-related misconduct.

B. Applicable Legal Principles

The parties do not dispute that the Respondent dismissed the employees whose discharges we consider below for conduct engaged in during the strike. To decide whether each discharge was lawful under the Act, we must first consider whether the Respondent has proved that it had an honest belief that the discharged employee engaged in strike misconduct of a serious nature. *Gem Urethane Corp.*, 284 NLRB 1349, 1352 (1987). Strike misconduct sufficiently serious to permit discharge is that which "under the circumstances existing . . . may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984) (internal quotations omitted), enfd. mem. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986);[8] Cf. *Briar Crest Nursing Home*, 333 NLRB 935, 938 (2001) (misconduct not egregious under the surrounding circumstances because "the strike was not marred by any instances of violence").

This standard is objective, and does not involve an inquiry into whether any particular employee was actually coerced or intimidated. *Detroit Newspapers*, 340 NLRB 1019, 1024–1025 (2003); *Mohawk Liqueur Co.*, 300 NLRB 1075, 1075 (1990), enfd. 951 F.2d 1308 (D.C. Cir. 1991). Nor does it involve inquiry into the intent of the discharged striker. *Roto Rooter*, 283 NLRB 771, 772 (1987); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977). The Respondent's honest belief may be based on hearsay sources, such as the reports of nonstriking employees, supervisors, and security guards. *Avery Heights*, 343 NLRB 1301, 1304 (2004). Its belief, however, must be based on evidence linking the specific employee in question to specific acts of misconduct. *Detroit Newspapers*, supra at 1024; *General Telephone Co. of Michigan*, 251 NLRB 737, 739 (1980), enfd. mem. 672 F.2d 895 (D.C. Cir. 1981).

Where the Respondent has shown that it has an honest belief that the returning striker in question engaged in serious strike misconduct, the Board will find that the discharge was lawful unless the General Counsel shows by a preponderance of the evidence either that the striker did not, in fact, engage in the alleged misconduct or that the conduct was not serious enough for the employee to forfeit the protection of the Act. *Detroit Newspapers*, supra at 1024; *Medite of New Mexico, Inc.*, 314 NLRB 1145, 1146 (1994), enfd. 72 F.3d 780 (10th Cir. 1995).[9]

[6] These threats often employed obscene and violent language such as the following:

> We are going to be waiting for you outside. It doesn't matter how long you take to come out because we are going to f— you up. It doesn't matter if you stay there inside or that you remain with those sons-of-bitches, we are going to be waiting for you here outside and it doesn't matter how long you take to come out because now we are really going to f— you up. You are a son-of-a-bitch, you f— you like to s— the owner's c— and you are a f— ass kisser and I already told you it doesn't matter how long it takes for you to come out, we are going to f— you up anyway.

[7] The Respondent issued a letter to each discharged employee stating that he was being terminated "[b]ased on [his] behavior and/or for making derogatory and offensive remarks to [his] supervisors and/or fellow employees[.]"

[8] In *Clear Pine Mouldings*, the Board overturned *Coronet Casuals*, 207 NLRB 304, 305 (1973), and its progeny, in which the Board had held that words alone cannot constitute serious strike misconduct warranting denial of reinstatement. *Clear Pine Mouldings*, 268 NLRB at 1045–1046.

[9] In his discussion of the applicable standard, the judge quotes at length from the Board's decision in *Clear Pine Mouldings*, supra. We observe, however, that *Clear Pine Mouldings* was a four-Member, full Board decision, and the passage the judge quotes is from an opinion signed by only two Members.

In determining whether specific misconduct is serious enough to warrant discharge, it is appropriate to consider all of the circumstances in which the alleged misconduct occurs, including, as our dissenting colleague concedes, other instances of vandalism, threats, and violence occurring during the course of the strike. See, e.g., *Briar Crest Nursing Home*, 333 NLRB at 937 (noting the importance of context and surrounding circumstances in assessing coercive impact of threats); *NLRB v. E-Systems, Inc.*, 642 F.2d 118, 119 (5th Cir. 1981) (taking into account prior acts of strike misconduct in assessing validity of discharges at issue). The ultimate issue is whether the conduct in question would reasonably tend to coerce or intimidate employees in the exercise of Section 7 rights, including the right to refrain from striking. *Clear Pine Mouldings*, 268 NLRB at 1046.

In our view, where violence, property damage, and other egregious misconduct directed at nonstriking employees have occurred earlier in a strike, threats to inflict similar harm in the future are likely to have a greater coercive impact. Id. ("[A] serious threat may draw its credibility from the surrounding circumstances") (quoting *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977), denying enf. in part to 227 NLRB 1200). We disagree with our dissenting colleague's assertion that we rely too heavily on early incidents of violence and intimidation in analyzing the conduct at issue in this decision, and his characterization of those incidents as mere "unrelated acts of misconduct." This case involves a pattern of violence, threats, and intimidation by strikers against those workers who exercised their Section 7 right to refrain from participating in the work stoppage; and the credibility of the specific threats at issue in this case must be considered in light of those surrounding circumstances. In sum, the Board is not compelled to assess each incident of alleged misconduct in a vacuum isolated from the totality of conduct occurring during the course of a strike. See, e.g., *Roto Rooter*, 283 NLRB 771, 772 (1987) (judge erred, when considering an individual's strike misconduct, when "choosing . . . to evaluate each incident in isolation from the others"); and *Axelson, Inc.*, 285 NRLB 862, 865 (1987) (noting that threatening statement came "near the end of a strike marked by violence and threats").

Cases cited by the dissent are clearly distinguishable. In *Hotel Roanoke*, 293 NLRB 182, 210 (1989), *Lamar Advertising of Janesville*, 340 NLRB 979, 981 (2003),[10] and *Gem Urethane Corp.*, 284 NLRB 1349, 1352 (1987), the strikers did not openly and stridently associate themselves with other strikers who committed a violent, offsite assault on nonstriking employees. Here, strikers expressly ratified the assault on Samayoa and promised similar treatment to others. Nor did those cases contain the same amount of vulgarity and pervasive sexual intimidation present here. Thus, in the cases cited by the dissent, where this level of vituperation was not present, the circumstances do not support a finding that a "kick your ass" type of statement was coercive. However, in this case, the striker misconduct was far more abusive, and a statement to "kick your ass" is no longer "garden-variety" rhetoric, as the dissent states, but a coercive threat.

In disagreeing with our analysis, the dissent objects that we are improperly turning relevant circumstances into dispositive ones. To the contrary, we simply note that there were a large number of relevant circumstances, including: the ambush and violent assault on Samayoa, and the strikers' endorsement of that beating and threats to repeat it; "the threats of rape and beatings"; the following of employees home and harassment of employees while driving; the rock throwing; the vandalism and other attempts at vandalism; and the repeated incidents of sexual harassment. This pattern of coercive misconduct directed at nonstrikers can, and does, color the subsequent similar threats directed at other employees.

C. The Discharges

1. Jose Becerril

The Respondent justifies its discharge of Jose Becerril on the ground that, inter alia, he assaulted security guards Norman Sayeg and Miguel Duran and a contract employee driving a Bobcat. The Respondent alleges that Becerril flicked stones at these individuals with a stick, and that some of these stones hit and stung Sayeg in the arms and chest.

The judge credited the testimony of the Respondent's witnesses that Becerril actually engaged in this misconduct. However, the judge found that Becerril's misconduct was insufficiently egregious to give the Respondent an honest belief that he had engaged in serious strike misconduct. In support of this conclusion, the judge noted that Becerril's stone-flicking did not hurt anyone, and that because the stones were small and could have been delivered with more force, Becerril did not intend any harm.

We disagree with the judge's conclusion. As an initial matter, we reject the judge's characterization of the facts.

[10] *Lamar Advertising* was a representation case involving objections to an election, in which the Board found that a "kick his ass" statement by prounion employees did not create a general atmosphere of fear and reprisal rendering a free election impossible, a higher standard than here. Further, the Board found that such comments were common as "everybody mess[ed] around" in that manner.

The stones Becerril was using were gravel rocks about 1 inch in diameter. Stones that size plainly have the potential of injuring their target. Further, the judge's analysis erroneously focuses on Becerril's subjective intent and the actual effect of his conduct. The relevant question is whether the conduct at issue has a reasonable tendency to coerce and intimidate, not whether it was intended to do so, *Roto Rooter*, supra at 772, or in fact produced injury, see *Mohawk Liqueur Co.*, supra at 1075. The Respondent's witnesses testified that Becerril flicked some of the stones with considerable force, and Sayeg testified that some stones hit and "stung" his upper body. Moreover, the testimony that Becerril delivered the stones by hitting them with a stick suggests that he had no control over their aim, i.e., he acted with reckless disregard for harm. On this evidence, Becerril's conduct posed a reasonably discernible threat of physical injury. Further, launching stones at the driver of the Bobcat, a piece of heavy machinery, was inherently dangerous. We find accordingly that the Respondent had an honest belief that Becerril had engaged in conduct that would reasonably tend to coerce or intimidate, *Clear Pine Mouldings*, supra at 1046, and therefore did not violate Section 8(a)(3) by discharging him.

2. Fidel Burciaga

The Respondent defends its discharge of Fidel Burciaga on the ground that security guard Duran reported that he saw Burciaga throwing rocks at working employees from a railroad boxcar.

The judge did not quarrel with the Respondent's contention that such rock throwing was sufficiently serious misconduct to warrant discharge. However, the judge found that the Respondent's belief that Burciaga had engaged in this misconduct was mistaken because Duran was incorrect in identifying the person he saw throwing rocks as Burciaga. In reaching this conclusion, the judge relied on the discrepancy between Duran's testimony that the stone thrower appeared to be in his mid-30s and Burciaga's testimony that he was in his mid-50s, and the fact that Duran testified at one point that the stone thrower might have been on the ground rather than on a boxcar. The judge also relied on his observation that Burciaga was unlikely to have climbed up onto the boxcar given his age and apparent "lack of agility."

We reverse the judge. The initial issue is not whether Duran's identification of Burciaga was correct or incorrect; but rather whether the Respondent had a good-faith belief that Burciaga engaged in the conduct. Based on the above, we believe that the Respondent satisfied its burden of showing that it had such a belief. The burden then shifted to the General Counsel to show that Burciaga did not in fact engage in the misconduct. We conclude that the General Counsel has not met that burden.

Contrary to the judge's observation, Burciaga *admitted* that he climbed up onto either an automobile or a railroad car to get a view of employees working behind the facility fence. The judge's assumption that Burciaga's age and apparent lack of agility rendered him physically incapable of climbing onto boxcars is contradicted by this admission. Burciaga's ability to climb onto boxcars also accounts for Duran's underestimate of Burciaga's age. Without more, the discrepancy that the judge noted in Duran's testimony regarding Burciaga's location and age is insufficient to satisfy the General Counsel's rebuttal burden.[11]

We find accordingly that the Respondent's honest belief that Burciaga threw rocks at nonstriking employees has not been shown to be mistaken, and therefore that the Respondent did not violate Section 8(a)(3) by discharging him.

3. Juan Lopez

The Respondent justifies its discharge of Juan Lopez on the ground that, inter alia, he threw rocks at nonstriking employee Simon Garcia while shouting: "I guarantee you that the next time I see you, I am going to beat the crap out of you."

The judge found Lopez' conduct was insufficiently egregious to warrant his discharge. In support of this conclusion, the judge observed that Garcia offered no details concerning the direction, velocity, or duration of the rock throwing. Thus, under *Gem Urethane*, supra, 284 NLRB at 1354 fn. 21, the judge found that Lopez' remarks to Garcia were hyperbole, and would not reasonably be understood as a threat.

We disagree with the judge's conclusion. Garcia's testimony that Lopez threw rocks in his presence while shouting that he was going to give him a beating gave the Respondent sufficient grounds for an honest belief that Lopez had engaged in serious strike misconduct. See *North Cambria Fuel Co. v. NLRB*, 645 F.2d 177, 182 (3d Cir. 1981) (rock throwing creates substantial risk of bodily injury). It was, therefore, the General Counsel's burden to show either that Lopez had not engaged in the conduct or that the rock throwing was not serious enough to warrant discharge. The General Counsel has failed to

[11] Contrary to our dissenting colleague's contention, in making this finding we do not reverse the judge's credibility determinations. The judge neither credited nor discredited Burciaga or Duran. The judge simply concluded that the General Counsel had shown by a preponderance of the evidence that Duran's identification of Burciaga was mistaken. However, as stated above, the evidence cited by the judge does not show that the Respondent was mistaken in its honest belief that Burciaga engaged in serious strike misconduct.

make this showing. Furthermore, the judge's application of *Gem Urethane*, supra, to Lopez' verbal remarks is inapposite because in that case the statement at issue was not accompanied by intimidating physical conduct equivalent to Lopez' stone throwing.[12]

We find accordingly that the Respondent had an honest belief that Lopez had engaged in conduct that would reasonably tend to coerce or intimidate, *Clear Pine Mouldings*, supra at 1046, and therefore did not violate Section 8(a)(3) by discharging him.

4. Enrique Luqueno

The Respondent justifies its discharge of Enrique Luqueno on the ground that, according to security guard Duran's testimony, Luqueno threatened nonstriking employees with the words: "When you come out, we're gonna get you all alone. . . . And we're gonna f—k you up." Luqueno admitted exchanging insults with nonstrikers, but denied using the threatening language described by Duran.

Without expressly resolving the credibility issues raised by the testimony of Duran and Luqueno, the judge found that even if made as alleged, Luqueno's remarks were insufficiently egregious to give the Respondent an honest belief that he had engaged in strike misconduct. In support of this conclusion, the judge noted that Duran testified that Luqueno delivered the above-stated threat along with a nonthreatening insult, that Duran had difficulty naming the target of Luqueno's remarks, and that, given Luqueno's testimony that he was unable to see into the facility, Luqueno could not have known whom he was addressing.

Contrary to the judge's conclusion, we find that Duran's report of Luqueno's behavior was sufficient to give Respondent an honest belief that Luqueno had engaged in serious misconduct. As to the honesty of the belief, the issue is not whether Duran's report was true, but rather whether the report gave the Respondent a reasonable belief that misconduct had occurred. As to the issue of the seriousness of the conduct, the judge himself noted that the expression "f—k you up" is harsher than any the Board has found to be mere hyperbole. Moreover, the prefatory phrase "[w]hen you come out, we're going to get you all alone" could reasonably be understood as implying that Luqueno and others intended to do exactly that—ambush the working employees away from the worksite, where no fence or security guards would be there to protect them. In light of the violent attack on nonstriking employees discussed above, which some strikers had taken up as a threat the next day, these words would carry special force. Thus, we find that these remarks had a reasonable tendency to coerce and intimidate. *Clear Pine Mouldings*, supra at 1046.[13] The judge's observations regarding Duran's difficulty in identifying the target of Luqueno's remarks and the possibility that Luqueno did not know whom he was addressing have no bearing on the issue of whether the Respondent had an honest belief that Luqueno had engaged in serious misconduct against someone. The relevant question is whether the striker engaged in conduct that has a reasonable tendency to coerce or intimidate, rather than whether such an effect was intended or produced, or who the victim was.[14]

We reject our dissenting colleague's contention that Luqueno's alleged remarks were not objectively likely to coerce or intimidate because—according to Luqueno's uncorroborated testimony—they were addressed to a friend, named Delfino Verona, with whom he commonly exchanged profanities. However, Verona did not testify. Further, based on the context of numerous threats and acts of harassment, and in which an employee was beaten unconscious by his striking coworkers who found him "alone" (i.e., outside the facility), a nonstriker would reasonably tend to be intimidated by a threat of physical violence couched in such harsh and specific terms, even if it were delivered by a friend. And while Luqueno testified that he and Verona were in the habit of exchanging profane banter with one another, Luqueno did not testify that threats to "get [each other] alone" and "f—k [each other] up" were a customary part of their relationship.

Even were we to agree with our colleague that the delivery of such remarks to a friend would not reasonably tend to intimidate the intended addressee, we would nevertheless find Luqueno's conduct sufficiently egregious to deprive him of the Act's protection. Luqueno shouted his threat from just outside the facility fence at an employee working inside. Other employees working within the facility without any special relationship to Luqueno or knowledge of his alleged friendship with Verona could easily have heard the threat and concluded that

[12] See also *Roto Rooter*, supra at 772 (seriousness of a striker's misconduct to be evaluated by considering the totality of the striker's behavior rather than each act in isolation).

[13] We reject our colleague's assertion that our analysis gives excessive weight to the general context of the strike while neglecting the immediate circumstances surrounding Luqueno's literal threat of physical violence. More than one striker threatened to do exactly the same thing to other nonstrikers as had been done to Samayoa. Luqueno's threat, that he would wait for his addressee and "get [him] all alone" before "f—k[ing him] up," is an accurate description of what happened to Samayoa. Thus, Luqueno's threat, far from being a remote circumstance, was clearly connected to the wider context of actual violence.

[14] See *Keco Industries*, 301 NLRB 303 (1991) (finding carrying of gun constituted strike misconduct even in the absence of evidence that employees saw the gun).

they risked violent reprisal by continuing to work during the strike. In these circumstances we find that, if made as alleged, Luqueno's statements had a reasonable tendency to coerce or intimidate employees in their exercise of rights protected by the Act. *Clear Pine Mouldings*, supra at 1046. Since the Respondent had a reasonable basis for believing that Luqueno engaged in serious misconduct, the burden shifted to the General Counsel to show that Luqueno did not in fact engage in the misconduct. As noted, the judge did not choose to resolve the credibility conflict in favor of Luqueno. In these circumstances, we are unable to say that the preponderance of the record evidence establishes that the employee did not engage in the misconduct.

The dissent asserts that we must remand this case in order for the judge to make further credibility findings that might vindicate Luqueno's version of the story. We disagree. Once the evidence established that the Respondent had a good-faith belief that Luqueno engaged in the misconduct, the General Counsel bore the burden of proving that Luqueno did not in fact engage in that misconduct. The General Counsel has not carried that burden.

Our dissenting colleague agrees that the General Counsel had the burden to establish that Luqueno was innocent of the misconduct. He also acknowledges that the judge did not make a finding of innocence, and that the General Counsel did not seek a remand for such a finding. He excuses the General Counsel on the ground that there was no need for the General Counsel to do so because the judge had found that any such conduct by Luqueno was not sufficient to warrant discharge. We disagree with our colleague. The General Counsel, exercising reasonable prudence, would have argued in the alternative that (1) the judge was correct, and (2) if the judge was incorrect, a remand is necessary. The General Counsel failed to make the second argument. He chose only argument 1. We have rejected that argument.[15]

5. Eduardo Martinez Mejia

The Respondent justifies its refusal to reinstate Eduardo Martinez Mejia on the ground that he was observed spray painting the word *"putos"* (homosexuals) on a "Do Not Enter" sign attached to a locked gate on the perimeter of the Respondent's facility.

The judge credited the Respondent's witnesses' testimony that Mejia vandalized the sign over Mejia's denials. Citing *Medite of New Mexico*, supra, however, the judge found that the damage Mejia inflicted on the Respondent's property was too minor to provide the Respondent an honest belief that he had engaged in serious strike misconduct. We disagree with the judge's finding. The judge's reliance on *Medite of New Mexico* is misplaced because in that case, which involved strikers beating on a car with cardboard picket signs, there was no record of any actual property damage. 314 NLRB at 1145–1147. By contrast, Mejia damaged his employer's property by defacing a traffic control sign in a public location. Moreover, the judge's finding that the damage to the sign was minor misses an important point. Repeated incidents of "minor" property damage may, taken together, create a sense that the workplace is out of the control of the employer. Finally, Mejia's act of vandalism did not occur in a vacuum. Other strikers jammed padlocks or rendered them unusable, in an effort to trap vans in front of the Respondent's gate and subject the nonstriking employees in the vans to intimidation. Viewed in the context of the other credited instances of actual or attempted strike-related property damage, such as the smashing of an applicant's windshield on the Respondent's property, Mejia's act of vandalism would tend to coerce nonstrikers by signaling to them their employer's inability to protect its property—and, by reasonable inference, the employees working upon it—from striker retaliation.[16] See also *GSM, Inc.*, 284 NLRB 174, 174–175 (1987) (finding that kicking at a car would reasonably tend to coerce or intimidate even though "relatively innocuous" compared to more violent behavior).[17]

We find accordingly that the Respondent had an honest belief that Martinez Mejia had engaged in conduct that would reasonably tend to coerce or intimidate, *Clear Pine Mouldings*, supra at 1046. Since the General Counsel has not shown the absence of misconduct, the Respondent did not violate Section 8(a)(3) by discharging Mejia.

6. Miguel Angel Padilla

The Respondent justifies its discharge of Miguel Angel Padilla on the grounds that, inter alia, he shouted at non-

[15] *Roto Rooter*, 283 NLRB 771, 773 (1987), cited by the dissent, is clearly distinguishable. In that case, the Board found it necessary to remand because the judge appeared to have credited opposing witnesses whose testimonies were mutually exclusive. There is no such conflict in this case.

[16] Our dissenting colleague asserts that "putos" has no threatening denotation or connotation. We disagree. Obviously, this is taken by some as a sexually demeaning phrase, and is one example of the coarse sexual intimidation employed by some of the strikers. The phrase is clearly abusive, and combined with the destruction of the Respondent's property, reasonably tended to coerce or intimidate the nonstrikers.

[17] The dissent's statement concerning Mejia, that "mere insults do not constitute serious strike misconduct," fails to consider the relevant circumstances. This was not a mere insult. It was an insult combined with destruction of property. These circumstances, along with the other coercive conduct engaged in by other strikers, render the conduct coercive. Thus, the dissent's cases concerning mere name calling are clearly inapposite.

striking employee Simon Garcia while Garcia was working that "wherever he would find [him] he would beat . . . the crap out of [him]"; and later that day, as Garcia disembarked from a bus at a dropoff point, Padilla directed further threats at him and made gang-related "*cholo*" hand signals.

The judge credited Garcia's testimony over Padilla's denial.[18] Citing *Gem Urethane*, supra at 1354 fn. 21, however, the judge found that Padilla's conduct was not sufficiently egregious to give the Respondent an honest belief that he engaged in serious strike misconduct because the record did not show a context that would render his verbal remarks reasonably discernible as credible threats rather than hyperbole.

We disagree with the judge's finding. We find that the record shows the existence of circumstances sufficient to render Padilla's remarks a credible threat. Padilla prefaced his "beat the crap" remark with an implied threat to seek Garcia out and assault him at a location where he would be unprotected. Padilla's remarks take on an air of added menace given the attack on Samayoa, which occurred under similar circumstances.[19] Moreover, Padilla made further threats to Garcia at the dropoff point.

The dissent contends that our consideration of the attack on Samayoa is excessive, that the presence of police would have lessened any intimidation, and that Padilla may have been drunk and thus less coercive. We disagree. Any employee, knowing that Samayoa had been caught off premises and subjected to a beating, would reasonably tend to be intimidated by a statement that a striker would "beat the crap out of him," "wherever he would find him." Further, the presence of the police, made necessary by the violence, destruction of personal property, sexual harassment, and threats of beatings and rape, underscored the volatile atmosphere created by the misconduct in this case. Thus, our reliance on all of the circumstances is warranted. Furthermore, the Board has found drunkenness to be an aggravating, not mitigating, factor when evaluating coercive striker misconduct. See *Georgia Kraft Co.*, 275 NLRB 636, 637 (1985) (citing drunkenness as one factor in finding that misconduct was coercive). Finally, the use of gang signs would tend to increase the threat's coercive effect.[20]

Accordingly, we find that the Respondent had an honest belief that Padilla had engaged in conduct that would reasonably tend to coerce or intimidate, *Clear Pine Mouldings*, supra 268 NLRB at 1046. Since the General Counsel has not shown that Padilla did not engage in the misconduct or that the misconduct involved was not serious enough to warrant discharge, the Respondent did not violate Section 8(a)(3) by discharging Padilla.

7. Alfredo Raya

The Respondent justifies its refusal to reinstate Alfredo Raya on the ground that, at a supermarket parking lot where nonstriking employees were being dropped off after work, he said, while pointing at nonstriker Pedro de la Rosa: "I'm going to beat the crap out of you. I'm going to beat you up and just go f—k your mother, and you're an idiot."

The judge credited the Respondent's testimony that Raya made the comments in question. Citing *Gem Urethane*, supra at 1354 fn. 21, however, the judge found that Raya's conduct was not sufficiently egregious for him to forfeit the protection of the Act because the record did not show a context that would render his verbal remarks reasonably discernible as credible threats rather than hyperbole.

We disagree with the judge's finding. Contrary to the judge's conclusion, we find that Raya's words did convey a credible threat of physical assault given the ambush and beating of Samayoa (see discussion of Luqueno, supra). We also find that his words conveyed a reasonably discernible threat of sexual violence given the use of sexual intimidation and outright rape threats by striking employees.[21] The credited evidence shows that on two occasions strikers threatened to rape a nonstriker's wife, and on one occasion a striker threatened to rape or kill an employee's daughter.

We find accordingly that the Respondent had an honest belief that Raya had engaged in conduct that would reasonably tend to coerce or intimidate, *Clear Pine Mouldings*, supra at 1046. Since the General Counsel did not show an absence of misconduct, the Respondent did not violate Section 8(a)(3) by discharging him.

The dissent contends that we again rely excessively on the overall circumstances of the strike, and that our finding that Raya made a credible threat of sexual violence is

[18] We disagree with our dissenting colleague's contention that the judge made no credibility determination regarding the conflicts between Garcia's and Padilla's testimony. The judge specifically stated that he had "no reason to doubt that the words attributed to [Padilla by Garcia] are reasonably accurate," and thereby implicitly discredited Padilla's denial that he made the threats at issue.

[19] See fn. 11, supra.

[20] Unlike the employees in the cases cited in the dissent, Padilla's threat was menacing and was repeated. Padilla said that he would "beat the crap" out of Garcia wherever he would find him, and a threat was repeated later that day.

[21] Contrary to our dissenting colleague's contention, we find that the addition of the insulting phrase "and you're an idiot" did nothing to mitigate the seriousness of Raya's threats of physical assault and sexual violence.

As with Padilla, the threat of Raya was more menacing than the conduct of employees in cases cited by the dissent.

not supported. We disagree. The issue is whether Raya's threat would reasonably tend to coerce or intimidate, not how likely it was that Raya actually would rape someone's mother. If the record demonstrates that the hearer of such a threat would reasonably be concerned about such an attack, it is coercive. In this case, strikers did follow nonstrikers home, and thus came into close proximity to nonstrikers' family members. Some strikers engaged in the highly-dangerous pursuit and harassment of nonstrikers as they drove in their cars. Additionally, several strikers engaged in sexual intimidation.[22] Accordingly, we find Raya's threat of rape would reasonably tend to be coercive or intimidating.[23]

8. Juan Carlos Vazquez

The Respondent justifies its discharge of Juan Carlos Vazquez on the grounds that, inter alia, he threatened physical violence against nonstriking employee Jose Uribe. Specifically, Uribe testified that Vazquez shouted: "[N]ow you're about to have a very bad time . . . Now you're going to get it. . . . I already know where you live, so I can go and beat the crap out of you." The Respondent also presented Uribe's testimony that on a later occasion Vazquez followed Uribe from the lumberyard to a supermarket parking lot used as a dropoff point for nonstriking employees and blocked the exit of Uribe's car with his vehicle.

The judge "believe[d] Uribe's recollection . . . with respect to the words Vazquez used." Citing *Gem Urethane*, supra at 1354 fn. 21, however, the judge found that Uribe's testimony was not sufficient to provide the Respondent with an honest belief that Vazquez engaged in strike misconduct of a serious nature because Vazquez' remarks were mere rhetoric. The judge did not discuss the significance of the car-blocking incident.

We disagree with the judge's finding. In reversing the judge, we take account of both Vazquez' verbal remarks and his physical conduct toward Uribe. Uribe testified that Vazquez threatened to "beat the crap" out of Uribe and then reinforced the seriousness of his threat by following Uribe from the worksite to the dropoff point and blocking the exit of his car. Based on this evidence, the Respondent had an honest belief that Vazquez engaged in conduct that would reasonably tend to coerce or intimidate. *Clear Pine Mouldings*, supra at 1046. The General Counsel has failed to show that Vazquez did not, in fact, engage in the alleged misconduct. Therefore, we conclude that the Respondent did not violate Section 8(a)(3) by discharging Vazquez.[24]

Finally, our dissenting colleague says that the "rhetoric, abuse and insults" committed by employees Luqueno, Mejia, Padilla, and Raya, was "garden variety." We agree that the conduct was abusive, and we think that it went beyond rhetoric and insults, i.e., it included threats. Although picket lines are not tea parties, we do not believe that the conduct here is "garden variety," i.e., typical of union picket lines.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Universal Truss, Inc., a Division of Universal Forest Products, Inc., Fontana, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Cabinet Makers, Millmen and Industrial Carpenters, Local 721, or any other union.

(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 this Order, offer Jose Ramon Flores and Rodolfo Navidad 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 the above-named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

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

[22] Indeed, the judge described the misconduct of employee Espinoza as threatening "despicable," "degrading," and "humiliating sexual submission."

[23] The dissent's assertions that we have "conjure[d] a genuine threat *solely* out of the unrelated misdeeds of other strikers" and that our decision "verges on the ludicrous" replaces our analysis with hyperbole. The threat was not conjured; it came from Raya. Further, the threat was uttered within the context of the gross misconduct of the strike, cited above. Regardless whether the context is general or immediate, if the context renders the threat reasonably coercive, it is not protected by the Act.

[24] In the section of his decision addressing the Respondent's allegations against Vazquez, the judge also discussed alleged instances of misconduct by Vazquez involving security guard Norman Sayeg. Member Schaumber disavows the judge's characterization of Sayeg as "thin-skinned" in this discussion.

(d) Preserve and, within 14 days of a request, or within 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 Fontana, California facility copies of the attached notice marked "Appendix,"[25] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 7, 2002.

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

IT IS FURTHER ORDERED that the second consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found or remanded.

MEMBER WALSH, dissenting in part.

The Respondent violated Section 8(a)(3) by discharging returning strikers Enrique Luqueno, Miguel Angel Padilla, Alfredo Raya, Eduardo Martinez Mejia, and Fidel Burciaga.[1] Burciaga's is a simple case: the Respondent's belief that he engaged in serious strike misconduct was mistaken. Regarding Luqueno, Padilla, Raya, and Mejia, the employees' alleged acts do not meet the test for serious strike misconduct established by *Clear Pine Mouldings*.[2] In finding to the contrary, the majority misapplies the *Clear Pine Mouldings* standard, ignores the balancing of interests the Board must undertake in strike-misconduct cases, and condones the principle of collective punishment. Accordingly, I dissent.

A. The Discharges of Luqueno, Padilla, Raya, and Mejia

1. The legal framework

In determining whether an employer's discharge of returning strikers was lawful, the Board must "strike the proper balance between the [employer's] asserted business justification[ ] and the invasion of employee rights in light of the Act and its policy."[3] When an employer justifies its discharge of returning strikers on the ground that they engaged in strike misconduct, the Board decides whether the alleged misconduct would, "under the circumstances existing, . . . reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[4] Thus, where the coerciveness of the employee conduct in question depends on how "the circumstances existing" are weighed, the Board must assess these circumstances in accordance with its general duty to balance the competing employer and employee interests at stake.

This principle is reflected in strike-misconduct cases involving statements that, taken literally, express a threat to inflict bodily harm, but that are also commonly used as merely abusive rhetoric. The Board does not find such statements reasonably coercive or intimidating where the expression used is a "well-known figure of speech . . . in common banter,"[5] and where the circumstances do not "indicat[e] that the 'threat' has an immediacy of reality."[6] Moreover, absent immediate aggravat-

[25] 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."

[1] I agree with my colleagues' dismissal of the allegations concerning Jose Becerril, Gerardo Garces, Juan Lopez, and Juan Carlos Vazquez. I also agree with the majority that the Respondent violated the Act by discharging Jose Ramon Flores and Rodolfo Navidad.

[2] 268 NLRB 1044 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).

[3] *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)). See also *Pinnacle Metal Products Co.*, 337 NLRB 806, 814 (2002) (employer's good-faith belief that the returning striker has engaged in serious strike-related misconduct is a legitimate business justification for the striker's discharge).

[4] *Clear Pine Mouldings*, supra at 1046 (internal quotations omitted).

[5] *Gem Urethane*, 284 NLRB 1349, 1354 fn. 21 (1987) ("threat" to "kick [non-striker's] ass").

[6] *Hotel Roanoke*, 293 NLRB 182, 210 (1989) ("threat" to "to beat [nonstriker's] ass"). See also *Lamar Advertising of Janesville*, 340 NLRB 979, 981 (2003) ("a threat by one employee to another to 'kick ass,' *without more*, is mere bravado that is unlikely to intimidate the listener"; such "threats . . . were of the nature of those not uncommon among workers in an industrial setting . . . [and] would [not] be expected to have a coercive impact") (emphasis in original), affd. in the sum. judg. proceeding 341 NLRB No. 96 (2004) (not reported in Board volumes), enfd. 127 Fed. Appx. 144 (5th Cir. 2005).

ing circumstances, the Board has not found literal "threats" of bodily harm to be coercive even if they are made in the context of strikes marked by incidents of actual and threatened violence and property damage. Thus, in *Gem Urethane*, the Board found a striker's "kick ass" threat was not serious strike misconduct (see fn. 5, supra), even though other strikers were lawfully discharged for threatening to blow up the employer's plant,[7] threatening to kill a nonstriker while stabbing at him with a knife,[8] and assaulting a nonstriker and his daughter.[9] Similarly, in *Hotel Roanoke*, supra, the Board found that a striker's "beat your ass" threat was not serious strike misconduct where there was no "evidence that [this striker] participated in any activity that would tend to indicate that her alleged words should be taken as a serious threat" (see fn. 6, above), even though the employer's property was fire bombed,[10] and strikers were found to have been lawfully discharged for assaulting a nonstriker[11] and for throwing a large rock at the windshield of an automobile on the employer's property.[12]

The majority's finding that, in the circumstances of this case, the verbal abuse and trivial vandalism here at issue constitute serious misconduct ignores these principles. To find that the acts in question would reasonably tend to intimidate and coerce, my colleagues rely heavily on the occurrence of entirely unrelated incidents of misconduct—primarily the assault on Luis Samayoa (the single incidence of violence in a strike involving some 300 employees), but also unrelated threats of sexual and physical violence and incidents of property damage. I recognize that, in assessing the coercive tendencies of an individual striker's actions, the Board and courts may take into account the occurrence (or nonoccurrence) of violence and property damage within the strike as a whole.[13] The majority points to no cases, however, in which an individual striker's conduct has been found coercive on the primary basis of acts committed by others. By so doing, the majority amplifies a relevant circumstance into a dispositive one and subjects employees engaged in the protected activities of striking and picketing to the risk that they will be discharged because of acts over which they have no control and for which they have no responsibility. This approach to assessing "the circumstances existing" abandons the Board's duty to balance the rights of employer and employee and—by effectively authorizing collective punishment—violates the most elementary notions of justice.

2. The discharges

Applying the principles outlined above to the discharges of Luqueno, Padilla, Raya, and Mejia, I would find that the alleged acts of these strikers did not meet the *Clear Pine Mouldings* standard for serious strike misconduct.

a. Enrique Luqueno

In justification of its discharge of Enrique Luqueno, the Respondent presented testimony from security guard Miguel Duran that Luqueno, located on the other side of a fence, shouted an insult at an employee Duran identified as "Bildona" who was working within the facility, and then added: "When you come out, we're gonna get you all alone. . . . And we're gonna f—k you up." I agree with the judge that even if Duran's testimony is credited, Luqueno's conduct was not, given the relevant circumstances, sufficiently egregious to forfeit him the protection of the Act. The judge correctly found that the remark at issue would tend to be reasonably perceived as insulting rhetoric rather than a serious threat, given that it immediately followed a mere insult and was made in the context of an exchange of abuse. I find additional support for this conclusion in Luqueno's uncontradicted testimony that he addressed the remarks to a personal friend, Delfino Verona,[14] with whom he customarily exchanged similar abuse, and that the two had friendly social contacts before and after this incident.[15] Given this context, Luqueno's alleged remarks would not have had a reasonable tendency to coerce or intimidate. See *Clear Pine Mouldings*, supra at 1046. Accordingly, I would affirm the judge's finding that the Respondent violated Section 8(a)(3) by discharging Luqueno.

The majority finds that the allegation regarding Luqueno's discharge should be dismissed. My colleagues support this conclusion with the argument that the assault on Samayoa renders Luqueno's statement a credible threat of violence. As discussed above, this mode of analysis gives excessive weight to remote circumstances while discounting immediate ones—the accompanying

[7] 284 NLRB at 1353–1354.
[8] 284 NLRB at 1372–1373.
[9] 284 NLRB at 1371–1372.
[10] 293 NLRB at 209.
[11] 293 NLRB at 210.
[12] 293 NLRB at 220–221.
[13] See, e.g., *Briar Crest Nursing Home*, 333 NLRB 935, 937–938 (2001); *NLRB v. E-Systems, Inc.*, 642 F.2d 118, 119 fn. 1 (5th Cir. 1981).

[14] As the judge stated, Duran had difficulty remembering the name of the target of Luqueno's alleged threat and eventually testified that this person was named "Bildona." It is clear from the record, however, that Duran was attempting to recall the name Verona.
[15] See *Hotel Roanoke*, 293 NLRB at 188, 220. Luqueno testified that before the incident at issue Verona asked him for a ride to Mexico, and that after the incident Verona visited Luqueno's home and in an unconfrontational manner discussed with him the advisability of supporting the strike.

insults, the parties' familiar relationship, and the distance and physical obstructions separating the two—indicating that Luqueno's statement would not have been reasonably taken as a genuine threat.[16]

Even were I to agree with my colleagues that Luqueno's alleged statements constituted serious strike misconduct, I would remand this part of the case to the judge to permit a definite finding as to whether Luqueno's denial that he made these statements should be credited. The judge expressly stated that he found it unnecessary to decide whether to credit Luqueno because, even if made as the Respondent alleges, his statements could not be considered serious strike misconduct, and his discharge was therefore unlawful. However, given that the majority has reversed the judge's finding regarding the seriousness of the alleged misconduct, the issue of whether Luqueno in fact engaged in this misconduct is now dispositive of the ultimate question of whether his discharge was lawful. See, e.g., *Detroit Newspapers*, 340 NLRB 1019, 1024 (2003).

The majority acknowledge that the judge failed to resolve the conflict between the testimony of Duran and Luqueno. Nevertheless, the majority summarily dismisses the complaint allegation that Luqueno was unlawfully discharged. The majority points out that it is the General Counsel's burden to establish that Luqueno did not engage in the misconduct attributed to him. From that correct premise the majority leaps to the erroneous conclusion that that burden was not satisfied because the General Counsel failed to seek a remand of the case to the judge. The majority's reasoning is flawed. The General Counsel had no reason to request a remand to resolve the conflict in testimony because he agreed with the judge's legal determination that Luqueno's alleged misconduct could not, in any case, have warranted his discharge.[17]

[16] The majority argues that even if Luqueno's alleged threat was addressed to a friend, it would still tend to have intimidated bystanders. This argument ignores the testimony of the Respondent's own witness that Luqueno uttered the threat while trading insults with Verona. Thus, individuals overhearing the remark at issue would have reasonably interpreted it as part of this exchange of abuse between Luqueno and Verona rather than as a threat of violence directed against nonstrikers in general.

I also reject my colleagues' contention that Luqueno's statement specifically alluded to the assault on Samayoa. This contention does not withstand scrutiny. Luqueno's remarks include no specific details from which a reference to the incident could reasonably be inferred.

[17] Addressing materially identical circumstances in *Roto Rooter*, 283 NLRB 771, 773 (1987), the Board remanded to the judge to make the credibility determinations necessitated by its reversal of his legal findings. Moreover, the Board remanded in the absence of a request to do so from the General Counsel. Id.

b. Miguel Angel Padilla

The Respondent contends that it was justified in discharging Miguel Angel Padilla because he repeatedly told a manager to "f—k himself" and also told employee Simon Garcia, while making gang-style "cholo" gestures, that "wherever he would find him" he would beat the crap out of him. Padilla admitted abusing the manager but denied threatening Garcia.

As stated by the judge, Padilla's remarks to the manager cannot be characterized as threats but were merely a sneer of contempt. The Board has repeatedly declined to find noncoercive abuse like this to be serious strike misconduct. See, e.g., *Calliope Designs*, 297 NLRB 510, 520 (1989); *Catalytic, Inc.*, 275 NLRB 97 (1985).

Regarding Padilla's alleged conduct toward Garcia, the judge correctly found that the Respondent did not present evidence of circumstances from which a threat would reasonably be perceived. I observe also that, on the two occasions that Padilla is alleged to have threatened Garcia, the first time the two of them were separated by 50 feet and the facility's perimeter fence; and the second time, later that day, Garcia was exiting a company bus in the presence of police. Given these protections, Garcia would not have reasonably feared a present assault. Moreover, Garcia reported that on both occasions, Padilla appeared to be heavily drunk, so his words would reasonably be taken as mere bravado rather than as a serious threat of future violence.[18] Accordingly, I agree with the judge that Padilla's alleged conduct does not meet the *Clear Pine Mouldings* standard for serious strike misconduct, 268 NLRB at 1046, and that the Respondent violated Section 8(a)(3) by discharging him.

To find that Padilla's remarks warranted discharge, once again the majority relies on the assault on Samayoa. For the reasons stated above, I disagree with my colleagues' excessive reliance on that circumstance. Nor do I agree with my colleagues that the vague expression "wherever he would find me" would reasonably be interpreted as a reference to that assault.[19]

[18] See *Gem Urethane*, 284 NLRB at 1354 fn. 21 (noting drunken state of striker who said, "I'm going to kick your ass" in finding the statement was not a serious threat of violence).

[19] Citing *Georgia Kraft Co.*, 275 NLRB 636, 637 (1985), my colleagues argue that Padilla's drunkenness exacerbated the threatening tendencies of his verbal remarks because it signaled that he was "in less control of himself." In *Georgia Kraft*, however, the intoxicated strikers made verbal threats at the house of a non-striking employee and his family in the absence of any third-party security. The strikers had, therefore, the present ability to act on their threats. In the instant case, by contrast, given the presence of police and private security guards, Padilla had no present ability to attack Garcia.

I also reject the puzzling logic of my colleagues' assertion that Garcia would reasonably have been more intimidated by Padilla's statements because police and security guards were present.

Even assuming, however, that the Respondent has presented evidence capable of sustaining a finding that Padilla engaged in serious strike misconduct, Padilla expressly contradicted this evidence, and the judge made no clear credibility determination regarding the conflicting testimony.[20] In these circumstances, the majority errs in denying Padilla the protections of the Act without at least following standard practice and remanding to the judge to make the necessary credibility findings.[21]

c. Alfredo Raya

I would find, in agreement with the judge, that the Respondent violated Section 8(a)(3) by discharging Alfredo Raya. The Respondent contends that it could lawfully discharge Raya because a nonstriking employee, Pedro de la Rosa, reported that Raya said to him: "I'm going to beat the crap out of you. I'm going to beat you up and just go f—k your mother, and you're an idiot." I agree with the judge that, given the relevant circumstances, Raya's statement did not convey a genuine threat. The record shows that Raya made the statement in the presence of both police and company security guards. Although his "threats" were couched in an idiom of physical and sexual violence, they were no more than formulaic expressions of anger and disdain with "no necessarily violent connotation." *Gem Urethane*, supra at 1354 fn. 21. Moreover, the bathetic concluding remark, "and you're an idiot," would lead a reasonable listener to understand that the statements preceding this remark were intended to offend rather than to threaten.

In finding to the contrary, my colleagues conjure a genuine threat *solely* out of the unrelated misdeeds of other strikers. The majority's contention that Raya's "f—k your mother" statement would reasonably have been understood as a genuine threat to rape de la Rosa's mother verges on the ludicrous, and again demonstrates the majority's emphasis on general context over immediate circumstances and on collective punishment over individual responsibility.

d. Eduardo Martinez Mejia

I would find that the Respondent violated Section 8(a)(3) by discharging Eduardo Martinez Mejia. The Respondent justifies the discharge on the ground that Mejia spray-painted the word *"putos"* (faggots) on a traffic control sign at the perimeter of the Respondent's facility. The judge credited the Respondent's evidence over Mejia's denial but found that Mejia's conduct did not reasonably tend to coerce or intimidate under *Clear Pine Mouldings.*

I agree with the judge's finding and reasoning. Under the *Clear Pine Mouldings* standard, property damage constitutes serious strike misconduct only if it has a reasonable tendency to intimidate or coerce. Mejia's conduct provides no basis for such a finding. He caused only minor damage to the employer's property, and the word he painted on the sign was simple abuse, without any threatening denotation or connotation. It is well settled that mere insults do not constitute serious strike misconduct.[22]

My colleagues argue that, given other credited instances of strike-related property damage, the graffiti tended to intimidate or coerce employees by demonstrating the Respondent's inability to maintain control over its property and protect the employees working within it. This argument is implausible. The defaced sign was on the perimeter of the facility, facing outward into a public street, so its defacement in no way implied that employees working inside were vulnerable to attack.[23] Once again, the majority relies on unrelated instances of misconduct in the general context of the strike to find an objective threat, while ignoring countervailing immediate circumstances. The majority's finding cannot, therefore, be supported under any rational interpretation of the *Clear Pine Mouldings* standard; rather, it reflects an excessive concern for employer property rights at the expense of employees' statutory right to engage in protected activity.

B. The Discharge of Burciaga

Finally, I would find that the Respondent violated Section 8(a)(3) by discharging Fidel Burciaga. The Respondent justifies the discharge on the basis of security guard

[20] The majority contends that the judge implicitly credited Garcia over Padilla by remarking, "I have no reason to doubt that the words attributed to [Padilla by Garcia] were reasonably accurate." This contention ignores the judge's earlier statement, which showed that he found it unnecessary to make any credibility determinations or findings of fact and therefore did not do so: "For the purpose of this discussion, the *only* question is, *assuming* Respondent's witnesses are being truthful, whether they have described behavior that gave Respondent a good faith belief that [Padilla] had committed verbal acts constituting striker misconduct." (Emphasis added.)

Although the judge analyzed the allegation concerning Raya (discussed below) in the same fashion, the record shows that Raya confirmed the Respondent's witness' account of his conduct. For this reason, a remand as to Raya would not be necessary.

[21] See *Roto Rooter*, 283 NLRB at 773.

[22] See, e.g., *National Assn. of Government Employees*, 327 NLRB 676, 681 (1999), enfd. mem. 205 F.3d 1324 (2d Cir. 1999) (stating rule); *Calliope Designs, Inc.*, 297 NLRB 510, 521 (1989) (calling a non-striker a "whore" not serious strike misconduct); *General Chemical Corp.*, 290 NLRB 76 (1988) (calling nonstrikers "liar," "crook," "thief," "stupid f—ker," and "scab" not serious misconduct).

[23] The majority cites *GSM, Inc.*, 284 NLRB 174, 174–175 (1987), in support of its position. The case is clearly distinguishable because in it the Board found that kicking the car of a nonstriker as he drove out of the plant tended to intimidate the vehicle's occupant. Mejia's defacement of the street sign had no such tendency.

Duran's testimony that he saw Burciaga throwing stones at working employees. Burciaga denied this allegation. Implicitly crediting Burciaga, the judge found that Duran had misidentified Burciaga as the person he saw throwing stones, and therefore the Respondent's belief that Burciaga had engaged in the alleged misconduct was mistaken.

I agree with the judge's credibility-based finding. The judge's decision to credit Burciaga's denial that he engaged in this conduct over Duran's testimony is supported by the record. There was a 20-year discrepancy between Duran's estimate of the stone-thrower's age and Burciaga's age as reported to, and observed by, the judge at the hearing; in addition, Duran's testimony regarding the stone-thrower's location was inconsistent and confused. The judge's credibility determination is not, therefore, contrary to the clear preponderance of all the relevant evidence, and his finding that the Respondent violated Section 8(a)(3) by discharging Burciaga should be affirmed.[24] *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

C. Conclusion

Relying on the single incident of serious violence in the strike—the Samayoa assault—along with assorted incidents of lesser misconduct, my colleagues transform the garden-variety rhetoric, abuse, and insult committed by Luqueno, Padilla, Raya, and Mejia into dischargeable offenses. The message to strikers is clear: you will be held collectively responsible for acts you do not commit. The chilling effect of the majority's decision on protected activity will be palpable. I dissent.

APPENDIX

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 discriminate against you for supporting Cabinet Makers, Millmen and Industrial Carpenters, Local 721, or any other union.

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

WE WILL, within 14 days from the date of the Board's Order, offer Jose Ramon Flores and Rodolfo Navidad 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 the above-named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the above-named employees, and WE WILL, within 3 days thereafter, notify those employees in writing that this has been done and that the discharges will not be used against them in any way.

UNIVERSAL TRUSS, INC., A DIVISION OF UNIVERSAL FOREST PRODUCTS, INC.

Nathan Laks and *Ernesto J. Fong, Esqs.,* for the General Counsel.

James W. Michalski and *Roxanne Torabian-Bashardoust (Riordan & McKinzie),* of Los Angeles, California, for the Respondent.

Gerald V. Selvo (DeCarlo, Connor & Selvo), of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Los Angeles, California, for 17 days beginning November 4, 2002, and closing February 19, 2003, upon a second consolidated complaint issued by the Regional Director for Region 31 of the National Labor Relations Board (the Board) on October 11, 2002. It is based on unfair labor practice charges originally filed on February 7, 2002,[1] by Cabinet Makers, Millmen and Industrial Carpenters, Local 721 (the Union). Additional charges were filed on May 8 and September 24 and all but the last were amended at various times. In its final form the complaint alleges that Universal Truss, Inc., a Division of Universal Forest Products, Inc. (Respondent) has engaged in

[24] I agree with the majority that the judge erred in assuming that Burciaga was physically incapable of climbing onto boxcars. Even without relying on this assumption, however, the judge's decision is adequately supported by the record. In order to find to the contrary, the majority speculates that Burciaga's ability to climb onto boxcars accounts for Duran's underestimate of Burciaga's age. I find the judge's explanation of the 20-year underestimate more plausible: Duran simply fingered the wrong person.

[1] All dates are 2002, unless otherwise indicated.

certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

Issues

This complaint comes in three parts: First is the issue of whether two employees suffered violations of Section 8(a)(1) by being threatened/told that in order to get a raise they would have to stop being members of the Union. Connected to that is whether they were assigned more onerous work because they declined to give up the Union. The evidence, however, modifies this fact pattern to the question of whether two bargaining unit members, Rafael Mandujano and Jorge Godinez-Meza,[2] who had been performing nonbargaining unit work in the office, and who were seeking raises, were unlawfully told they had to give up their union membership as a condition of the raise or whether they assessed their choices and decided to return to work in the yard where their promotion/raise opportunities were more foreseeable under the collective-bargaining contract. Second, is the issue of whether Gerardo Garcés, a union steward, was discharged in violation of Section 8(a)(3) or whether he was lawfully fired for attendance problems and/or because he deliberately evaded a medical screen to determine his fitness for duty.

Third, and most time consuming, is whether Respondent violated Section 8(a)(3) by "terminating" 28 economic strikers. This issue is governed by the burden-shifting procedures established by the Board in *General Telephone Co. of Michigan*, 251 NLRB 737 (1980), enfd. sub nom. *Electrical Workers Local 1106 v. NLRB,* 672 F.2d 895 (D.C. Cir. 1981), and similar cases, following the lead of *Rubin Bros. Footwear*, 99 NLRB 610, 611 (1952), enf. denied on other grounds 203 F.2d 486 (5th Cir. 1953), as informed by *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Under the rule of these cases, the General Counsel need only show that the individuals were strikers who were denied reinstatement. At that point the respondent must demonstrate that it held an honest belief that the strikers denied reinstatement had committed serious misconduct while engaged in the strike. The burden then shifts back to the General Counsel in rebuttal to prove that the respondent, for whatever legitimate reasons he can present, did not hold a reasonable belief. If the rebuttal is successful a violation of the Act has been established. If the rebuttal is unsuccessful, the discharge will stand. This issue is also controlled to a great extent by the Board's prohibition of striker misconduct as set forth in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). That case is discussed in greater detail, infra. If, however, the Employer despite its good-faith belief has made a mistake, the discharge will be held to be unlawful. *NLRB v. Burnup & Sims,* supra.

All parties have filed briefs which have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

[2] Godinez-Meza's name was garbled in the complaint, requiring a correction. He was incorrectly listed as Manuel Gondinez. The error was not explained, but led to some misunderstandings.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that at material times it is has been a corporation with a factory located in Fontana, California, where it manufactures roof trusses. It also admits that it annually sells and ships goods or services valued in excess of $50,000 from that plant directly to points outside the State of California. It therefore admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Furthermore, it admits, and I find, that the Union is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent was created sometime during the year 2000 when the plant in question was purchased by Universal Forest Products, Inc., its corporate parent. Prior to that, the facility had been owned by Gang-Nail, Inc. That predecessor had, it has been said, a "decades-long" relationship with the Union. At the time of the purchase, in 2000, Respondent not only recognized the Union, it also accepted the remainder of the collective-bargaining contract, signing a separate agreement to do it. That contract expired on June 5, 2001. It was later extended for a period of time not clearly shown in the record, but with an across-the-board 10-cent hourly wage increase. On April 18, 2002, the Union called a strike. At that time Respondent employed about 200 factory workers on its day shift, and perhaps another 100 on its night shift. Few of these production workers speak any English; most speak Spanish and an interpreter was required for most of those who testified.

In the fall of 2001, Respondent's general manager was Rifkey (Rickey) Hanna. He was the general manager during the time in which employees Rafael Mandujano and Jorge Godinez-Meza, the two bargaining unit employees who were working in the office, sought pay raises. In February, Karen Wilson succeeded Hanna as general manager.[3] Reporting to the general manager were Human Resources Director Miguel Gaytan and Yard Supervisor Jess Romo.[4] Production Supervisor Hector Sanchez, who was promoted to that job in early 2002, assists Romo. In fact, Mandujano had competed with Sanchez for that job.

During this timeframe, two production workers served as the Union's stewards for the day shift. One, Domatilo (Tilo) Acosta served as the principal steward during the day shift. His backup was Gerardo Garcés, the employee alleged to have been unlawfully discharged. The Union's business representative was Bill Miller. He was the Union's principal official assigned to cover Respondent. As Miller is not fluent in Spanish, Spe-

[3] Wilson had worked at the plant for about 7 years, initially with Gang-Nail and always having a function in the operations department. Prior to becoming general manager for Respondent, she had held the post of operations manager. She was well acquainted with the staff and with the manner in which the plant manufactured its product.

[4] Romo's counterpart for the night shift appears to have been Rod Harris.

cial Representative/Business Agent Fernando Rojas who is bilingual, assisted him.

The factory itself can be described as a large, open-air, lumberyard. The employees work outside, but under canopy style roofs. The facility is fairly rectangular and large enough to be served by its own railroad spur, which enters to the rear, southeast corner. The main entrance is on the southwest corner opening to Sultana Street, a north-south road. The north boundary is Foothill Boulevard, a major east-west thoroughfare. The east side is bounded by the railroad's branch line, which is off the property. A chain link fence surrounds the entire property, although there are lesser-used locked gates located at various points. There is a guard shack at the Sultana Street gate. That entrance leads to parking areas as well as to the main office, all of which are at the south end of the property. The rail spur enters through a large gate almost directly east and across the property from the Sultana gate. Close to the rail spur is a production area known as "Specials."[5] When the strike began, most of the picketing occurred at the Sultana gate, although strikers did congregate across the street opposite it. They also gathered near the railroad gate. Because of the tracks, they usually stayed to the east of the railroad track. Since that track was a branch line, rail cars could often be found there. Strikers also kept an eye on the locked auxiliary gates.

B. Rafael Mandujano and Jorge Godinez-Meza

1. Rafael Mandujano had been hired by Gang-Nail in 1988. He worked his way up to the job of lead quality control. He speaks English moderately well, but was permitted to testify in Spanish. At some point, Jess Romo proposed that Mandujano work in the office and he accepted. Mandujano did not give precise testimony concerning when that occurred, ranging from 1996–1999, though it seems to have been after a 1997 hand injury. Furthermore, the record does not clearly describe what his duties in the office were, but they seem to have involved paperwork such as accident reports. He also continued to work frequently in the yard performing "checker" (quality control) work as before. He kept the lead quality control pay rate as he performed work both in and outside of bargaining unit. Throughout this time, Respondent treated Mandujano as if he were working in the bargaining unit, making the appropriate payroll deductions, including union dues-checkoffs, as well as the contractual fringe benefit deductions.

This arrangement continued until late 2001 when Mandujano decided he needed a raise. He had long since reached the top pay rate for his official classification. He says he had two conversations with Hanna concerning the raise. The first occurred approximately December 21, 2001, and the second occurred about January 2, 2002.

Mandujano's testimony was somewhat disjointed. For the General Counsel he testified that they both occurred in Hanna's office, for he had gone there to ask for the raise. He did not describe the meetings in any great detail, but gave the following testimony concerning the December 21 discussion:

> Q. [BY MR. LAKS] And how did you end up in his office?
>
> A. Because I asked him for a raise—pay raise.
>
> Q. Did you have a conversation with Mr. Hanna?
>
> A. Yes, sir.
>
> Q. Tell us what you remember about that conversation.
>
> A. He asked me to drop the Union.
>
> Q. Did he—what else did he say?
>
> A. To think about my future.
>
> Q. Did he explain to you why he wanted you to leave the Union?
>
> A. That was the only way that he could give me a pay raise, working in the office.
>
> Q. Did he explain why the only way he could give you a pay raise in the office, was if you left the Union?
>
> A. He told me that that was the only way that he could give me a pay raise. Yes, sir.

With respect to the January 2 conversation he testified:

> Q. [BY MR. LAKS] When was the next conversation that you had with him about this topic?
>
> A. The matter of leaving the Union? Or the matter of the pay raise.
>
> Q. The matter of leaving the Union.
>
> A. I again spoke with him on January 2nd, 2002.
>
> Q. And can you—and where did that conversation take place?
>
> A. In his office, again.
>
> Q. Please tell us what you can remember about that conversation.
>
> A. He had asked me to think about my future. So I was to give him that answer on that day. And the answer was no. I wished to continue with the Union.
>
> Q. Did Mr. Hanna say anything to that?
>
> A. To think about my future.
>
> Q. Did Mr. Hanna tell you what would happen if you did not leave the Union?
>
> A. Yes.
>
> Q. What did he tell you?
>
> A. He told me that he was going to take me out of there. Because all the people in the office did not belong to a Union.

He concluded his direct testimony on the issues by saying that on January 17 one of the yard supervisors, Rod Harris, advised him that he was to go to the yard and "check", i.e., perform his job as a lead quality control inspector. Mandujano says he asked Harris if he was to be inside the office and Harris replied, "For now, to do it like that" and he would think about it in the future. Mandujano remained outside performing quality control work until the strike began in April.[6]

[5] A minimized construction schematic of the property is in evidence as R. Exh. 12. It is generally accurate, but does not label the Specials work area located near the spur. There is such an area so labeled in the northwest corner of the property, but that location is not of concern here.

[6] Mandujano is one of the 28 employees who were not recalled at the end of the strike, because, according to Respondent, he engaged in striker misconduct.

It should be observed that Mandujano was a member of the Union's bargaining committee and had, in that capacity, attended several bargaining meetings with Respondent's representatives, all of which Human Resources Manager Miguel Gaytan also attended. Both Hanna and a company attorney were there as well. Mandujano's principal duty was to assist one of the committee members, a shop steward who spoke no English. The General Counsel did not explore the question of when Mandujano's bargaining committee work began with Respondent (as opposed to the predecessor), but it seems likely that it was ongoing. A signup sheet shows he attended the last meeting before the strike began in April. He often had worn union T-shirts or pins while at work.

On cross-examination, Mandujano acknowledged that no manager or supervisor ever told him that office work was a part of his permanent duties. On cross, he acknowledged for the first time that to get the raise he sought, he had to apply for a different job, production supervisor. That job was posted, per a company routine, perhaps in July 2001. He also claimed, somewhat disingenuously, that he didn't know whether that job was a union job. He, as well as several others, was interviewed for that job, though he did not say by whom.[7] (As noted above, the job eventually went to Hector Sanchez in mid-January 2002.[8]) Mandujano agrees that he told Hanna that if he were to take that job, he wanted more money. He denied that Hanna told him that if he took the job he could not be in the Union, saying that Hanna told him he would still have to work outside whenever the quality control person was missing. In his prehearing affidavit, Mandujano said of the January 2 meeting with Hanna that Hanna asked him if he had talked the matter over with his wife and that he responded: "I wanted to stay with the Union. Hanna again said I had to think of the future. I said, 'to be a supervisor I needed to be paid $20.00 per hour.'"

Hanna testified a bit differently. He could recall only one specific discussion with Mandujano, the one in which Mandujano withdrew his name from consideration. Hanna did say that Mandujano frequently asked him for more money and he just as frequently responded by asking Mandujano how a raise could be justified. Eventually, he said, the production supervisor job came up and Mandujano applied for it, leading to the conversation he testified about. Hanna recalls Mandujano asking how much the job paid. Initially, Hanna could not respond, because the starting rate would have been different for each applicant, and depended upon what pay rate they currently enjoyed. He later prepared four different calculations, one for each of the four finalists. The rate proposed to Mandujano was about $12.50 per hour. For the others it ranged between $12.50 and $15. It was never a $20-per-hour job. Even so, the job is outside the bargaining unit, not covered by the collective-bargaining contract, no doubt because it is regarded as supervisory and supervisors are excluded from the unit. Hanna also recalls at one point before Mandujano withdrew his name, that Mandujano asked him whether he would have to leave the Union if he took the job. Hanna told him it was a "nonunion position."

From Hanna's perspective, he was entirely indifferent to whether an individual took the job or not. He testified:

> Q. [BY MR. MICHALSKI] What do you recall from the second conversation?
>
> A. That he said he talked it over with is wife and he doesn't want it.
>
> Q. Doesn't want what?
>
> A. He doesn't want the job, he doesn't want to be considered for the job.
>
> Q. Did he give you any reason?
>
> A. If I recall, at that time that is when he said if you don't pay me $20 an hour I would not take it. I am not sure if he was joking or was serious, I am not really sure.
>
> Q. Did he say anything about any reasons for declining that were related to union status?
>
> A. No, but I guess he didn't want to leave the union or the money wasn't enough or whatever the reason is, he just came and he told me that he doesn't want to be considered and I said, "Okay. That is your decision, it is up to you."
>
> Q. Did you have a preference about whether he would accept the position or not?
>
> A. No. It was up to the individual.
>
> Q. So that was not discussed?
>
> A. No.

2. Jorge Godinez-Meza was initially hired by Gang-Nail in 1997 as a helper. He eventually became, under the collective-bargaining contract, a jig loader, although he apparently had other yard duties as well, including something he described as "plater." Although he speaks little English, in 1999 he was assigned to do some work in the main office. He says the paperwork he did was "not written in Spanish," so he appears to have some English reading/writing capability. That work expanded so that for several months he alternated, by week, between the yard and the office. Eventually, he says sometime in mid-2000 Jess Romo told him to work in office full time. He continued in the office performing duties which are not well described in the record until sometime in February 2002 when he was returned to the yard. His return to the yard is the focus of the complaint.

During the entire time that he worked in the office Respondent carried him on the payroll as a jig loader and treated him as a bargaining unit member. It paid him the contract rate, as well as the contract fringe benefits. His union membership was known as he had come from the yard. Moreover, he occasionally wore a union T-shirt while working in the office.

Sometime in 2001, Godinez-Meza says he began seeking a pay raise, asking Romo for one. He says Romo told him he would speak to General Manager Hanna about it, but nothing happened. He asked again, toward the end of the year, and eventually was called to a meeting with Romo and HR Manager Miguel Gaytan.

Godinez-Meza testified that Gaytan told him he had a plan. He did not describe the plan very well on direct. He said:

[7] The interviewers were Human Resources Director Miguel Gaytan and (apparently former) Production Supervisor Rod Harris. They wrote their interview reports on August 6 and 7, 2001.

[8] The nearly 6-month delay in finalizing the selection is not explained in the record.

Q. [BY MR. LAKS] Can you tell us what Mr. Gaytan told you?

A. He told me about the plan, about the pay raise they were going to give me and about my insurance.

Q. What else did Mr. Gaytan tell you?

A. That they were offering me that and to continue working at the office and to get the plan because at the office they were not working with a union and I was in the union and since I was in the union I could not be working at the office. And to continue working at the office I had to not be with the union and that was the plan they were offering to me.

Q. Is that what Mr. Gaytan said?

A. Yes.

. . . .

Q. And did Mr. Gaytan say anything about what would happen if you did not accept the plan?

A. Yes, he told me that I would have to go out to the yard to work.

Godinez-Meza says Gaytan told him to think about it and to give them an answer the next day, to tell them if he wanted to accept it. He testified that he turned it down some days later and did so because the pay raise depended on annual evaluations and there was no assurance of a raise:

Q. [BY MR. LAKS] Did you eventually give Mr. Gaytan an answer?

A. Yes, days later.

Q. How did that happen?

A. He again told Jessie the same thing, to tell me to go to the office to speak to him.

Q. Did you go to Mr. Gaytan's office?

A. Yes.

Q. And who was present in Mr. Gaytan's office?

A. For that conversation it was just he and I.

Q. And what language did you have your conversation?

A. Spanish.

Q. Tell us what you remember of that conversation?

A. He asked me what I had thought about the offer.

Q. Did you reply?

A. Yes.

Q. And what did you say?

A. That I did not accept the proposal.

Q. Did you say anything else to Mr. Gaytan?

A. No, he said that it was okay, that he accepted or that he respected my decision.

Q. Did you tell Mr. Gaytan why you did not accept his plan?

A. Yes.

Q. What did you tell Mr. Gaytan?

A. Because according to the plan it indicated there that each year there was an evaluation performed on the employees, on the office employees, and each one's anniversary date. Because when he offered me that plan my anniversary date was near to come and so I told him that if he was going to do an evaluation on me and he said that he did not know that he would need to consult other people. But he was not assuring me of anything.

Q. Did Mr. Gaytan tell you at that conversation what was going to happen to your job?

A. No. He said that if I did not accept they were going to inform me as to when I had to go out to the yard and work.

Q. Do you remember anything else from that conversation?

A. No.

Q. And what happened, in fact, with your job?

A. During that week Jessie Romo informed me that I didn't have to go and work [in] the yard.

Q. Did you, in fact, go to work in the yard?

A. Yes.

Q. And about when—do you remember what month that happened?

A. Beginning of February of this year [2002].

On cross-examination Godinez-Meza continued:

Q. [BY MR. MICHALSKI] When you asked for the pay raises were you still a jig loader classification?

A. Yes.

Q. Is it true, Mr. Godinez Meza, that Mr. Gaytan told you that you could not receive a higher wage because you were already at the top for your classification?

A. I don't understand that too well.

[Witness presented prehearing affidavit.]

. . . .

A. According to the classification where I was, that is why he had that plan that he mentioned to be able to get me more.

JUDGE KENNEDY: Let's first approach the question, if you could, please. Is it correct that you were at the top of your pay rate allowed for your classification of jig loader?

THE WITNESS: Yes.

JUDGE KENNEDY: And while you were at that maximum rate you asked for a pay increase?

THE WITNESS: Yes.

. . . .

[MR. MICHALSKI]: I will rephrase it. Did Mr. Gaytan tell you he was giving you this proposal as a way to have a higher pay rate if you chose to accept it?

THE INTERPRETER: I am sorry, sir, I lost the last part of the question.

[MR. MICHALSKI]: So you said 'for a higher rate' if [you] chose to accept it?

THE WITNESS: Yes, at the classification for which I had topped out, that was the classification on the labor contract and when I went to the office and at that time I was still under the classification of jig loader, which was on the contract. At the time when he offered me this plan it was no longer included in that labor contract, but it was rather for the people who work in the office, which are not within the union. Or that do not have any contract of any kind.

Q. BY MR. MICHALSKI: Did you understand that Mr. Gaytan was proposing the plan as a way that you might have a higher pay rate?

[Objection interposed]

Q. BY MR. MICHALSKI: Did you understand that Mr. Gaytan was proposing the plan as a way that you could have a higher pay rate?

A. Yes, I understood something like that.

Q. BY MR. MICHALSKI: Did you also understand when Mr. Gaytan said that he would respect your decision, that the choice was entirely yours?

A. Yes. [9]

Gaytan testified that Godinez-Meza came to him sometime in December 2001 and asked for a raise. He said: "When he asked for the raise, I said I would look into it and then shortly got back to him but I met with him and he said he wanted to work in the office. I said, well, we do have a Production Office Clerk position available." Godinez-Meza replied that he was interested in the position and asked for more information about it.[10] Gaytan admits that at some point, in response to that question, he told Godinez-Meza that the position was nonunion. He also observed that Godinez-Meza was currently at the highest pay rate available under the collective-bargaining contract for a jig loader. He recalls their discussion about the duties of a production clerk manner. Gaytan says they went over the written job description, which sets forth those duties. As it happened, Godinez-Meza was approaching the annual anniversary of his hire and Gaytan used that coincidence to illustrate how the production clerk's pay rate is reviewed since it is a nonunit job. Gaytan testified he said, "Some of this process is that in a Production Office Clerk in the office, in a non-union position, you get reviewed once a year on your anniversary and there is no guarantee of an increase. Normally, you do but, you know, there is no guarantee of that and the amount can vary."

Gaytan recalls that Godinez-Meza replied he wanted "something certain" but Gaytan could not be specific. During the same conversation they compared pay increases under the collective-bargaining contract, observing that as a jig loader he had gotten a 50-cent increase every 6 months (until he reached the top scale), and if he became a jig leader he would get a 30-cent increase every 2 months until he reached the top scale. "He requested to go to the yard because he felt he could make more money, eventually being promoted to a jig leader and make more money that way." Jig leader, of course, was the next slot on the ladder for jig loaders such as Godinez-Meza. Gaytan says he told Godinez-Meza that the entire matter was his choice, he was free to do as he wished in order to get the raise he wanted. A few days later, Godinez-Meza came back and said he preferred to move up to jig leader as he knew what that progression was.

When asked if Godinez-Meza was ordered to return the yard, Gaytan replied negatively, saying, "He requested [to return] and we okayed it. He went to the yard."

Analysis and Conclusions Concerning Mandujano and Godinez-Meza

The complaint alleges with respect to Mandujano and Godinez-Meza that the conversations Hanna and Gaytan had with the respective employees constituted unlawful threats of adverse consequences and more onerous working conditions if the employee supported the Union. It also asserts that Hanna and Gaytan told each employee that he would get a wage increase if he gave up the Union. It concludes that because each chose to stay in the bargaining unit, Respondent had imposed working conditions more onerous than those they had enjoyed before the conversations.

After reviewing the testimony, I am unable to agree with any of these allegations. It is true, of course, that both were working in the office; it is also true that in doing so they were working outside their classifications. There is nothing in the record, however, to suggest that their office duties had become permanent assignments. In fact, Mandujano frequently performed his quality control duties during this period. Moreover, they benefited on both sides. They were able to perform office work at the same time as they maintained their union representation—the collective-bargaining contract's wages and fringe benefits.

Furthermore, during this timeframe, aside from the imprecise shorthand phrase "nonunion," counsel for the General Counsel, did not offer any evidence that Respondent exhibited union animus of any kind. Instead, the evidence objectively shows that the two employees, independently sought pay raises. In each case their request was viewed favorably and Respondent took steps to accommodate their request. Of course, their request resulted in scrutiny of their situations by the personnel officer responsible for such things, Human Resources Manager Miguel Gaytan. He could see, from only a cursory review, that both were working at tasks that were outside the bargaining unit and if they were to receive pay increases, both had reached pay levels where their contractual classifications had to be changed or they had to be assigned nonbargaining unit jobs. Those choices were very clear.

In each case the employee was offered the option of accepting a nonbargaining unit job or remaining in his contractual classification. And, in each case the employee, after assessing the situation in accordance with his own needs and desires, chose to retain his original job. Neither liked the uncertainty that the absence of a collective-bargaining contract portended. And, there is no doubt that each analyzed it that way. Mandujano actually signed up to be a supervisor, although he was reluctant to concede that to be the case, asserting disingenuously that no one explained to him that the supervisor job was outside the bargaining unit. Even if that is technically true, he knew from his experience that the production supervisor was not a bargaining unit job. He had been taking orders from incumbents such as Harris for years. And, in his prehearing affidavit he sought the high wage of what he thought a supervisor should earn (more than twice as much as he was currently earning and even more than that over other bargaining unit employ-

[9] Strike-through/bracket insertion corrects transcript error; some punctuation added for clarity.

[10] Gaytan credibly testified that the work Godinez-Meza had been performing in the office was not the work of the production office clerk. Nonetheless, the record does not reflect what duties Godinez-Meza was actually carrying out.

ees): *("I responded that I wanted to stay with the Union. Hanna again said I had to think of the future. I said, to be a supervisor I needed to be paid $20.00 per hour.")*

Similarly, Godinez-Meza said: *("the classification for which I had topped out, that was the classification on the labor contract and when I went to the office and at that time I was still under the classification of jig loader, which was on the contract. At the time when he offered me this plan it was no longer included in that labor contract, but it was rather for the people who work in the office, which are not within the union.")*

Clearly both employees understood that the offered work was outside the bargaining unit. Mandujano was being offered a first-line supervisor's slot and Godinez-Meza a clerical job.

It is true that both Hanna and Gaytan testified that they used the phrase "nonunion job" when describing the offered post to the employee. It is this supposed imprecision upon which the General Counsel now relies in arguing for a violation. This is a classic case of preferring form to substance. Certainly a thorough factual analysis is required as opposed to looking for magic words. The principal question to be asked, of course, is whether these statements, in the context in which they were made, could have reasonably interfered with, restrained or coerced the employees in the exercise of their Section 7 rights. I conclude they could not. Here both Hanna and Gaytan accurately told each employee that the job he sought was "nonunion"—i.e., that it was not covered by the current collective-bargaining agreement. It was a truthful statement, uttered during the course of describing to two union-represented employees that if they took the new job, they would be working under nonunion circumstances, not under the collectively bargained conditions to which they were accustomed. Furthermore, the statements, in context, did not suggest that the employees had to resign their union membership or that the Company was taking any steps to get rid of the Union. The two executives were simply pointing out the changes that would take place if they accepted. These were not coercive circumstances.

With respect to the legal analysis to be applied here, I observe that more than 30 years ago, the Board adopted a decision by Trial Examiner Josephine H. Klein, who said with respect to unit v. union matters in *Meredith Corp.*, 194 NLRB 588, 591 (1971):

> Addressing itself to the question left open by the Supreme Court in *Gaynor News* [*Radio Officers Union v. NLRB*, 347 U.S. 17 (1954)], the Board has "specifically held that where the Union is not the exclusive bargaining agent of all the employees, the Board may not, without reference to the employer's actual motivation, properly infer discriminatory intent from the disparate conduct itself." While differentiation among employees "based on 'membership' in a union" is a per se violation of Section 8(a)(3), "differentiation . . . based on membership in a unit" may be entirely legal. *Central States Petroleum Union, Local 115 [(Standard Oil Co.]*, 127 NLRB 223, 228–229 [(1960)], referring to *Speidel Corp*., 120 NLRB 733 [(1958)], in which the Board held that an employer did not violate Section 8(a)(3) by granting a bonus to unorganized employees while withholding it from a unit which had recently chosen to be represented by a union. To similar effect, see, e.g., *Anheuser-Busch, Inc.*, 112 NLRB 686 [(1955)]; *New Orleans Board of Trade*, supra, 152 NLRB at 1264–1265. Cf. *Wagner Electric Corp.*, 105 NLRB 1 [(1953)], finding no violation of the Act in an employer's paying unorganized employees who did not work during a strike while not paying either the employees in the striking unit or those in another unit represented by a second union. [[F]ootnote omitted.] Even in those cases in which the Board has found unlawful discrimination, it has recognized that "any employer has the right to restrict the compensation of represented employees to that agreed to by their bargaining representative, while setting the compensation of unrepresented employees at whatever level it deems proper, so long as the employer does not intend thereby to discourage union membership or activity." *Pittsburgh-Des Moines Steel Company*, 124 NLRB 855, 859 fn. 8 [(1959)], in which the Board held that an employer violated Section 8(a)(3) by not granting to strikers a customary Christmas bonus which it gave to nonstrikers. [[F]ootnote omitted.] In the somewhat different context of pending contract negotiations, the Board has recently reaffirmed its longstanding interpretation of the *Gaynor News* principle. In *Chevron Oil Company*, 182 NLRB 445 (1970), in reversing a Trial Examiner's dismissal of Section 8(a)(3) allegation, the Board said: "Were it not for the unfair labor practice setting in which the withholding action occurred, we would have no hesitancy in adopting the Trial Examiner's finding. It has long been an established Board principle that, in a context of good-faith bargaining, and absent other proof of unlawful motive, an employer is privileged to withhold from organized employees wage increases granted to unorganized employees or to condition their grant upon final contract settlement."*

* In setting aside the *Chevron* order in pertinent part, the [court of appeals] quoted this portion of the Board's decision with approval. The court disagreed with "the Board's finding that the Company's withholding action occurred within a bad-faith bargaining context," 442 F.2d. 1067 (5th Cir. 1971)."

Following this same reasoning is *P.S. Elliott Services*, 300 NLRB 1161 (1990). There, the successful bidder on a successor service contract held a meeting with its predecessor's workforce during which the employees asked if the new jobs would be "union." The employer replied, "We are a non-union company." The Board, performing its 8(a)(1) analysis, held that the respondent "did not violate . . . the Act by Elliott's statement to the former . . . employees that it was a 'non-union company.' " It observed the statement was in response to an employee question and was not accompanied by any threats, interrogations, or other unlawful coercion. Moreover, it said, in view of the respondent's preexisting circumstance as a nonunion company, the remark constituted a truthful statement of objective fact. Id. at 1162. Thus, no restraint or coercion could be discerned.

Here, of course, at their request, Respondent was offering two union members jobs outside the unit. Under either *Meredith,* supra, or *Elliott,* supra, it was privileged to say what it said. This is particularly so because the statements contained no explicit or implicit threat of reprisal, force or promise of

benefit and because the remarks constituted a truthful statement of objective fact.[11]

And, finally, the fact that both of the employees chose to retain their current classifications eventually led to the inevitable: They would be required to resume the duties for which they were actually being employed. This is hardly assigning employees to more onerous duties because of their union activities. It was, instead, honoring the choice made by each offeree. Even if Respondent was concerned about the two having access to office information (and no such contention has been made) no discrimination occurred here.[12] This portion of the complaint will be dismissed.

C. Gerardo Garcés

The complaint alleges that Respondent discharged its employee Gerardo Garcés on March 21 in violation of Section 8(a)(3). Garcés was a longtime employee at the plant having been hired by Gang-Nail in 1979. During that entire time he was a sawyer (sawman, saw operator) who for some time before his discharge operated a table saw. He was a longtime union member and served on the Union's negotiating committee and speaks both English and Spanish. For between 6–8 years before his discharge he had been a shop steward, although at the time of the discharge he was the assistant to Day-Shift Steward Tilo Acosta, serving principally as Acosta's backup. The General Counsel asserts that Respondent fired him because of his actions as a steward on Saturday, March 2, when he initiated a weather-related shutdown of operations.

Respondent asserts it discharged Garcés because on March 2 he came to work with liquor on his breath, evaded a mandatory drug/alcohol screen, left work, and never returned. It acknowledges that Garcés called in sick on several occasions thereafter, but nevertheless failed to comply with the attendance rules because his calls were too infrequent.

Garcés has a history of alcohol abuse and carries the unfortunate nickname (Borracho) (drunkie or drunken one).[13] He has undergone at least one Company-approved rehabilitation treatment. He admits, however, that he continues to drink.

During the last days of February and the first days of March, the weather conditions in Fontana were unsettled. Although the staff worked on February 27 and 28, it was uncomfortable and windy. On Friday, March 1, Respondent sent the workers home early. Although under the collective-bargaining contract, the normal workweek is Monday through Friday, Respondent, apparently to make up for the lost day, scheduled work for Saturday, March 2. This was on somewhat short notice, since employees are usually notified on Thursdays if there is to be Saturday work.

On Saturday morning, at 5:45 a.m., Garcés called the office to advise that he would be "a little late." The record does not clearly reflect the time of day the shift starts in the morning, but the morning break takes place about 8 a.m. It seems likely that the shift begins at 6 a.m. (most likely) or 6:30 a.m. In any event, Garcés arrived sometime before the morning break. He gave the following testimony on direct. As will be seen, he omitted a great deal.

> Q. [BY MR. LAKS] Did you have any conversations with [yard supervisor Jess Romo] about the weather on March 1—I am sorry, on the next day, March 2?
>
> A. [Witness Garcés] March 2, yes, I did.
>
> Q. Now that was Saturday, am I right?
>
> A. That is right, Saturday.
>
> Q. Did you have more than one conversation with him on Saturday?
>
> A. Yes.
>
> Q. Can you tell us what you remember about the first conversation?
>
> A. I went to him and the people didn't want to work and I told him it was a lot worse on Friday so he said, let's walk around the yard and all the workers started screaming, "close the company down, let's go home." Then about 8:30 he sent the workers home.
>
> Q. And what did you do at that time?
>
> A. The same thing, I went home like everybody else.
>
> Q. Did you punch out?
>
> A. I was talking with the other union steward and if the workers were supposed to come back to work and we were discussing this for a few minutes and then I asked him if he was going to leave and he said he got some paperwork to do in the office. So I proceed to my car and went home.
>
> Q. Now were any other employees going home at this time?

---

[11] Cf., *Ready Mix, Inc.*, 337 NLRB 1189, 1190–1191 (2002), where the Board said: "Ramsey was asked by employees on several occasions whether the Respondent 'was union' or had 'plans to go union' or was 'going to go union.' In each instance, Ramsey responded either that the Respondent was not unionized or had no plans to go union or to be union. Further, Ramsey did not state or imply that the Respondent intended to ensure its nonunion status through discriminatory or coercive means. In these circumstances, we find that Ramsey's answers to employees' inquiries were, in context, noncoercive statements regarding the Respondent's nonunion status and, therefore, would not reasonably cause employees to believe that efforts to serve union representation would be futile."

[12] Cf. *Illinois Bell Telephone Co.*, 228 NLRB 942 fn. 1 (1977). There the Board said,

> In agreeing with the Administrative Law Judge's finding that Respondent did not violate Sec. 8(a)(3) and (1) of the Act by transferring the Charging Party from the Pioneer Group to the Safety Group, we do not adopt his Decision insofar as it implies that proof of actual loss is necessary to establish a violation. However, the fact that the Charging Party was not transferred to a more onerous job and did not suffer a pecuniary loss is relevant in assessing Respondent's motivation and supports the Administrative Law Judge's finding that the action was taken for a legitimate business reason and not to discourage union activity.

Nor do we adopt the administrative law judge's statement that "[t]he presumption that one with access to confidential material might leak it where there is a conflict of interest is respectable." We think there is no such presumption of misconduct on the part of employees, but the fact that the possibility does exist in a more than conjectural sense entitles the Employer to protect himself against it.

[13] Literally, "borracho" is an adjective meaning "drunk." When used colloquially as a proper noun, as here, it means "Drunkie." "Borrachón" is a similar, nonslang noun having almost the same meaning, "drunkard."

A. Everybody.
Q. How do you know that?
A. Because we already were out of the yard, everybody was walking out.

On cross-examination, Garcés conceded that the reason he didn't report to work on time on Saturday morning was because he wanted to wait to see what the weather conditions were like. He says he called in to see if Respondent was going to be operating. He agrees that it was not raining that morning, as it had on Friday. Nonetheless, he chose to call rather than report on time. I infer from that approach that he was hoping the Saturday workday had been canceled. Garcés acknowledged on cross that he may have been drinking the night before, but denies that he had been drinking that morning.[14] He says he arrived at the plant at 6:30 a.m., half an hour late. Given his other testimony, however, it seems to me that he must have arrived sometime after 7 a.m.

When Garcés actually arrived at work, there is no evidence that he went to his saw. Instead, he says, "the workers came to me and they didn't want to work so I talked with Jess Romo." He agrees that about 30 employees followed him as he went to find Romo. Curiously, he did not first consult with his fellow (and principal steward) Tilo Acosta concerning what course the employees should take.

Garcés agrees that at one point, Romo decided to check conditions around the yard. Romo permitted Garcés to walk with him and Hector Sanchez as they investigated the conditions.

Romo testified that he met with Garcés who told him that the men didn't want to work. Romo, at first annoyed, told Garcés to go back to work. But as Garcés explained that the men were concerned about "visibility," meaning blowing dust and sawdust, he relented. Romo thought the visibility issue a bit odd (as all employees wear goggles), but knew the wind was at least a "moderate" problem. The men were told to return to their stations. Romo called Sanchez over and those two, accompanied by Garcés, who had insisted upon joining them, toured the work stations to determine what the conditions actually were. After the tour, Romo said he would discuss the situation with the safety committee. An announcement was made telling the men that a decision would be made within the hour. Romo says Garcés immediately went and rounded up the safety committee, one of whose members was Steward Tilo Acosta. Romo had not asked Garcés to do so (normally something he or Sanchez would have done), but Garcés was being very insistent that something be done, so Romo said nothing.

While Garcés rounded up the safety committee members, Sanchez told Romo that during the tour, he had smelled liquor on Garcés' breath. When Garcés returned with the committee, Romo made the same observation.

The committee agreed that the weather conditions were not so severe that work could not be performed, but thought each employee should make his own decision. Romo agreed, informing General Manager Karen Wilson of the decision.[15] He also observed that Garcés was prematurely telling people they could go home. Romo sent Sanchez to each workstation to explain that employees could volunteer to work if they chose; they need not go home.[16] About 30 percent decided to stay. Sanchez thought, based on Garcés' behavior and the smell of alcohol, that Garcés was looking for a way not to work that morning. He admonished Garcés for telling people to leave before he had a chance to tell them they could volunteer to stay.

A few minutes later, while Garcés remained, Romo told Sanchez they needed to send Garcés to the clinic for a drug/alcohol screen. About the same time, Romo told Steward Tilo Acosta that he suspected Garcés of being under the influence and that he was sending him to the clinic. Moments later, Acosta told Garcés what Romo was going to do:

Sanchez told Garcés to stay where he was, that forklift driver Javier [Baltazar] was going to take him to the clinic. The clinic is located 5 or 6 miles from the plant. One of Baltazar's regular duties was to drive the company truck on various errands, including taking employees to the clinic. Sanchez recalls waiting in front of the office for Romo to get the keys to Baltazar.

Acosta's testimony:

Q. [BY MR. MICHALSKI] Okay. Do you remember a morning with Gerardo Garcés when it was windy?
A. Yes.
Q. And it's true, isn't it, that you were the union steward at that time?
A. Yes.
Q. And Mr. Romo came to you as your—Excuse me. Let me rephrase that. Mr. Romo came to you because you were a union steward to discuss the Garcés situation, correct?

[14] Garcés testified:

Q. [BY MR. MICHALSKI] Were you drinking alcohol that morning?
A. No.
Q. How about the night before?
A. Maybe.
Q. Do you regularly drink alcohol?
[Objection interposed.]
Q. [BY MR. MICHALSKI]: Do you drink alcohol?
A. Sometimes.

[15] Wilson had succeeded Hanna as the general manager.

[16] Sanchez' testimony:

When I asked them one-by-one, because some of the persons—want to—everybody go. Some others were afraid. Some of them wanted to stay working; some others, they just want to go but they want to take the other ones. They want to stay with them.

So, that is why I asked each one person-by-person and asked them, did you want to stay; did you want to go? Some of them say, I want to stay but he [Garcés] says that I got to go. I said no; if you want to stay, stay because this is voluntary. If you want to go, let him go; if you want to stay, take your own tools and get back to work. The other guys that want to go, take your tools and go home, I told them.

. . . .

I asked them because I did not reach that point at that time. I asked them, where you are going? They said we are leaving. When I asked, why are you leaving, if I did not even talk to you, they said, Gerardo [Garcés] told me that we can go. I said, no. You have to work for me until I ask you. They said Gerardo already told me that I can go. Well, Gerardo has no authorization, no authority in the Company to say that.

A. Yes.

. . . .

Q. [BY MR. MICHALSKI]: Mr. Romo told you that he suspected Mr. Garcés had been drinking, correct?

A. Yes.

[Objections interposed.]

Q. [BY MR. MICHALSKI]: When did—Did Mr. Romo say anything particular to you about Mr. Garcés that morning?

A. Yes.

Q. What?

A. That he suspected him to have traces of alcohol.

THE INTERPRETER: I'm sorry. That he had alcohol in him.

Q. BY MR. MICHALSKI: That Mr. Garcés had alcohol in him?

A. Yes.

Q. Did you communicate anything to Mr. Garcés about this?

A. Yes.

Q. What?

A. That Jesse Romo had told me that he suspected him to have alcohol in him.

Q. You said this to Mr. Garcés ?

A. Yes.

Q. That morning?

A. Yes.

Q. And that was while Mr. Garcés—and was that while Mr. Garcés was still at the company?

A. Yes.

Q. Did Mr. Garcés ask you anything—Let me rephrase this. Did Mr. Garcés ask you to do anything in connection with this incident?

A. Yes.

Q. What?

A. To ignore what Jesse had told me.

Q. And what do you mean by that?

A. As if he was telling me to ignore that Jesse had ever told me anything.

Q. Did Mr. Garcés ask you when you should—Let me rephrase this. Did Mr. Garcés tell you when you should say this?

A. No. Just in case Jesse should asked me.

Q. And so, if Jesse asked you whether you told Mr. Garcés to go to the clinic, what did Mr. Garcés want you to say?

A. To act as if Jesse and I had not discussed anything.

Q. So are you telling me that Mr. Garcés wanted you to lie for him?

A. Yes.

Q. And this is while you were the union steward?

A. Yes.

When Baltazar appeared, Garcés told him he would drive himself. He and Garcés went toward the area where the cars were parked, but Garcés got into his own vehicle and drove off. Baltazar returned and told Sanchez what Garcés had said and done. The matter was reported to Romo who decided to drive to the clinic with Baltazar. Romo had earlier called to make certain a doctor was there. When they arrived, Romo went inside to see if Garcés had come. He had not. He and Baltazar waited for about half an hour, whereupon Romo again spoke to the doctor asking to be told if Garcés appeared. The two returned to the plant. Garcés never appeared at the clinic.

Garcés attempted, unpersuasively, to explain himself on cross-examination:

Q. [BY MR. MICHALSKI] Didn't Tilo Acosta come with Jess Romo and tell you that Jess wanted you to go to the clinic?

A. Yes.

Q. And did he say why he wanted you to go to the clinic?

A. No, because we were already—no, he didn't say. We were already dismissed.

Q. Well, didn't Jess Romo say to you that he wanted you to go to the clinic that morning because he smelled alcohol on your breathe?

[Objection interposed]

A. No.

Q. [BY MR. MICHALSKI]: No?

A. He didn't say that.

Q. Isn't it true that you were to go to Mr. Baltazar's car to go to the clinic?

A. No.

Q. No?

A. No.

Q. So if Mr. Baltazar said that he was supposed to drive you to the clinic that is not true?

A. That is not true.

Q. You were not told—you told me that Tilo and Jess—you just testified told you to go to the clinic. Now—

A. Jess never said that.

Q. Well, what did he say?

A. After I already was going home he said he wanted me to go to the clinic far away, like from here to—

Q. To where?

A. It was the wall, that far.

Q. Did he tell you why he wanted you to go to the clinic?

A. I said, no.

Q. You said, no, I am not going?

A. No. I said he didn't ask me.

Q. So you are saying Jess never asked you to go to the clinic?

A. He said somebody—when we were already going home he said something, he screamed something from far away.

Q. What did he scream?

A. I don't know, I couldn't hear. We were already going home.

Q. Okay.

A. Everybody had punched out.

Q. So you don't know what he said?

A. No.

Q. Isn't it true that Tilo Acosta came to you with Jess?
A. No.
Q. Did Jess Romo ever say to you, Mr. Garcés, "I smell alcohol on your breath?"
A. No.
Q. Did anyone say that to you?
A. No.
Q. Isn't it true that you walked with Javier Baltazar to the parking lot?
A. I was going to my car.
Q. Were you with Mr. Baltazar?
A. He said, I am going to give you a ride. I said, "I have my truck."
Q. Where was he going to give you a ride?
A. I don't know.
Q. You don't know?
A. No. He never said the reason.
Q. Did you drive together to work?
A. No, I was going to my truck.
Q. So why would he say to you, "I am going to give you a ride?"
A. I said, "what for, we already were dismissed. I am going to my truck."
Q. Did you ever say to Mr. Baltazar, "I can drive myself to the clinic?"
A. No.
Q. Did you ever talk to Mr. Baltazar about a clinic?
A. No.
Q. Did you ever talk to Mr. Baltazar about drinking alcohol?
A. No.

Aside from the question of truthfulness, it appears that Garcés' principal justification for not going to the clinic is that he had been dismissed from work and had no obligation to go for the alcohol screen.

Garcés never returned to work after that Saturday. Instead he called in sick on an infrequent basis. From the following Monday, March 4, until Monday, March 25, he visited a Dr. McGill, at the Kaiser-Permanente clinic near his Temecula home on four occasions. Respondent sent him a discharge letter dated Thursday, March 21. The discharge letter signed by Human Resources Manager Miguel Gaytan said, in its entirety, "Since we have not heard from you, your employment has been terminated. Please find enclosed your final pay including any vacation due." Garcés says that he was not home when the mailman attempted to deliver the (registered/certified) letter on March 22 and the postman had to leave a postal slip notifying him of the attempt to deliver it. Peculiarly, Garcés explained his absence from home by saying he was "probably working." He offered no other explanation.

The General Counsel offered four Kaiser-Permanente "documents of medical impairment" for the March visits. Each of these advised that Garcés was to take a number of days off work. The March 6 slip says 3 days; the March 12 slip, 4 days; the March 19 slip, 7 days.[17] However, none was transmitted to Respondent during Garcés' purported medical incapacity. They were eventually presented at a grievance meeting held April 4 concerning the discharge. They did not persuade Respondent to put him back to work.

Garcés called in sick the first day, March 4. The individual taking the call, Dan Saucedo, noted that Garcés said he had the flu. Garcés testified that he tried to see the doctor that day, but could not get an appointment until March 6. Garcés again called on both March 6 and 7, again saying he had the flu. He did not call again until March 15—"sick and won't be in today." He called again on March 18—"sick"—and did not call again until March 28. The last occurred after the discharge; Saucedo simply took the message, unaware of any termination issue.

Respondent maintains, as part of its attendance rules, a requirement that individuals who are ill and unable to come to work, call to advise of their intended absence at least once every 3 days. Garcés admitted he was aware of the rule, not only because he was a longtime employee, but also because he, as a union steward, was obligated to be familiar with plant rules. Clearly, his failure to call between March 8 and 15[18] was a breach of the rule, as was his failure to call from March 19 through 21. (Gaytan properly observes that Garcés needed to call in the morning of March 21, the third day in the last sequence; once again he did not, and Gaytan was free to apply the rule, for the 3-day rule had been breached yet one more time.) Who knows how Respondent would have reacted had Garcés submitted any of the doctor's reports. Given the severity of the claimed illness, Respondent may well have understood the problem. Yet Garcés made no effort to help himself here. One may well ask why he did not.

Analysis and Conclusions Concerning Gerardo Garcés

From the General Counsel's point of view, a prima facie case for a violation of Section 8(a)(3) had been made out. First, he observes the Garcés was a union steward and part of the Union's negotiating committee. Furthermore, he notes that Garcés seemed to be performing his duties as a union steward on the morning of March 2 when he took the employees' part in asserting that conditions were too windy to work safely. This, notes the General Counsel, was an annoyance sufficient to give Romo a reason to discharge Garcés. Romo, in fact, acknowledges he was annoyed when he first heard the men were not working and when he saw Garcés walking toward him accompanied by thirty employees.

However, Romo's annoyance over that issue quickly passed. His review of the situation with Sanchez and subsequent discussion of the matter with the safety committee caused him to rethink the situation. The weather conditions were such that everybody agreed, including the plant's general manager, that individuals should make up their own mind about whether they wanted to stay and work or whether they wanted to leave. Certainly Romo never said anything to anybody about taking a reprisal against Garcés for his activity that morning. Yet, in the middle of all that, Garcés betrayed himself, by allowing proof

[17] The March 25 slip, issued after the discharge, recommended 5 days off.

[18] March 9 and 10 were weekend days. His third day would have been Tuesday, March 12, but he did not call. Nor did he call on Wednesday or Thursday, waiting until early Friday morning, March 15.

of the accuracy of his nickname to surface. First, Sanchez, and then Romo, smelled alcohol on his breath. Romo, at least, knew Garcés had come in late that morning and also knew that Garcés had never gone to his workstation. That, together with Garcés' history of alcohol abuse combined with his eagerness to avoid work, made Romo suspicious that Garcés had come to work unfit for duty,[19] no matter what the merits of the windiness issue were. Romo was well within his rights to insist that that Garcés submit to an alcohol screen.

Romo's directive to Garcés to go to the clinic for the screen was based on reasonable suspicion that Garcés had reported to work under the influence of alcohol. At that point, Garcés took steps to evade the request. When fellow Steward Acosta advised him what Romo wanted, Garcés decided to leave and to deny that he ever understood he was to go to the clinic, whether with Baltazar or by himself. He even asked Acosta to lie as part of his cover story. Furthermore, there is no doubt that Garcés has been less than forthright during the course of his testimony. His penchant for shading the truth can be seen throughout his testimony. It is so severe one may even ask whether his claim of illness may be believed. He would have us accept his claim of acute bronchitis/flu without scrutiny.

Be that as it may, the General Counsel looks to Respondent's letter of discharge and argues that it is inconsistent with the arguments Respondent is now making and, therefore, Respondent's defense must be seen as shifting and an attempt to paper over the real reason for the discharge. I disagree.

Gaytan's letter simply says, "Since we haven't heard from you, your employment has been terminated." The General Counsel cites this language solely as a reference to breaching the attendance rules, allowing that Respondent's current addition of evading the alcohol screen was never a reason for the discharge. I do not read the letter so narrowly. The letter obviously included both issues. I do think that attendance is an issue that may be found there. Yet, Romo really wanted to talk to Garcés about why he had evaded the alcohol screen. Given Garcés' absence for nearly 3 weeks without any word from him whatsoever, the letter clearly encompasses that issue as well. There is nothing misleading about the discharge letter and it may not be invoked as evidence of a reasoning shift.

That being the case, I apply the Board's *Wright Line*,[20] analysis. Under that rule, once the General Counsel has put on a prima facie case, the burden of proof shifts to Respondent to rebut it; a prima facie case has been made out even if the protected conduct was only a "motivating factor" in the discharge. Here, it has been shown Garcés, as a steward, was instrumental in calling a safety-related partial shutdown on March 2. And the timing of his discharge seems to coincide, at least in a general way, with that incident. However, animus is weak, as Romo actually accepted Garcés' argument that the day was somewhat unsafe. It was not until Garcés showed himself likely to be inebriated did Romo take any steps against Garcés. But, the steps taken were those that would be taken against any employee who reported to work under the influence. Garcés was not singled out for his union/protected activity or status. He was selected because he seemed unfit for work. When Garcés realized that Romo had caught on to his condition, he became deceitful and evasive. He induced Acosta to lie for him and drove away claiming he didn't know what Romo wanted and was unaware that Baltazar was to drive him to the clinic. Besides, he reasoned, the crew had now been sent home[21] so whatever his condition may have been, he was entitled to leave.

That behavior was immediately followed by an unexplained absence that Respondent tolerated for almost 3 weeks. Respondent only had some vaguely explained "illness" calls to rely on. At the same time, it knew Garcés was not complying with the 3-day call-in rule. At some point, it became entitled to take action against an employee who had absented himself for a lengthy period without much explanation and who was not following the call-in rule. In that circumstance, I find that Respondent has, under *Wright Line,* rebutted the General Counsel's prima facie case. The rules apply to all employees, even union stewards, as Garcés acknowledged. Moreover, the General Counsel has not shown that Garcés was treated differently than any other employee who came to work smelling of liquor, or one who breached the 3-day call-in rule. Nor, of course, is there a comparable employee who responded both evasively and deceitfully as Garcés did here. It is, therefore, clear that Garcés would have been treated the same way even in the absence of any protected conduct or status. The General Counsel's case has been rebutted. Accordingly, the portion of the complaint relating to Garcés' discharge will be dismissed.

D. The Legal Framework with Respect to Striker Misconduct

Before discussing each of the strikers' alleged misconduct, it is appropriate to be aware of the Board's yardstick against which striker misconduct is to be measured. We start, of course with the Act's guarantee under Sections 7 and 13 of the right to strike (and refrain from striking). Each of the employees listed in the complaint did participate in the strike, but each of them has been discharged because of allegations that each committed acts of misconduct in his capacity as a striker sufficient to warrant their being denied reinstatement at the end of the strike. The General Counsel has argued, during the course of the hearing, and to a lesser extent in its brief, that the conduct which Respondent has shown these individuals to have committed is the kind of conduct which should be excused as not being particularly offensive. Indeed, many of the incidents which Respondent proved were of the verbal variety or perhaps not rising to the level of a crime or disturbance of the peace. The same, of course, can be said of an employer's threats that may nonetheless be unfair labor practices within the meaning of the Act. In 1984, the Board issued a clarification of its striker misconduct scrutiny when it decided *Clear Pine Mouldings*, 268 NLRB 1044 (1984). The case is worth re-reading because too

[19] It goes almost without saying that it is unacceptably unsafe for a table saw operator to perform that work while impaired by alcohol. The risk of severe injury is simply too high.

[20] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Naomi Knitting Plant*, 328 NLRB 1279 (1999).

[21] An exaggeration as those who wanted to stay were allowed to do so.

often we forget what it actually said about strikers' verbal conduct. At the risk of overstating what should now be well understood, I quote the Board's analysis in full, found Id. at 1044–1047, including footnotes (here, as endnotes):

> Section 7 of the Act gives employees the right to peacefully strike, picket, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 7 also grants employees the equivalent right to "refrain from" these activities.
>
> Previously, the Board has held that "not every impropriety committed in the course of a strike deprives an employee of the protective mantle of the Act" and that "minor acts of misconduct must have been in the contemplation of Congress when it provided for the right to strike . . . ."[6] However, the Board has also acknowledged that "serious acts of misconduct which occur in the course of a strike may disqualify a striker from the protection of the Act." [7]
>
> The difficulty lies in deciding whether particular strike misconduct results in the loss of statutory protection the employees otherwise would have. In the past, the Board has held that verbal threats by strikers, "not accompanied by any physical acts or gestures that would provide added emphasis or meaning to [the] words," do not constitute serious strike misconduct warranting an employer's refusal to reinstate the strikers.[8] On the other hand, the Board has held that verbal threats which are accompanied by physical movements or contacts, such as hitting cars, do constitute serious strike misconduct.[9] The Board summarized its standard for finding strike misconduct based on verbal threats in *Coronet Casuals*, where it stated that "absent violence . . . a picket is not disqualified from reinstatement despite . . . making abusive threats against nonstrikers." . . .[10]
>
> We disagree with this standard because actions such as the making of abusive threats against nonstriking employees equate to "restraint and coercion" prohibited elsewhere in the Act and are not privileged by Section 8(c) of the Act. Although we agree that the presence of physical gestures accompanying a verbal threat may increase the gravity of verbal conduct, we reject the per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts. Rather, we agree with the United States Court of Appeals for the First Circuit that "[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker."[11] We also agree with the United States Court of Appeals for the Third Circuit that an employer need not "countenance conduct that amounts to intimidation and threats of bodily harm."[12] In *McQuaide*, the Third Circuit applied the following objective test for determining whether verbal threats by strikers directed at fellow employees justify an employer's refusal to reinstate: "'whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'"[13] We believe this is the correct standard and we adopt it.[14]
>
> The legislative history of the Labor Management Relations Act supports the adoption of such a standard. Although the Act specifically recognizes the right to strike,[15] and although any strike which involves picketing may have a coercive aspect, it is clear that Congress never intended to afford special protection to all picket line conduct, whatever the circumstances.[16] The legislative history of the Labor Management Relations Act clearly indicates that Congress intended to impose limits on the types of employee strike conduct that would be considered protected. The right to strike embodied in Section 13 of the Act was modified with the passage of the Taft-Hartley Act in 1947. The amendments to Section 13 included a provision that nothing in the Act shall be construed "to affect the limitations of qualifications on" the right to strike. The legislative history of this amendment[17] indicates that it was designed, inter alia, to incorporate into the Act the restrictions on the scope of protected strike activities found by the Supreme Court in *Fansteel Metallurgical Corp. v. NLRB*.[18] In *Fansteel*, although the specific type of striker misconduct was different from that presented in the instant case, the reasoning of the Court is nevertheless applicable here. There, striking employees had seized their employer's plant. The Court held:[19]
>
> > The seizure and holding of the building was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company . . . *or other unlawful acts in order to force compliance with demands.* To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society. [Emphasis added.]
>
> Interpreting Section 13 (even before modification of that section by Taft-Hartley), the Court held that "this recognition of 'the right to strike' plainly contemplates a lawful strike,—the exercise of the unquestioned right to quit work."[20] The Court went on to state:[21]
>
> > There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights.
>
> There is also evidence in the legislative history of the Taft-Hartley Act that Congress was acutely aware of, and concerned with curbing, picket line violence in general.[22]
>
> We believe it is appropriate, at this point, to state our view that the existence of a "strike" in which some employees elect to voluntarily withhold their services does not in any way privilege those employees to engage in

other than peaceful picketing and persuasion. They have no right, for example, to threaten those employees who, for whatever reason, have decided to work during the strike, to block access to the employer's premises, and certainly no right to carry or use weapons or other objects of intimidation. As we view the statute, the only activity the statute privileges in this context, other than peaceful patrolling, is the nonthreatening expression of opinion, verbally or through signs and pamphleteering, similar to that found in Section 8(c).[23]

In deciding whether reinstatement should be ordered after an unfair labor practice strike, the Board has in the past balanced the severity of the employer's unfair labor practices that provoked the strike against the gravity of the striker's misconduct.[24] We do not agree with this test. There is nothing in the statute to support the notion that striking employees are free to engage in or escalate violence or misconduct in proportion to their individual estimates of the degree of seriousness of an employer's unfair labor practices. Rather, it is for the Board to fashion remedies and policies which will discourage unfair labor practices and the resort to violence and unlawful coercion by employers and employees alike. In cases of picket line and strike misconduct, we will do this by denying reinstatement and backpay to employees who exceed the bounds of peaceful and reasoned conduct.[25]

[6] *Coronet Casuals*, 207 NLRB 304, 305 (1973).

[7] Id. at 304.

[8] *W. C. McQuaide, Inc.*, 220 NLRB 593, 594 (1975), enf. denied in pertinent part 552 F.2d 519 (3d Cir. 1977). See also *A. Duie Pyle, Inc.*, 263 NLRB 744 (1982); *Georgia Kraft Co.*, 258 NLRB 908, 912–913 (1981), enfd. 696 F.2d 931 (11th Cir. 1983), cert. granted [464 U.S. 981] 52 U.S.L.W. 3386 (Nov. 14, 1983) (No. 83–103); *Arrow Industries*, 245 NLRB 1376 (1979); *MP Industries*, 227 NLRB 1709, 1711 (1977).

[9] *Hedstrom Co.*, 235 NLRB 1198, 1198–[11]99 (1978), enfd. 629 F.2d 305 (3d Cir. 1980); *Pepsi Cola Bottling Co.*, 203 NLRB 183 (1973), enfd. in pertinent part 496 F.2d 226 (4th Cir. 1974); *Alabaster Lime Co.*, 194 NLRB 1116 (1972).

[10] *Coronet Casuals*, 207 NLRB at 304–305.

[11] *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977), denying enf. in part to 227 NLRB 1200.

[12] *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977), denying enf. in part to 220 NLRB 593 (1975). We read the *McQuaide* standard to essentially adopt a "reasonably tends to restrain and coerce" measure for the loss of reinstatement rights.

[13] Id. at 528 (quoting *Operating Engineers Local 542 v. NLRB*, 328 F.2d 850, 852–853 (3d Cir. 1964), cert. denied 379 U.S. 826).

[14] Previous Board decisions that failed to apply this standard, including the cases cited in fn. 8, above, are overruled to the extent they are inconsistent with our decision today. In accordance with our usual practice, we shall apply the Third Circuit standard to all pending cases in whatever stage. *Midland National Life Insurance Co.*, 263 NLRB 127, 133 fn. 24 (1982).

We would also apply an analogous standard to the assessment of strikers' verbal and nonverbal conduct directed against persons who do not enjoy the protection of Sec. 7 of the Act.

[15] Sec. 13 of the Act.

[16] See generally H.R. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., reprinted in Legislative History of the Labor Management Relations Act, 1947 at 542–544. "It is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the Act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the Act." Id. at 544. "[I]n section 10(c) of the amended act ... it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharging were committed in connection with a concerted activity." Id. at 543.

[17] Views of Senator Taft, Rep. No. 105 accompanying S. 1126, 80th Cong., 1st Sess., reprinted in Legislative History of the Labor Management Relations Act, 1947 at 434.

[18] 306 U.S. 240 (1939).

[19] Id. at 253.

[20] Id. at 256.

[21] Id. at 257–258.

[22] For example, the House Committee on Education and Labor, by Congressman Hartley, stated:

> For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act....
>
> The employer's plight has likewise not been happy.... He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees.... He has had to stand helplessly by while employees desiring to enter his plant to work have been obstructed by violence, mass picketing, and general rowdyism.

Rep. No. 245, on H.R. 3020, 80th Cong., 1st Sess, reprinted in Legislative History of the Labor Management Relations Act, 1947 at 295–296.

[23] This of course does not prevent a union from advising its members of the possible consequences crossing a picket line may have under lawful provisions of the union's constitution and bylaws.

[24] *Coronet Casuals*, 207 NLRB at 305 fn. 15. See also *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir. 1954), cert. denied 348 U.S. 883 (1955), which holds that, where collective action is precipitated by an employer's unfair labor practice, a finding that the employees' conduct is not protected under Sec. 7 does not, ipso facto, preclude the Board from ordering the employer to reinstate the employees if such an order would effectuate the purposes of the Act, and which uses the same balancing test to determine whether reinstatement is warranted.

[25] Balancing the misconduct of strikers against the seriousness of the employer's unfair labor practice is inappropriate because it condones misconduct on the part of employees as a response to the employer's unfair labor practice and indeed makes it part of the remedy protected by the Act. Retaliation breeds retaliation and, in the emotion-charged strike atmosphere, retaliation will likely initiate an escalation of misconduct culminating in the violent coercive actions we condemn. It would be virtually impossible for all practical purposes for employees to know what is expected of them during a strike because balancing remains illusive and would be applied only long after the operative events have occurred. Likewise we believe that the unclear and permissive standards previously employed by the Board have failed to adequately protect employee rights. Rather, it is our purpose to dis-

> courage any belief that misconduct is ever a proper element of labor relations. Only in this way can we honor the Act's commitment to the peaceful settlement of labor disputes without resort to coercion, intimidation, and violence. Therefore, we refuse to adopt a standard which will allow the illegal acts of one party to justify the wrongful acts of another.

Clear Pine Mouldings, supra, therefore, stands for the proposition that a striker's conduct which would tend to discourage a nonstriking employee in the exercise of his or her right to refrain from striking will result first in rendering that conduct unprotected and second depriving the striker of reinstatement at the end of the strike. Disqualifying misconduct clearly includes verbal threats against both statutory employees and, by analogy, nonstatutory employees. *Clear Pine Mouldings*, supra at 1046 fn. 14, 1048. The Board continues to hold that view. *Pratt Towers, Inc.*, 338 NLRB 61, 68 (2002); *Virginia Mfg. Co.*, 310 NLRB 1261, 1272, (1993), enfd. 27 F.3d 565 (4th Cir. 1994); *General Chemical Corp.*, 290 NLRB 76, 82 (1988); and *Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988). And, according to *Clear Pine*, the Board has declared that its responsibility is to honor the Act's commitment to the peaceful settlement of labor disputes and deter any party's resort to coercion, intimidation, and violence. Importantly, it said, "As we view the statute, the only activity the statute privileges in this context, other than peaceful patrolling, is the nonthreatening expression of opinion, verbally or through signs and pamphleteering, similar to that found in Section 8(c)." With those basic tenets in mind, I proceed to the evidence.

E. The Strikers

Based on a stipulation, the parties are in agreement that the 28 individuals named in paragraph 10 of the complaint were all strikers and that all 28 were "terminated" (discharged) upon the conclusion of the strike. Based on the stipulation I directed Respondent to defend its decision to deny them reinstatement. In general, Respondent asserts that each of them was fired because of strike-related misconduct. Except for three who are accused of assaulting nonstrikers at a liquor store parking lot after work, each of the dischargees' circumstance is relatively discrete and requires individualized treatment.

The strike began in the early morning of Thursday, April 18, following an unsuccessful negotiating meeting the day before. The General Counsel and the Union contend that union officials Miller and Rojas gave the strikers proper instructions concerning their behavior and that the instructions were followed. The instructions required each striker to refrain from touching individuals and to respect the property of the employer and nonstrikers. Furthermore, they note that the Union had notified the county sheriff's office of the strike and that for the most part a deputy, often Bob Fletcher who headed the labor detail, was present. Sometimes there were three or four deputies in the area. The officers' presence supposedly served as a reminder that strikers were to be on good behavior.

One of the strikers, truss assembler Enrique Luqueño, described the Union's instructions:

> And we held a meeting there [across the street from the main gate]. And so they [union official Fernando Rojas] told us, as to what was prohibited to do, and what we could do . . . That we could say everything that we wanted to, and not to. . . . Yes, not to attack anyone but that we could say anything we wished to. But we should not cross the line. But we could say anything that we wanted to, but not to attack anyone, as—also, not to threaten anyone, nor to touch the rear gates, and things like that. . . . Nor throwing stones, or anything like that.

The "say anything we want" instruction appears to have contributed to much that followed. While the inflammatory language the strikers chose may or may not have driven some strikers to misconduct, it certainly kept things unsettled. Respondent presented strong evidence that the prohibition against attacking anyone was not followed. There was an April 22 assault upon nonstrikers at the 99 Cent Liquor Store located in a strip mall not far from the plant; rock throwing incidents from railroad cars; automobile chases, and efforts to prevent ingress through tire spiking and jamming padlocks. Furthermore, there is credible testimony describing a wide variety of threats, ranging from deportation to physical violence including beatings and sexual assaults. There is also some evidence that strikers vandalized the automobile of a job applicant.[22] Clearly the General Counsel and Respondent have divergent perceptions over the peaceable nature of the strike.

The strike ended 15 days later, on Thursday, May 2, when the Union abandoned it, unable to garner enough support to prevent Respondent from continuing to operate. Indeed, although the strike caught Respondent by surprise, from the first day it was able to function reasonably well as many employees crossed the picket line and went to work.[23] The Union's failure to convince a large percentage of the employees to join the strike, together with its bargaining disappointments, probably contributed to the strikers' frustration. There is no doubt that the atmosphere quickly became charged.

On the first day of the strike, Respondent began receiving telephone calls from employees who wanted to come to work, but who said they had been prevented from doing so by the pickets. As a result, Respondent rented some passenger vans/buses and arranged to meet the employees at various offsite locations so they could be convoyed through the gate. These included two different hotel/motels and a supermarket. Initially, the vans' windows were uncovered, and the strikers could easily determine the identities of the occupants. Later, the windows were obscured by black plastic. However, once the crossers' identities became known, incidents began to occur. In addition, the strikers quickly discovered the pickup locations by following the vans. Incidents occurred at those locations as well. The most serious episode occurred at a strip mall not far from the plant on Monday afternoon, April 22, 4 days after the strike began. It was not a dropoff site. This event may well have set the tone for what followed.

The following discussions will refer to the discharged strikers' circumstances in a rough chronological order. The number in parenthesis next to each name refers to striker's number in

[22] The nonstrikers also held a high degree of suspicion against the strikers due to some unattributable vandalism of autos at nonstrikers' homes.

[23] It is estimated that more than 30 percent of the employees refused to join the strike; moreover, many abandoned the strike as it went on.

paragraph 10 of the complaint, which is arranged somewhat alphabetically. The chronology is not perfect, however, as most of the witnesses were unable to provide exact dates. They could, nevertheless, describe the events in which they participated or which they observed.

1. Juan Velasquez Chavez (5), Zacarias Guillen (11), and Juan Loera (13)

a. The victims' version

Respondent asserts that Juan Velasquez Chavez (Chavez), Zacarias Guillen, and Juan Loera were three strikers who (together with Hector Guerra, a former employee and Loera's brother-in-law) committed an assault on April 22 at the strip mall in front of the 99 Cent Liquor Store. These three admit that a violent event took place there, but deny responsibility, asserting they acted in self-defense.

Respondent presented three witnesses. Kelvin Lucero, a 2-year employee who at the time was a jig leader helper, testified that on the morning of April 22 while getting ready to go to work, he discovered his car had been vandalized. As a result, he chose to stay home that day to attend to the car. In the afternoon, about 3:30, he was driving home from errands connected to the car when he stopped to buy a soda from the 99 Cent Liquor Store. As he began to exit the parking lot, he encountered fellow employees Irving Ruano and Luis Samayoa (a/k/a Gallina or Hen; Chicken) arriving in Ruano's 30-year-old yellow Volkswagen Beetle (which he called "La Cucaracha" or "The Cockroach").[24] They greeted each other as they passed, with Lucero's friend Samayoa asking him why he had not come to work that morning. Lucero found a parking spot near the exit and walked back to converse with them. By the time he reached their car, Samayoa had jumped out and gone into the liquor store, so he stood next to Ruano who remained in the driver's seat and spoke with him for a few minutes waiting for Samayoa to return.

Lucero says as he and Ruano conversed, the car was suddenly surrounded by four people, three of whom who began pounding on the car's sides and kicking it. He turned around to see who was behind him and was struck in the right eye by Guillen. During the incident, he recognized all four as Guillen, Loera, Chavez, and Guerra. He knew them all from work. Guillen began to advance on him displaying an ice pick and acting as if he intended to stab Lucero. Lucero backed away. As he did so, Samayoa came out of the store and shouted at them, "Calm down! Don't fight!" Guillen halted, but almost immediately, Lucero saw Loera strike Samayoa in the face, knocking him to the ground. Guerra moved to the fallen Samayoa and began kicking him in the head. Lucero said that almost immediately Chavez called out, "Let's go! Let's go!" The four quickly left and the police and an ambulance were called. Samayoa was hospitalized overnight. Lucero later saw that the Cucaracha's tires had been flattened.

Irving Ruano,[25] the car's owner, testified that the two flat tires had suffered puncture holes, a brake light had been broken and the left front door dented.

Ruano was a brand new employee, having been hired the day before the strike as an assembler. At the time of the incident, he did not know very many people at the plant, striker or nonstriker, except for Samayoa, whom he had known before. He was giving Samayoa and another new employee, Mario (Valdez?) a ride that day. Mario was in the back seat of the Cucaracha. Ruano had seen Loera at the picket line but did not know who he was. He had not seen Chavez or Guillen, or even met Lucero before the confrontation. Ruano became aware almost immediately that Lucero knew them all, but it was not until after Human Resources Manager Gaytan showed him their photographs and he identified them as the assailants, that Ruano learned their names.

In any event, he was able to put the names with the faces during his testimony. He said he was sitting in the driver's seat of the Volkswagen talking to Lucero while Samayoa was inside the liquor store. Mario was in the back seat. He recalled four people coming to his car, felt some bumps like kicking his car, then observed Guillen strike Lucero in his eye. He also saw a sharp object in Guillen's hand, making a stabbing motion. He says, Loera then pulled the driver's door open and kicked him in the leg. Mario started to get out on the passenger side, Loera pulled away in response, allowing Ruano time to unbuckle his safety belt so he could get out. At that point Samayoa appeared, saying something about calming down. Ruano then saw Loera strike Samayoa in the eye with his fist, felling Samayoa. Ruano says that Guillen (apparently leaving Lucero) joined Loera and both began kicking the downed Samayoa. Almost immediately, Ruano says he was approached by Chavez who, threatening to fight, said, "Come on, faggot." The two circled for a moment. Ruano pulled out his cell phone and dialed what he told Chavez was the police. One of the four told his fellows "Let's go" and the four left. In fact, Ruano (who speaks only Spanish) called his uncle who lived a block away, but who is bilingual, and the uncle called the police. Moments later, Ruano says, Lucero borrowed the phone and called Gaytan, saying they had been attacked by strikers. The uncle arrived almost immediately, followed by the police and the paramedics. The following day he was called to Gaytan's office, looked at the photos and gave an oral description of what had happened.

The principal difference between Lucero's testimony and that of Ruano is that Lucero identified Samayoa's second assailant as Guerra; Ruano said it was Guillen. For the purposes of this case, the discrepancy is insignificant.

Luis Samayoa is a 5-year employee with Respondent and at the time of the strike was a team leader. Samayoa testified that he noticed, after he had gotten off the company bus at one of the hotel dropoff points and entered Ruano's VW Beetle, that

[24] Lucero also recalls a third person in the car but does not know who he was.

[25] The index to Tr. vol. 8, where Ruano's testimony may be found, inadvertently omits the "Ruano" portion of his name. He testified his surnames are "Ruano Rendon," but the index only picked up "Rendon." His full name is Irving Rolando Ruano Rendon and is correctly shown on p. 1193.

they were being followed in another car by three people. One was a person he knew as Zacarias and another he knew as Juan Velasquez. He could not recall the third. I find that "Zacarias" is Guillen and Juan Velasquez is Juan Velasquez Chavez. He told Ruano that he needed to pick up a card (phone card, according to the police report) at the "99" so Ruano drove there. When he exited the store with his purchase, he saw Zacarias attacking Lucero with an ice pick, but the others saw him as he approached and immediately came after him. "I said, 'Hey, what is going on?' He said, 'No, the thing is with you,' and that is when he hit me the first time and it was over here (gesturing) and that is when he knocked me out." He identified the individual as "Juan Nogera," apparently misspeaking. I find that he meant "Juan Loera" giving a physical description fitting Loera. Out of the corner of his eye, he says he saw Zacarias hit him as he fell. He also testified he was kicked after he was down.[26]

b. The dischargees' version

Juan Carlos Velasquez Chavez testified that at the time of the strike he was a day-shift jig loader who had been employed by Respondent for 1-1/4 years. He testified that he never received any instructions from the Union regarding how to behave during the strike. He said he was at strike locations only during the first few days of the strike, from April 18–25. He was at the main gate, the railway gate, and at one of the hotel pickup points. He said he only held a picket sign but didn't sing or chant. He asserts he was principally an observer although he did yell at nonstrikers.

Juan Loera was a day-shift sawman when the strike began. He had been hired in 1993 and had worked at the plant for 9-1/2 years. He says the Union only gave simple instructions regarding how to conduct oneself during the strike. He recalls being told: "[I]f you are going to go [on] strike, just behave. Don't do nothing out of order." He was usually at the main gate, was at the rail spur entrance on one occasion, and also went to the Fontana Motor Lodge once for a dropoff. He sang songs and chanted slogans. At the motel his lexicon was more forceful: "I was screaming in Spanish. Come on, you f—kers. Come out of there. Don't be faggots. Why the f—k do you go in there?" He said he participated in the beginning of the strike but after 2-1/2 weeks, i.e., about 10 days after the liquor store incident, he stopped coming to the picket line. He also said that after the "fight" he only went to the main gate once, the day after the liquor store incident.

Zacarias Guillen was a day-shift jig leader. He had worked for Respondent for about 2-1/2 years. He testified that the Union's instructions allowed the strikers to "could yell whatever we wanted." He denied that the Union said there were things the strikers should not do. He went to some of the hotels for dropoff. He was at the hotels nearly every day. He said the strikers would tell the nonstrikers, "'Beggars,' to 'go f—k themselves,' to 'have shame and dignity.' That's all. We would show them the fingers; [make obscene gestures]." After the incident in front of the liquor store, Guillen no longer participated at the picket line(s) or the hotels.

Chavez drew a small diagram of the area in which the incident occurred. (GC Exh. 18.) The diagram is helpful in the sense that it describes the strikers' relative position to the nonstrikers at the start of the incident. All participants agree that it occurred in the midafternoon. The strikers all agree that they had first gone to the Fontana Motor Lodge dropoff point where they had verbally given the nonstrikers a hard time. Chavez knew the Volkswagen had been at the Fontana Motor Lodge and was being used by a nonstriker, though he says he didn't know the car owner's name.[27]

The liquor store is at one end of a strip mall containing, at the very least, one other business, a restaurant. Chavez' diagram shows that the liquor store and restaurant share a common wall, but their entrances are around the building corner from one another. Both entrances open to the parking lot. If one parks immediately in front of the restaurant, he cannot be seen from a parking space immediately in front of the liquor store. However, if one were driving south on Citrus Avenue (from Foothill Blvd.) to the strip mall, one could, if the parking lot was not too busy, see any vehicle in front of the liquor store, particularly one as distinctive as the Cucaracha. One could immediately make a left turn onto Arrow Boulevard and enter the lot from a driveway further east and park in front of the restaurant. If one did that, he could be sure that he could not be seen from the liquor store and relatively sure that he had not been seen entering the lot all. In a very real sense the diagram shows a possible setup for an ambush.[28]

Indeed, Loera took that exact route. He parked in front of the restaurant. Three of the four occupants got out immediately, ostensibly to get a beverage (sodas, according to Guillen) from the liquor store. The fourth (Chavez said it was he), stayed in the car, a blue Cadillac. According to Loera and Guillen, they, accompanied by Loera's brother-in-law[29] Hector Guerra,[30] all went around the corner toward the liquor store

[26] Despite Samayoa's testimony that he was "knocked out," it is clear that he was not immediately rendered unconscious, but was instead severely dazed; he recalls being kicked and he heard Ruano calling the police. He believes he did lose consciousness at some point, after the arrival of the police. He also seems to have lost track of time, saying they kicked him for 10 minutes, when it must have been for only a few seconds. He was unable to explain to the police what had happened. His recall was triggered the following day when someone explained how he had gotten to the hospital. His lack of clarity is understandable.

[27] Inexplicably, Chavez said the Volkswagen Beetle was light brown; Loera said it was maroon.

[28] It is also conceivable, given the possibility of a divided roadway on Citrus, that a southbound driver wishing to enter the strip mall would necessarily follow that route, since a divider on Citrus would prevent a left turn directly into the liquor store. Even so, the diagram does show an entrance at that location. None of the three strikers explained why the more circuitous route was taken. Chavez' diagram suggests that Lucero's car had been left near the Arrow entrance. If so, at least Ruano's car, if not all three, probably entered there. Even so, why did Loera park in front of the restaurant instead of seeking more convenient spaces in front of the liquor store?

[29] Guillen testified he did not know the name of the man who accompanied them.

[30] Guerra was not called to testify, although the General Counsel, with a modicum of effort, should have been able to locate him through Loera if it wished.

where they encountered "Calvin" (Kelvin Lucero) standing next to the Volkswagen.

According to Guillen, as the three rounded the corner Calvin began making fun of them and he replied in kind. He says Calvin then kicked him in the knee and he responded by hitting Calvin in the eye. He says Calvin ran to his car (which according to the diagram, Guillen could not have observed, since it was parked east of the Arrow driveway and no doubt screened by the building). That, of course, constitutes an admission that he (and his group) knew Lucero's car and could surmise (if they hadn't already seen him) that Lucero was visiting the mall.

Guillen says Lucero reappeared a few moments later with a baseball bat which he swung in a threatening manner. He says he heard Loera tell Calvin that there would be problems if he hit anyone with the bat. As he heard Loera speak, a man came out the store saying, "Leave him for me!" That individual then grabbed the brother-in-law by the shirtfront. Guillen did not then know the man who came from the store, but says he learned later that it was "La Gallina" (Samayoa). He says as soon as the man from the store grabbed the brother-in-law's shirt, the brother-in-law punched the man in the face. Guillen asserts that he immediately started to return to the car and knows nothing more of what happened. He did not see anyone fall. He does say the fourth man was still at the car, implying that he (Chavez, whom he only identified as "the fat guy") had never left it. On cross, he said he could not remember if the fourth man ever got out of the car.

On cross, Guillen, in describing his encounter with Calvin, says that Calvin first kicked him then threw a punch. It was not until the punch was thrown that he responded by hitting Calvin above the eye. His affidavit says the punches were "about the same time." Then, without prompting, he repeated: "Well, he just kicked me, and I just threw a punch at him, and that's it."

When asked about the brother-in-law and Gallina on cross, Guillen professed very little knowledge. In his affidavit, however, he said, "When we were close to where the cars were parked in front of store, the striker hit the non-striker, who fell down." That statement carries two implications: First, that he did see Gallina fall, and second, that he knew Gallina was a nonstriker. In fact, he admitted he knew Gallina was a night-shift worker.

On cross, he said at the moment he started to leave, Calvin reappeared with the bat. He avoided the bat by backing away. He described the bat as "wood bat." He also denies that he or Loera ever kicked or hit Gallina, asserting that anyone who said so must be lying. He also denies that anyone from the other group said to leave them alone. Then he said he did hear that, but they also said something to the effect of "one on one."

Loera testified that on the one occasion when he went to the Fontana Motor Lodge he saw Calvin (Kelvin Lucero) getting off the bus and get into his car. This testimony is peculiar, because Lucero had not gone to work that day and had not been at the motel. Loera agrees, however, that he was joined that day by Zacarias (Guillen), Juan (Chavez), and Guerra,[31] his brother-in-law. They decided to get something to drink at the liquor store located at Citrus and Arrow. He denies that he followed anyone who had left the motel. Per the diagram, he parked his car around the corner from the liquor store. He denied that he was following anyone.

Loera said when he and his companions came around the corner, he saw Calvin inside a Volkswagen Beetle. Calvin was talking and laughing with some others and Loera concluded they were laughing at him. He says, "they" (four of them) got out of their car and approached his group. One of them said, "Now, what are you f—kers up to?" Loera testified that at that point, "[w]hen they said all that, they were walking towards us. They told us that and then they just went like that [pushing gesture] to us, well, to me. Because I don't remember whatever, but that guy that said that, he was in the back of the car with Calvin because I remember him because he was the one talking to me, right. He just went like that and just pushed me. And we started fighting after that."

Loera did not describe much that happened to others, but did say he suddenly observed Calvin with a bat and Guerra warned about it ("Watch out because that fool has a bat"). He said Calvin never struck anyone with the bat, only threatened to do so. At that point, he said, everything stopped. He said they all began to return to his car when a fellow appeared in front of the liquor store. Loera didn't know him but later learned his nickname was "Gallina." That man yelled to the others, "Let's go beat them up . . . . Hey, f—ers. Where the f—k are you going? Let's go beat the shit out of them."

Upon hearing that, Loera and the other two turned back. He testified:

> A. [WITNESS LOERA] And then we went back. Me and my brother-in-law and I don't remember if Zacarias went back or not, because I was in the front with my brother-in-law. We were about to get in the car and we went back, right. When we went back to the little corner where we were at at first, this other guy, the opponents started saying, "Oh, no, no. One on one. One on one, right." They were saying that in Spanish though. One on one.
>
> Q. [BY MR. LAKS] Do you remember the Spanish words?
>
> A. Uno y uno, uno y uno. One on one. One on one.
>
> Q. At the time, what did you think they meant by that?
>
> A. Yeah. Like they wanted to fight one on one. But the thing is, the guy, the skinny guy that came up at last—
>
> Q. The one that I am going to call Gallina?
>
> A. Yes.
>
> Q. Okay.
>
> A. He went—he said it in Spanish. "Hey, just you and I."
>
> Q. And to whom did he say that?
>
> A. To my brother-in-law.
>
> Q. Mr. Guerra?
>
> A. Yes.
>
> Q. And what happened then?
>
> A. And my brother-in-law, there was like this little curb where the parking lots are at, and that other guy, that skinny guy, he was on the curb and my brother-in-law was on the bottom. And the guy they called Gallina, he tried to

[31] Loera says Guerra had been fired by Respondent 3 months earlier.

swing on my brother-in-law, and my brother-in-law bucked up, and I don't know if tripped with little bump, the parking bump or with the oil or something, he almost fell. But that guy, Gallina, missed my brother-in-law, and my brother-in-law came up and he hit him in the face. The guy they called Gallina, he just fell down.

Q. Okay. If I understand you correctly, Gallina took a swing at Mr. Guerra, but missed

A. Yes.

Q. Gallina was standing, I guess, on the sidewalk so that he as standing on a higher level than Mr. Guerra, who was standing on the parking surface.

A. Yes.

Q. Gallina swung and missed at Mr. Guerra, and then Mr. Guerra swung at Gallina and hit Gallina in the face?

A. Right.

Q. Is that what you described?

A. Yes.

Q. What happened then?

A. That other guy fell, Gallina. He fell on the sidewalk.

Q. Yes.

A. And he just didn't get up. He just stayed there.

Q. What happened then?

A. My brother-in-law, he tried to grab him by the face like that, or grab him by his shoulders or like here by his T-shirt, but at that point, I heard somebody like from the liquor store or something. They were yelling like, "Hey, watch out. Cause [sic] [Call] the cops," or something like that, right. And I just grabbed my brother-in-law like that and we took off.

Q. Where did you take off to?

A. To my car.

Q. And what happened then?

A. We just left the parking lot.

On cross, Loera admitted that he had earlier seen the Volkswagen at the hotel. He also admitted that he knew Calvin was a company employee. There were three in his group because the fourth had stayed behind. And, it is clear that it was initially his three against two, testifying that only two people got out of the VW, Calvin and someone he didn't know.[32] (The third appeared later.) Yet, his affidavit attempts to be more self-protective: "I note that the three who were on the sidewalk and/or coming out of the store, I did not ever (even) recognize as employees." Yet, contradictorily, he said in the same affidavit: "I took on the worker who had come from the back of the car." Obviously, he was aware that the people in the VW were company employees. He testified, both on direct and cross, that the fight started when the other man pushed him. His affidavit, however, glosses over that detail, saying only "we started fighting." He claims he said he had been pushed in his report to the police a week later, but that report has not been offered in evidence.[33]

It was at this point that Loera said Calvin appeared with the baseball bat. Loera was at a loss concerning where the bat had come from since the first time he had seen Calvin at the VW, he didn't have one. Then, after Loera's scuffle with the man from the back of the car, Calvin had suddenly obtained a bat. Oddly, Loera was unable to remember whether the bat was made of wood. (He opined that Calvin must have gotten it from the VW.) And, he said, after the bat's presence stopped the fight, the third man, the skinny one called Gallina challenged the three as they were leaving. They accepted the challenge, but Loera says it was Guerra who felled Samayoa, not him. He, too, denies that anyone kicked Gallina once he was down, and like Guillen, asserted that anyone who says they did is lying.

Both Loera and Guillen agree that once they heard someone call for the police, they left.

> [WITNESS LOERA] Well, we were all like, "Let's go, let's go." Yes. That's why we left. Or we would have left even if the cops were not [called], you know.
>
> Q. [BY MR. MICHALSKI] Well, let me ask you this question then. Did it not occur to you that if Gallina started the fight and the police came and asked, that you should be there to say that he started the fight?
>
> [MR. SELVO]: Objection. Was that a hypothetical question?
>
> [JUDGE KENNEDY]: I'll overrule it.
>
> Q. [BY MR. MICHALSKI]: That did not occur to you?
>
> A. [WITNESS LOERA] No. We just took off.
>
> Q. When you took off, was Gallina still on the ground?
>
> A. When I grabbed my brother-in-law, he was still on the ground, and we took off.
>
> Q. Okay. And did you try to make any attempt to see what had happened to him?
>
> A. No.

Furthermore, both deny that they were in possession of an ice pick.

Chavez testified that he remained in the backseat of Loera's car in front of the restaurant during waiting for his companions to return. As he remained in the car, he observed Calvin, bleeding from the right eye, run from around the building corner, past him, and on to his car which was parked near the Arrow driveway. As a result, he got out and ran to the corner of the building to see what was happening. As he rounded the corner, he saw his companions in a fight with some other people. About that time he said he was forced to duck away from the bat being swung by Calvin who had reappeared. After Calvin missed him, Chavez says Calvin then threatened Guillen with

[32] Loera testified:

> Q. [BY MR. MICHALSKI] So there were two men total that came in the VW?
>
> A. [WITNESS LOERA Yes. That were in the car when I seen them.
>
> Q. All right. Then Calvin and someone else, the two of them got out of the VW?
>
> A. Yes.

[33] At one point, counsel for the General Counsel said he thought Loera's police report had been received in evidence. I believe him to have been mistaken. The only police reports in evidence are GC Exhs. 13 and 14 which are essentially victim reports.

the bat. At that point things stopped and the four of them returned to Loera's car. He says the others followed and someone threw a bottle at hitting Loera's car as they left. He, too, denies that Loera was following anyone and also denies any of his cohorts had an ice pick or were armed in any manner.

On cross, Chavez said that he did not see the altercation begin. He also said that none of the three from Loera's group ever said afterwards that the other group connected to the VW had started the fight. Similarly, none of his group claimed to have been hit by anyone.[34]

Chavez said on cross that he did not know if the other group consisted of Respondent's employees. He was sure. Yet his affidavit refers to them as "workers from the second shift."[35] When asked about Calvin's bat, Chavez said it was gray and appeared to be made of aluminum. This conflicts with Guillen who said it was wood. (Loera claimed to be unable to remember what kind of bat it was.) Chavez also denied that the bat had anything to do with breaking up the fight between Guillen and with whomever he was scuffling. His affidavit differs: "He (Calvin) went over to Zacarias [Guillen] and the worker Zacarias was fighting with and broke them up—since they stopped fighting, then Zacarias tried to get away from the bat." As with Guillen and Loera, it all stopped when they heard someone mention calling the police.

2. Analysis and conclusions regarding the liquor store altercation

After reviewing the testimony of all the participants, I am unable to credit the dischargees' version(s). As can be seen, there are a number of inconsistencies, both internal and among them. I am entirely unimpressed with the baseball bat story and find it to have been a fabrication. First, it seems to have magically appeared. Everyone agrees that Lucero did not have it at the beginning of the incident. Loera opines that he got it from the Volkswagen, but that car belonged to Ruano whom Lucero had just met. He could not have known enough about the car's contents to immediately obtain anything from inside it. Moreover, Chavez, who claims that he saw Lucero running to his car after being cut over the eye never said that he also saw Lucero return from his car with a bat. And, given the swiftness of events, it is entirely unlikely that Lucero would have had time to run to his car and back, then momentarily break the fight up only to have it resume with the supposed appearance of Samayoa from the store. Curiously, Guillen said it was a wood bat, Chavez said it was aluminum, and Loera conveniently could not remember. I simply do not believe that an individual would forget a basic detail such as whether a threatening bat was wood or metal. Anyone familiar with baseball would remember what type of bat had been swung at him or their fellows if they had observed it. This is simply a matter of misfeasors being unable to get their stories straight. Two guessed and one feigned lack of recollection, realizing that such a detail might trip him up. Moreover, Lucero denied having a bat of any kind. The baseball bat story can only be disbelieved.

Furthermore, the flattened tires and the vehicle damage Ruano described are unchallenged; indeed, they are mentioned in the police report (GC Exh. 13, p. 5). Flat tires, door denting, and broken tail lights are not the behavior, of persons who are defending themselves, as claimed by Guillen and Loera. Those acts are the product of angry people; frustrated individuals likely to engage in an assault, such as strikers irate that their fellow employees were undermining the Union's struggle.

And, as I observed above, the very place Loera chose to park his car suggests that an ambush had been (perhaps hastily) conceived. Loera and his group recognized Ruano's yellow VW Beetle from the hotel, they knew there were three nonstrikers in the car and they followed it, as Samayoa observed. Once the VW had halted in front of the liquor store the opportunity to confront the nonstrikers presented itself. They took advantage. Furthermore, I find that the Loera group took steps which suggest their guilt. Not only did they lie about defending themselves, they also fled the scene, something they would not have done had they done nothing wrong. I, therefore, find that the incident occurred much as described by Lucero, Ruano, and Samayoa. I find that the incident began when the four kicked and pounded on the car, broke a tail light and stabbed the Volkswagen's tires with a sharp instrument. Almost simultaneously, Guillen sucker-punched Kelvin Lucero. The pounding was designed both to frighten the occupants and force them to exit the car in a way in which render them vulnerable. Ruano, caught in his safety belt, had trouble exiting, but got clear when Loera moved on Mario who had gotten out on the passenger side; Guillen went with Loera, leaving Lucero both stunned from the blow and backing away from Guillen's weapon. At that moment Samayoa came out of the store and uttered words that drew Loera's attention. Loera then struck Samayoa, knocking him to the pavement. Ruano got out his cell phone and announced he was calling the police at which point Chavez, seeing the damage done to Samayoa, called to his fellows to leave. Neither he nor they wanted to explain their behavior to the police. They only wanted to avoid capture.

On those facts, it is clear to me that the four strikers in Loera's group had essentially conspired to attack some nonstrikers and they did so. There is credible evidence that Loera assaulted Samayoa, that Guillen assaulted both Lucero and Ruano and that Chavez was a part of the attack even if he did not throw a punch. Certainly he was part of the coverup they attempted

[34] Chavez testified:

Q. [BY MR. MICHALSKI] Well, isn't it true, Mr. Chavez, that you did not hear any of them, including Mr. Loera, say they had been hit by the others?

A. [WITNESS CHAVEZ] I never heard them, but I did hear that they were very angry.

Q. Well, you never heard them say that they were hit. Correct?

A. No.

Q. They never said they were hit?

A. No.

Q. Okay. So I want to make sure I have this correct because of the way the question has been stated. At any time, did you hear Mr. Loera say, "I was hit"?

A. No.

Q. Did you hear Zacarias say, "I was hit"?

A. No.

Q. Did you hear the third person in the car say, "I was hit"?

A. No.

[35] Chavez blames the NLRB investigator for the discrepancy, saying it was she who suggested they were workers from the second shift.

afterwards. At the very least, he joined the lie about the bat. The coverup included not only the bat story, but the claim of self-defense, as well as Loera's pointing the finger at the only nonemployee, a person who is not part of this case, his brother-in-law Guerra.

The General Counsel has failed to rebut Respondent's good-faith belief, based on the credible evidence that Chavez, Guillen, and Loera (accompanied by Guerra) assaulted Lucero, Ruano, Samayoa (and a fourth person who is not part of this case) committed strike-based serious misconduct. He has failed to rebut the evidence that those four assailants, as part of the attack on persons also attempted to frighten their victims by beating on the VW. Finally, he failed to rebut the evidence that the four, during the attack, deliberately damaged Ruano's vehicle. This portion of the complaint will be dismissed.

a. Domatilo Acosta (1)

Domatilo Acosta is one of the Union's stewards and has worked at the plant for 20 years. He gave testimony cited earlier in this decision concerning the discharge of Gerardo Garcés. Acosta, as steward, joined the strike when it began. He, of course, was well known to and easily recognized by management officials such as General Manager Karen Wilson and HR Director Miguel Gaytan. Respondent did not recall Acosta at the end of the strike based on its belief that he had exceeded the bounds of civil behavior by verbal threats. He is not accused of doing anything physical.

Gaytan testified that the day after Samayoa had been taken to the hospital following the assault, he observed Acosta shouting at people in the vans as they entered the main gate in the early hours of the morning. He looked through the windows and said loudly said in Spanish, "Where is Gallina, do you know what happened to him?" . . . "Do you want what happened to The Chicken to happen to you?" He repeated that for each of three vans that morning. As Gaytan heard Acosta say the Spanish words he instantly translated them for the benefit of Karen Wilson who was standing next to him. She corroborates that Gaytan told her what Acosta was saying.[36]

Acosta was heard by bilingual security guard Miguel Duran[37] on a daily basis yelling into the vans, "Be careful because we're going to f—k you up, all you assholes. Protect your families because they're going to be taken away from you by INS. We're going to call INS on you." Duran says that Acosta was not the only one who made such remarks. Fellow security guard Norman Sayeg, who accompanied Duran, testified to the same thing.[38]

A similar incident occurred one morning near the rail spur entrance. In an ultimately fruitless effort to avoid the pickets at the main gate, about 30 employees were entering from the rear of the property through the spur gate, having been dropped off by a bus on Lime Street to the east. Several individuals heard Acosta say, among other things, that the workers should watch out because the Immigration Service was coming at 10 a.m. Witnesses who testified to that effect included Gaytan and employees Andres Gonzalez, Rene Martinez-Jimenez ("Wetbacks, at 10 a.m., Immigration is gonna come for you!"), and Ricardo Luna. Luna also testified that Acosta said he was going to grab Luna by the sweatshirt and "kick his ass . . . beat the crap out of you."

Similarly, Jorge Rodelo recalls Acosta on the strike's second day at the main gate saying to the van-riding nonstrikers that the INS was coming at 10 a.m. to get all the "wetbacks." Rodelo also heard Acosta say he was going to beat the crap out of him. Rodelo says Acosta called the employees cowards and assholes, as well.

Acosta admitted calling the nonstrikers names such as "assholes" or "idiots" but denies making any threats. He also admits that he told the nonstrikers, "The Immigration is going to come for you at 10:00 a.m." He denies the remark was directed specifically to any individual, such as Luna, Rodelo, or Martinez-Jimenez. He also claims he did not say that he was going to beat the crap out of anyone. He also denies saying anything to the effect of, "Do you want what happened to The Chicken to happen to you?"

The General Counsel observed that Acosta is an older, mild-mannered man, arguing that it is inconceivable that he would make threatening remarks to others who are younger and stronger than he. The problem with this defense is that given what actually happened to Samayoa (The Chicken), the person who made the threat need not be the person who commits the violence. Moreover, Acosta did admit that he threatened nonstrikers with calling the INS. Such a threat if made by an employer against employees exercising their Section 7 rights is a violation of Section 8(a)(1) as it would reasonably interfere with, restrain, and coerce an employee from exercising that right.[39] That alone is sufficient to meet the *Clear Pine Mouldings* test justifying barring a striker's return. But Acosta's adoption of the attack on Samayoa punctuates the issue in further favor of Respondent's decision. Acosta's denial in the face of multiple witnesses is insufficient to offset their testimony. In essence, the credible evidence supports a finding that Acosta threatened nonstrikers with violence similar to that which befell Samayoa. His credibility is not helped by the testimony that he threatened to "kick the ass" or the "crap out of" others, even if those can be characterized as only hyperbole.[40] This evidence

[36] I held that Wilson's testimony could be received substantively as it conformed with FRE 802(1), the present sense exception to the hearsay rule. His translation was reasonably contemporaneous. She testified, "After it was repeated several times, I asked him [Gaytan] what he [Acosta] was yelling at them. . . . Three seconds."

[37] Duran's first language is Spanish. His English vocabulary is certainly serviceable, but limited, and he would not qualify as a certified translator. Nuanced words do not come easily to him. He is a young man and not particularly well read. He is certainly capable with the street vulgarities of both languages.

[38] Sayeg does not speak Spanish, but I ruled Sayeg's testimony admissible on the same basis as Wilson's, i.e., FRE 802(1).

[39] There is a myriad of cases so holding. A few are: *CKE Enterprises*, 285 NLRB 975, 989 (1987); *Great American Products*, 312 NLRB 962, 966–967 (1993); *Impressive Textiles*, 317 NLRB 8, 13 (1995); *Orbit Lightspeed Courier Systems*, 323 NLRB 380, 391 (1997); *Belle Knitting Mills, Inc.*, 331 NLRB 80 (2000); and *Westchester Iron Works Corp.*, 333 NLRB 859 (2001).

[40] The Board said in *Gem Urethane*, 284 NLRB 1349 (1987), that a threat "to kick the ass" of another is a "well-known figure of speech . . . [having] no necessarily violent connotation and is common banter."

gave Respondent a good-faith belief that Acosta had committed serious misconduct. The denials elicited by the General Counsel are insufficient to rebut Respondent's good-faith belief. The complaint, as it relates to Acosta, will be dismissed.

b. Jaime Gallegos Ramirez (9)

Jaime Gallegos Ramirez[41] is 42 years old and had worked for Respondent for about 1-1/2 years before the strike. He is accused of a variety of things, but the principal evidence against him are two threats of physical harm, one at the front gate and one at the motel. He denies the threats, but concedes that he called nonstrikers names and yelled obscenities at them. He said he neither speaks nor understands English, though he acknowledged that he may understand English on some rudimentary level.

Human Resources Director Miguel Gaytan testified that in the afternoon the day after Samayoa had been assaulted and taken to the hospital, he saw Gallegos approach one of the vans as it was leaving the yard. He observed Gallegos pointing and shouting into at least two vans. His finger were cocked as if they were a gun and he appeared to be "shooting" with his hands. At the same time he called out in Spanish, "You already know what happened to The Chicken yesterday. Do you want the same thing to happen to you?" "Hey! Where's Gallina? You know what happened to him? Do you want the same thing to happen to you?" When he fired his imaginary gun, he would also feign a firearm recoil.

Jose Uribe was a nonstriker who worked as a jig leader. His nickname is "Diablo." He testified that he was convoyed to and from the Fontana Motor Lodge. He knew Gallegos as a night-shift employee, but had little, if any, relationship with him beyond that of coworker. He testified that one afternoon at the motel Gallegos, in the company of Ramon Torres, both taunted him. He had been dropped off, but his wife had not yet arrived to pick him up. He had gone into the motel office and was behind closed doors. From the swimming pool area of the motel, apparently under Torres' lead, Uribe heard Gallegos chime in, "Diablo, if you don't have a ride, come over here. I'll give you a ride, but to beat the crap out of you." Uribe, through the glass doors, could see Gallegos hit his open hand with his fist.

Security guard Norman Sayeg was also at the motel. He testified that he heard Gallegos say that he was going to kill the people who had gone into the office. Sayeg does not speak or understand Spanish, but, as noted, his patrol partner Miguel Duran does. Duran would often simultaneously translate to Sayeg what the demonstrators were saying. This is admissible; see infra, footnote 38. Sayeg testified that on that day the demonstration was quite vociferous and that he and other guards had to set up a security wall with their bodies to separate the strikers from the nonstrikers. Some nonstrikers were moved into the office. During that event, Sayeg heard Gallegos say that he was "going to kill the people inside." He testified: "[Gallegos] would push up against security, walk right into us—he would walk right into you and as doing so, he would be holding up a picket sign with his fists up in the air with one picket sign, waving his fist in the other, just trying to get in and trying to just—he would get right through us telling him he is going to kill them. He is going to f—k them up."

There is also evidence that during the demonstration strikers made additional remarks, both vulgar and insulting. They need not be described here.

Gallegos denied the accusations. He conceded that he was both at the front gate when the vans departed for the day and that he was at the Fontana Motor Lodge on the day the employees went inside the office to wait. Though, as the General Counsel argues, Gallegos' denials are "forthright," they are also not believed. In each incident, Respondent has presented evidence that Gallegos' statements fell into the realm of threats and intimidation designed to deter employees from exercising their Section 7 right to refrain from striking. First, he pointed out the actual assault against Samayoa, asking the van riders if they wanted it to happen to them; then he dared Uribe to come out of the motel so he could suffer a beating, clearly a threat to beat him up when he came out; finally, during the course of the demonstration he was heard to be threatening to kill nonstrikers. It may well be that Gallegos was simply blowing steam and had no intention of carrying out his threats. If so, the parties hearing him in those moments could not easily discern that intent. They could only take him at face value. My ruling must be the same as it was for Acosta. Under *Clear Pine Mouldings*, supra, these threats are unprotected and I conclude that Respondent held a good faith belief that the behavior constituted striker misconduct and that the General Counsel has not rebutted it. This portion of the complaint will be dismissed.

c. Ramon Torres (25)

Ramon Torres was a forklift driver for Respondent and had worked at the facility for about 8 years. He is accused of making physical threats to Jose Uribe and others at the Fontana Motor Lodge, as described above in the Gallegos section, and making sexual threats aimed at General Manager Karen Wilson and a corporate employee named Ingrid. Torres, like Gallegos denies the accusations.

Security guard Miguel Duran testified about Torres' behavior at the motel. Some of it occurred during the moments when at least four guards (he was less sure about the number of off-duty police officers who were moonlighting as guards) formed a human wall to separate about 30 strikers from the nonstrikers. He testified he heard Torres from a distance of 15 feet call to the nonstrikers in the office: "Don't hide yourselves! Come out of there. Be men . . . We will give you a ride, but we're going to f—k you up!" He acknowledged that he did not know Torres prior to the incident and that Torres was identified for him by the nonstrikers who had taken refuge in the office. He says Torres, Gallegos, Ernesto Montaño, and Jose Flores were identified for him.

Uribe testified that Torres seemed to be the leader of the four involved in this portion of the demonstration. From his position in the motel office he could see Torres near the swimming pool and heard him say, "Diablo, if you don't have a ride, come over here, I'm gonna give you a ride, but to beat the crap out of you." As he said those words, with his fingers he beckoned

[41] Gallegos Ramirez appears in the complaint as "Gallegos." When he testified he added his maternal surname, "Ramirez."

Uribe outside. As noted above, he also heard Gallegos say nearly the same thing. He also saw Flores with them. He did not testify that there was a fourth person with these three. When Uribe's wife finally arrived, one of the security guards escorted him to the car. Most of the strikers had left by then, but Torres, Flores, and Gallegos had waited for him to come out. Uribe recalls Flores saying something negative (which will be recited during the section concerning him) but the waiting strikers did not carry out the threat.

Security guard Sayeg described the sexual remarks. He testified that one day, between 10 and 11 a.m., he was at the guard shack near the main gate with HR Manager Miguel Gaytan and General Manager Karen Wilson. He heard Torres "screaming" in Spanish at Wilson. On direct, he said Gaytan made a simultaneous translation; on cross, he said it was Duran. According to Sayeg, Torres screamed (in English), "[H]e wanted to f—k her. He wanted—he told her to go f—k herself." . . . He was "going to f—k her whether she gave it up or not and that he would take it however he had to." Respondent did not ask Gaytan, Duran, or Wilson to corroborate Sayeg and they gave no testimony about the incident.

Sayeg testified Torres was very abusive to other females who entered the premises. Again, Duran served as his simultaneous translator. He recalls Torres once called out to a woman named Ingrid,[42] who was visiting from Respondent's corporate headquarters, occasionally serving as a van driver. He said he would f—k her.

With respect to the incident at the motel, as with Gallegos, I credit Duran and Uribe. It is clear that matters there were nearly out of control. Thirty angry strikers had descended upon the motel and were directing invective at the nonstrikers. Both Gallegos and Torres knew Uribe and saw that his ride had not arrived. The delay gave them the opportunity to pick on him. Moreover, they did not leave when most of the strikers left. One may reasonably conclude that they were waiting for Uribe to come out, hoping he would be unprotected. No doubt Uribe thought that. Torres' words and behavior both add up to a reasonable apprehension that he and his group would carry out their threat. "We'll give you a ride to beat the crap out of you" cannot be ignored, given its immediacy and the mob mentality they were displaying. I cannot credit Torres' denial.

Accordingly, I find that Torres, like Gallegos, made a threat of physical harm to Uribe and that it would reasonably lead him to abandon his Section 7 right to refrain from striking. Under *Clear Pine Mouldings*, Torres' behavior gave Respondent a reasonable belief that he had engaged in strike misconduct.

In view of that finding, it is unnecessary to make additional findings regarding the statements he allegedly made to Wilson. They supposedly occurred in the presence of Gaytan and/or Duran. Yet neither was asked to corroborate him. That circumstance renders the proof Sayeg offered somewhat thin. I do not necessarily discredit Sayeg on the point, but observe that there is some likelihood, due to possible mistranslation issues, that it did not occur quite as he described.

[42] Sayeg did not know Ingrid's last name; Duran believes her last name to be Reich. Both agree that she understood Spanish and that she did some simultaneous translation.

Insofar as Torres' other remarks are concerned, those dealing with Ingrid and other females crossing the line, his behavior was crude and vulgar, but did not rise to a sexual threat. I do, however, regard the matter as in the nature of sexual harassment. In essence, Torres was creating an atmosphere designed to put fear into the women as he regarded them as more likely to be intimidated by such an approach. Even so, it is not necessary to make such a finding in view of the misconduct already found above. This portion of the complaint will be dismissed.

d. Ernesto Montaño (19)

When the strike began, Ernesto Montaño had worked for Respondent for almost 3 years. He was a jig leader. Respondent accuses him of improper threats made to Uribe and others at the Fontana Motor Lodge. Montaño denies them.

As noted earlier, security guards Duran and Sayeg testified that Montaño was 1 of the 30 demonstrators at the motel on the day of the demonstration. Uribe did not really give testimony about Montaño's behavior that day, although it appears he was one of the four in Torres' group. Duran and Sayeg did. In addition, Uribe, however, said there was an encounter with Montaño on a different day. Respondent relies on both in support of its good-faith belief that Montaño committed acts of strike misconduct.

Duran testified that Montaño was with the other three and he specifically heard Montaño, while waving his fists, say to the nonstrikers, "We're going to f—k you all up. Be careful." Duran said that he appeared to be directing his effort to the people inside the motel office. Sayeg says that Montaño pushed up against the security guards as they made their "wall." In the process, Montaño came into contact with Sayeg, although it does not appear that any injury ensued. Sayeg says it occurred when Montaño attempted to "walk through" the security line and bumped him. He also says Montaño swung his picket sign in a manner which forced the security guards to back away. Sayeg also remembers Duran translating Montaño to the effect that Montaño was "telling the people that were inside waiting to get rides that he was 'going to follow them to their houses. He was going to beat their asses —'. . . . He was going 'to f—k them up.' He 'would follow them wherever they went,' that he 'knows where they live.' He says, 'I'll be waiting for you.'"

Montaño denies the incident, but does acknowledge being present every day at the hotel and agrees that he regularly hurled vulgar insults at the nonstrikers. He also agreed that he knew Uribe.

Uribe testified that one afternoon some time after the demonstration, he had been dropped at the hotel by the company Blazer. He said as he went to his car, Montaño shouted "Diablo, wherever I see you, I'm going to beat the crap out of you." Uribe says Montaño simultaneously made a hand gesture which he interpreted as meaning the same thing. Montaño denied Uribe's testimony as well, although he said he did see Uribe at the motel at least once.

Again, I do not credit Montaño's denials. The detail provided by Respondent's witnesses is consistent with what probably happened. As noted above, the demonstration was mob-like and Montaño was very much a part of it. If he was

screaming the invective he acknowledges, it would not be much of a stretch to take it to threats. These threats, however, are somewhat borderline. Threatening to "beat/kick the crap" out of someone may well fall into hyperbole as described in footnote 40, supra. However, all of these also included Montaño's statement that he would follow the nonstriker to another, less public, location where the beating would occur, even to the intended victim's home. In my view, that attachment takes the threat beyond hyperbole into the realm of intimidation. When a statement crosses the line into intimidation, it runs afoul of the *Clear Pine Mouldings,* 268 NLRB 1044 (1984), bar and the Employer's good-faith belief of misconduct is established. Montaño's denials do not rebut it. Accordingly, this aspect of the complaint will be dismissed.

e. Jose Ramon Flores (28)

Jose Ramon Flores[43] was employed by Respondent as a yard man. He had worked at the facility for a little over 5 years. Respondent has accused him of making unprivileged threats to Uribe at the Fontana Motor Lodge in the company of Torres and Gallegos. Flores agrees that he knew Uribe

Uribe, in fact, does not accuse Flores of making the same remarks he attributed to Gallegos and Torres, although he says Flores was with them at the time and was one of the men who were waiting for him when he finally exited the motel to go to his car. Instead, he quotes Flores as saying to him in a normal voice, "Diablo, come outside if you're a man, don't lock yourself in like a whore."

While it is true that Flores was challenging his manhood and suggesting he was hiding in a motel like a prostitute, Flores' alleged remark does not rise to the level of a physical threat. It does not even rise to the level of a dare to come fight. Instead, it is intended as an insult, no doubt provocative, but that is all it was. Here, Uribe's evidence does not give Respondent a good-faith belief that Flores engaged in strike misconduct.[44] That is true even if Flores was in the company of others who did make such threats. Accordingly, Respondent violated Section 8(a)(3) by refusing to reinstate Flores and a remedial order will be entered.

f. Omar Hernandez (12)

Omar Hernandez was a sawman in the specials department who had worked for Respondent for 2 years. He joined the strike when it began and recalled that Union Special Representative/Organizer Fernando Rojas gave instructions concerning his behavior during the strike. He said Rojas told him, "That we could yell, but we did not have to make any physical contact and not to make any threats." That left a wide range of things which were not disallowed. Hernandez is reasonably bilingual, but at his request was given permission to testify in Spanish. Even so, much of what is alleged to have said occurred in English as well as Spanish.

Respondent refused to allow Hernandez to return to work after the strike ended because he had been observed throwing a spike strip in front of a van as it tried to enter a side gate. He is also alleged to have made certain threats to HR Director Miguel Gaytan.

Robert Guy, a supervisor for the security agency hired by Respondent during the strike, testified that the spike strip incident occurred about 4:30 a.m., Monday, April 22. He testified that it was Respondent's practice (at least during the first few days of the strike) to send the vans arriving with the nonstrikers to those entry gates with the fewest pickets. On that morning he was driving the lead van from one of the pickup points. A side gate near the intersection of Sultana and Foothill had been chosen as the point of entry. As noted earlier, the chain link perimeter fence around the property contains several side gates, all of which are locked with extra-sturdy padlocks. The padlocks were frequently inspected, but on that morning when the transport vans arrived at that gate, the lock was discovered to have been jammed by wooden splinters stuffed into the keyhole and broken off.

The guard (said to be an off-duty police officer) assigned to unlock that gate struggled with it for a few moments in the headlights but was unable to open it. As he floundered, pickets from the main and side gates ran to the location and descended upon the vans and their drivers. Guy, recognizing that urgency was required, pulled out a pair of bolt cutters to give them to his assistant so the gate could be freed. At that moment he observed a man in a denim jacket and a blue ball cap with a yellow bill run behind his vehicle and throw something in front of the following vehicle, driven by HR Director Miguel Gaytan. The individual then went to the front of Guy's van and dropped another object in front of it, then moved away. When the gate was opened, Guy retrieved both objects. They turned out to be spike strips. I inspected the strips at the hearing and permitted photographs to be substituted in evidence. The strips (perhaps moulding scraps) are approximately 40 inches long and each has six drywall screws protruding about 2 inches from the flat side. They are clearly instruments designed to puncture tires, although they are somewhat amateurish in their rendition.

After picking up both strips, Guy retrieved the bolt cutters and then used his radio to call the deputy sheriff as the man in the ball cap was still nearby. When the man overheard Guy call the sheriff, Guy heard him utter, "Oh, shit!" and the man immediately got into a nearby vehicle which then sped south toward the main gate. Despite the call, the deputy never responded. Guy's next duty was to get the employees into the facility, and he did so. About 1-1/2 hours later, at the main gate, Guy pointed out to Gaytan the individual who had placed the strips and Gaytan identified him as "Omar Hernandez.".

Gaytan already knew Omar Hernandez and testified that while sitting in the second vehicle he observed Hernandez, who was wearing a yellow-billed cap, throw something in front of both vans. Gaytan later saw Guy pick the objects up. Soon after that, he took them from Guy and gave them to General Manager Karen Wilson who kept them in her office until they were brought to the hearing.

Gaytan also testified that on Friday, April 26, he, his assistant, and one of the male office clerks had set up a table near

[43] Flores, who uses both names, is identified in the record both as Jose Flores and Ramon Flores. He is the only Flores in the case.

[44] It is unnecessary to resolve any credibility conflict between Uribe and Flores as Uribe's testimony is legally insufficient to assist Respondent on the point.

the main gate to pass out paychecks for work performed before the strike. Gaytan could both see Hernandez and hear his voice with which he was familiar. Gaytan heard Hernandez speaking in a mixture of Spanish and English. The first, in Spanish were name calling: "f—king Gaytan," "asshole," "(ambitious) ass kisser," and "faggot." Mixed with that was a dare for Gaytan to come outside the gate so he could "get his ass kicked" and that Gaytan would not always have the police around to protect him.

Gaytan described a second incident, also near the front gate and its attendant guard shack. This occurred sometime in the middle of the strike and Gaytan was unable to be more precise, recalling only that it was in the morning after work had begun.

Again, according to Gaytan, using a mixture of English and Spanish, Hernandez repeated some of the name calling, adding that Gaytan was a "coyote" and a "f—king liar" who promised a lot, but did not deliver. That was followed, as in the previous harangue with "[y]ou're not always going to have the police to protect you" twice saying, "We're going to get you later."

While Hernandez agreed that he had used the coarse language attributed to him, he denied the threats. When testifying, he tried to use the plural "we" whenever he could to deflect his conduct from the first person singular to the collective group. He initially denied saying anything at all to Gaytan at the main gate, though he agreed that he saw Gaytan there. However, in his affidavit he admitted yelling specifically at Gaytan, and finally admitted that he used all the phrases attributed to him by Gaytan as well as others. Yet his initial denials as well as the effort to deflect the behavior onto others undermines the denials that he was involved in the spike strip incident or that he threatened Gaytan with physical harm. He simply was guarded about telling the truth.

Hernandez' defense to the allegation that he threw the spike strips in front of the cars is based on the claim that he only wore a Dodger hat, which are usually blue (he says his was black and without a yellow bill), and that the car he supposedly entered was not the kind of car he usually rode in. He said he did not drive to the picket line, but rode with fellow striker Sergio Fuentes. I am unimpressed. While there is some possibility that Gaytan made a mistaken identification, that possibility is remote. Gaytan knew him, saw him next to the cars and observed him throw objects in front of them. Despite the darkness, Gaytan would not have made a mistake at that distance. The headlights of at least two, and probably three vans were on. There was sufficient, if diffuse, light in the area, more than adequate for facial recognition. Furthermore, Hernandez' testimony does not rule out that he fled to someone else's car. Indeed, Guy testified that the fellow in the ball cap was not the driver.

Accordingly, I find that the General Counsel has not rebutted Respondent's evidence that Hernandez was the striker who threw the spike strips in front of the vans. That conduct alone is sufficient to warrant denial of reinstatement. *Siemens Energy & Automation*, 328 NLRB 1175 (1999), and *Cook Family Foods,* 323 NLRB 413 (1997).

As far as the threats of physical harm are concerned, the evidence is fairly clear that Hernandez made them. Yet, given my above finding, it is not necessary to determine whether standing alone they would be sufficiently serious to warrant denial of reinstatement. On balance, I think the statements were rude, but do not qualify as threats to be taken literally. They were aimed at a management official, were in some sense connected to bargaining and had no real immediacy. If this were all Respondent had presented, I would hold the evidence insufficient to make out a case of picket line misconduct. Clearly, Respondent passed the necessary threshold by its evidence concerning the spike strips. Its good-faith belief of Hernandez' misconduct stands unrebutted. This aspect of the complaint will be dismissed.

g. Raul Castaneda (4)

Raul Castaneda Ortiz was employed by Respondent for 2 years prior to the strike. His last job was as a sawman. Respondent denied him recall after the strike because of his verbal threats, including what might be characterized as a threat of raping employee Luna's wife. He testified that the Union's special representative/organizer, Fernando Rojas, had given him instructions regarding how to behave during the strike. He said Rojas told him: "Not to approach or get near the ones who had crossed the picket line, not to attack them, not to touch their cars nor the vans being driven in and not to go inside the company nor to throw things inside, either." It will be observed that he did not do any of the things Rojas prohibited. As with Hernandez, that still left a wide range of things which were not disallowed.

Around 9 a.m., on the first Monday of the strike (April 22), General Manager Karen Wilson was performing some rounds of the property. She knew Castaneda as he was a component sawyer, a key person in the plant. From a location within the property, perhaps 60 feet away, she observed (apparently through a gap between buildings) Castaneda handling the padlock and chain which secured gate 3, a side gate on Sultana north of the main gate.

He was outside the gate and she saw him holding the lock upside down. He also seemed to have something else in his hand which she could not clearly see. Wanting to see what he was doing, she walked to that gate and as she did so she saw Castaneda let go of the lock and its chain and turn away, disappearing from view behind a building.

Upon arriving at the gate, she examined the lock and discovered a still tacky clear, plastic liquid on the lock and in the keyhole. She concluded it was some sort of instant glue ("super glue"), placed into the keyhole to render it inoperable. It is an expensive ABUS heavy duty lock with a hardened steel shackle. She called security and one of the guards cut the chain from the lock, replaced it, and brought it to her office. She gave it to counsel who brought it to the hearing.

Castaneda denies the incident. He testified that he never touched any company lock, never poured any glue into one, and never saw anyone else do so, either. He did, however, acknowledge that he patrolled some side gates, particularly the one on Foothill during the morning hours. He also acknowledges there were times when the police/sheriff and the security guards were not to be seen.

Nonstriker Ricardo Luna testified that he had two separate encounters with Castaneda during the strike. The first occurred

at an Albertson's[45] supermarket parking lot near the plant and the second at the hotel on Foothill Boulevard Both were pickup/dropoff locations used by Respondent's transportation vans. Luna recalled the strikers would wait for them and hurl insults while they waited for the van in the morning or when they went to their cars in the afternoon. Luna said one afternoon, after being dropped off, he went to his car and Castaneda accosted him, "telling me in front of my truck that he was going to beat me up, that I was the worst of sorts. He said to me, 'Go f—k your mother. You are a dummy.' I got into my truck. I started my truck and so he would do this with his finger [obscene gesture] and he would stretch his arm toward me, and I wasn't paying attention to them. I just got on my truck. I started it up and I went home."

Luna gave the following testimony about the hotel encounter(s):

> He [Castaneda] got real close to my truck and he spit on my window. Since there were cars in front of me and behind me, I couldn't either go forward nor backward. And so I didn't tell him anything back. I just waited for the car in front of me to move away and then I just left and as I was leaving, he was still telling me and yelling things at me. The following day when we got off work, the same way, there were three people there and they yelled at me as I was about to board my truck, they said, "Hey, we going to f—k your wife." And I got angry. I got angry and I got out of my truck and my brother who was across came over and he told them that those were things they should not be saying.

Here, Castaneda agrees that he used abusive language: "Not to sell themselves out, not to be such low-lifes, and I would yell to them to go f—k their mothers." He denies that he spit or attempted to spit on Luna. Still, he says he only saw Luna once during the strike, at Albertson's. He denies that he said told Luna to f—k his mother, denies he said he would beat Luna up, and that Luna should be careful.

With respect to the second incident at the hotel, I note that Luna never actually accused Castaneda of threatening to have sex with his wife. He attributes the remark to three other strikers, Ricardo Martinez, Jaime Custodio, and Hector Quintero. Accordingly, I do not find Castaneda said anything which could be characterized as a rape threat.

That, however, says nothing concerning the threat made the day before or the lock-gluing incident. In both instances, I find that Castaneda's denials ring hollow. Wilson certainly caught him red-handed fouling the lock. And, he did it for the same reason the other lock had been spiked, to stop the vans from entering the property, i.e., in labor law terminology, "to bar ingress." In other words, the conduct was not simple property damage; it was an effort to trap the vans, expose the occupants, and subject them to intimidation. Furthermore, he admits making the exact kind of threat Luna reported, while simultaneously denying that he had said it specifically to Luna. His denial is not credited. Given what had happened to Samayoa, such a threat cannot be lightly ignored and I shall not do so. Indeed, I credit Luna's description of the spitting effort as well. That was an act of provocation aimed at justifying an altercation where Castaneda could fight with Luna. Respondent had a good-faith belief that Castaneda had engaged in serious striker misconduct. Moreover, I find that the General Counsel has not rebutted Respondent's evidence that that Castaneda had engaged in the misconduct.

As the Board said in *Clear Pine Mouldings*, supra, it is of the "view that the existence of a 'strike' in which some employees elect to voluntarily withhold their services does not in any way privilege those employees to engage in other than peaceful picketing and persuasion. They have no right, for example, to threaten those employees who, for whatever reason, have decided to work during the strike, to block access to the employer's premises, and certainly no right to carry or use weapons or other objects of intimidation. As we view the statute, the only activity the statute privileges in this context, other than peaceful patrolling, is the nonthreatening expression of opinion, verbally or through signs and pamphleteering, similar to that found in Section 8(c)." Id. at 1047.

This allegation of the complaint will be dismissed.

h. Crisanto Vargas (26)

Crisanto Vargas worked in Respondent's shipping department when the strike began. He had worked for Respondent for about 4-1/2 years, apparently in other capacities. Respondent has accused him during the strike of making verbal threats of bodily harm and jamming a lock with toothpicks.

According to nonstriker Amado Garcia, Vargas threatened him one afternoon early in the strike after he had been dropped off at the Albertson's store parking lot. He remembers Garcia standing nearby with a group of strikers, including Sergio Fuentes, Jose Becerril, and Omar Hernandez. Garcia testified that those in the group shouted insults, told him they already knew where he lived and they would beat the crap out of him. He specifically remembers Vargas said, "Wherever he saw me, he was going to beat me up." One problem with Garcia's testimony is that he never actually said how he knew Vargas. When a foundational objection was sustained, Garcia described how he knew Fuentes and Acosta, but was never asked how he knew Vargas, Becerril, or Hernandez. No further objection was forthcoming and Garcia continued his testimony.

With respect to this incident, I think it is clear that Garcia received invective and threats from a group of employees, one of whom was Vargas. However, he has not persuaded me that Vargas was the one who actually made the threat. He did not say he knew Vargas's voice or say that he saw, as well as heard, Vargas speak.

There is simply too much doubt about the quality of this evidence to warrant my finding that Vargas, as opposed to others in the group, actually made the threat. That being the case, this incident is insufficient to give Respondent a good-faith belief that Vargas made a threat of bodily harm.

However, Respondent's evidence concerning fouling the security lock does not fall into that category. On the morning of

[45] Luna called it a Lucky supermarket and it had no doubt been one for years previously; the Lucky chain had been absorbed by Albertson's several years earlier, but people probably continue to call it "Lucky," simply out of habit. Luna certainly did.

April 23, the day after discovering the lock gluing committed by Raul Castaneda, General Manager Karen Wilson also came upon Vargas as he was putting toothpicks into a gold-colored Brink's padlock[46] attached to the perimeter gate leading to the maintenance building. Because its keyhole had been jammed, the shackle had to be cut to remove it. Wilson clearly knew who he was and had no difficulty in identifying him. Nonetheless, Vargas denied damaging any locks, saying he did not even touch any locks during the course of the strike.

As with Castaneda, jamming padlocks on perimeter gates had only one purpose, to bar easy ingress. It was not simply property damage; it was an effort to trap the vans, expose the occupants and subject them to intimidation. And, as with Castaneda, Vargas' conduct exceeded the limits established by *Clear Pine Mouldings*. Respondent has established that it had a good-faith belief that Vargas committed misconduct as a striker. Vargas' denial elicited by the General Counsel is insufficient to rebut it. Accordingly, this portion of the complaint will be dismissed.

i. Eduardo Martinez Mejia (18)

Before the strike began, Eduardo Martinez Mejia[47] had worked 5 or 6 years as a laborer. As with the others here, he was fired for alleged striker misconduct. He testified that he neither speaks nor understands English, presenting himself as somewhat ignorant and one who minds his own business. Respondent asserts that it denied Mejia recall because General Manager Karen Wilson caught him on the second day of the strike spray painting a company traffic control sign. Wilson said she had had little previous contact with Mejia, but she knew who he was.

Wilson testified that the day after the strike started she was making a round of the plant about 7:30 a.m. when she came upon a closed gate on Sultana near the transportation department. A "do not enter" sign is attached to the inside of the gate, though it faces outward to the street. She saw Mejia spraying something on the sign with a can of spray paint. She said she went to see what had happened to the sign, since it faced outward and observed the word written across it. Photographs show the sign with the spray-painted word "putos," meaning "faggots." The sign was fastened loosely enough so that she could pull it back far enough to see what had happened.

Mejia denied the incident occurred, saying he did not do anything beyond chanting, singing, and picketing. He does admit he was at the location at various times and he was somewhat aware of the frequency which security and the sheriff's deputy patrolled that area.

Given the detail of Wilson's account, I do not credit his denial and I find that Mejia did spray paint the word "putos" on the sign. However, the matter does not end there. It is true that vandalism is misconduct not protected by the Act. However, the Board has held that not all misconduct warrants discharge. First, even under the *Clear Pine Mouldings* rule this sort of property damage would not tend to interfere with anyone's Section 7 rights nor would it amount to a threat or intimidation of a nonemployee manager or supervisor. This is the kind of damage which is quite minor in the overview. The sign was placed at an out-of-the-way gate and the paint could probably be removed with some solvent and some elbow grease. Annoying? Yes. Damage serious enough to warrant discharge? No. Compare *Medite of New Mexico*, 314 NLRB 1145, 1146–1147 (1994), where the Board held that a striker who struck a supervisor's car with a cardboard picket sign, doing no damage, had not committed serious picket line misconduct. Accordingly, I find that Respondent's refusal to reinstate Mejia after the strike ended penalizes him for engaging in the protected activity of engaging in a lawful strike. A remedial order will be entered in his favor.

j. Jaime Custodio (6), Ricardo Martinez (17), and Hector Quintero (23)

Jaime Custodio, Ricardo Martinez, and Hector Quintero are grouped together principally because they are all the subject of testimony by Ricardo Luna, although there are also other acts of alleged misconduct attributed to them. Custodio is a 14-year employee. His last job was as a jig leader. Ricardo Martinez had worked for Respondent for 5 years; his last job was "stocker." At the time of the strike Martinez had spent the previous 2 years as a union steward (or assistant steward). Quintero is a 12-year employee last employed as a quality control inspector.

Luna testified that it was two of these three who called to him at the hotel the day after the spitting incident with Castaneda. Luna testified: "[T]hree people were there and they yelled at me as I was about to board my truck, they said, 'Hey, we going to f—k your wife.'" At that point he became sufficiently provoked to get out of his truck to confront them; he had to be restrained by his brother and a police officer. There were three in the group who he says said the words. They were Custodio and Quintero, who were accompanied by Ricardo Montes, who Luna described as a union official, not a company employee.[48]

Luna does not place Ricardo Martinez with the group at the second hotel incident, but did put him at the spitting incident with Castaneda, Quintero and Custodio.. He recalls that during the incident, Martinez said, "Fella[h], the Mafia does not forgive." Luna recalls Martinez following that with, "And he told me to go f—k my mother," "I am going to beat the crap out of you, idiot, ass kisser . . . . You go and sleep with Antonio Romero since you go to the hotel with Antonio Romero." He says Martinez tried to spit on him but was unable to project his saliva. Castaneda was the only successful spitter of the four. Luna testified that the Mafia reference needs to be taken as a threat of physical harm because, "[i]n Mexico, mafia people are

[46] Wilson testified that because so many locks were being fouled, it was more economical to convert to the cheaper Brink's locks which were easier to remove, than continuing to use the expensive ABUS locks.

[47] When he testified, he dropped his maternal last name, Mejia, although it is shown correctly in the complaint, favoring his paternal name, Martinez. However, to distinguish him from Ricardo Martinez, I shall refer to him as "Mejia."

[48] Montes' status with the Union is not explored in any depth, because in the context of the complaint his rights and/or status were not in issue and therefore immaterial to the case. It is possible that Luna's knowledge on the point is incomplete.

people who go around killing other people. . . . People who going around selling drugs and the worst kind of people and since it had been heard that the mafia has killed people, the mafia this, the mafia that" and "it includes not only just you yourself, it includes [y]our whole family." Luna had good reason to be concerned because many people knew where he lived, for his wife's business is next to their home. She is a barber whose customers include many company employees; she gives them a discount. Furthermore, a can of gasoline had mysteriously appeared next to her shop.

Ricardo Martinez denied all of these allegations. He has known Luna for about 5 years. His testimony on direct was:

> Q. [BY MR. FONG] Mr. Martinez, did you ever see Mr. Luna during the strike while you were at the strike?
>
> A. If I did, maybe twice.
>
> Q. During the two times, Mr. Martinez, did you ever yell or say to Mr. Luna, hey, we will f—k your wife?
>
> A. No, because the only time or the two times that I saw him he was working clear in the back, all the way inside.
>
> Q. Mr. Martinez, did you ever spit or try to spit on Mr. Luna during the strike?
>
> A. Never. I don't even know when he arrived nor when he left.
>
> Q. Mr. Martinez, did you ever tell Mr. Luna during the strike, hey, fellow, the Mafia doesn't forgive, f—k your mother?
>
> A. Neither and I don't know what Mafia that refers to. I am an employee, a worker and I don't belong to any Mafia or any gang. I am just a simple worker.
>
> Q. Mr. Martinez, one last thing, did you ever tell or yell to Mr. Luna during the strike, I will beat the crap out of you, idiot, you go to that hotel with Romero?
>
> A. Neither.

At this point an observation needs to be made. Luna never accused Martinez of actually being a member of any criminal syndicate. He said only that Martinez used the sinister phrase "the mafia doesn't forgive," meaning not that Martinez was an actual member, but that he and his fellow strikers might behave as criminal syndicalists are generally believed to behave, i.e., might commit murder, assault, property destruction, etc. Thus, Martinez's denial that he was a member of any such organization really does not constitute a denial of the threat. Those denials can be found elsewhere. In a real sense, Martinez was over answering the question.

Martinez did, however, acknowledge that he and his fellow strikers used invective. "We would yell certain slogans to the people with strong wording such as assholes, dogs, and at times we would insult their mothers." ("Something like f—k your mother.")

On cross-exception, Martinez testified that he knew Luna did not support the Union; Luna's lack of support, he said, was well known to the strikers. He also denied that Quintero or Custodio made any threats against Luna or that they threatened to have nonconsensual sex with his wife. He asserts that Luna is lying if he ever said that.

Martinez was also involved in some alleged threats against HR Manager Miguel Gaytan and General Manager Karen Wilson. Security officer Duran testified that nearly every time Gaytan and/or Wilson appeared at the front gate, he heard Martinez say things to or about them. He would say to Gaytan, "Whenever I see him alone, I'm going to f—k him up." Duran recalls Martinez said that he "hated" Wilson, calling out, "F—king old woman, you never treated us well . . . Whenever I see you alone, I'm going to f—k you. . . . You'll pay for it with me." He said the frequency was nearly daily. As before, Martinez denied these remarks.

And, as Respondent points out in its brief, Martinez is the only one of about 40 strikers who claimed that during one of the mornings when paychecks were distributed, that Gaytan pushed people. His testimony:

> Q. [BY MR. FONG] Did you ever threaten Mr. Gaytan during those two times either verbally or physically?
>
> A. No. On the contrary, he was the one who on the first time when we picked up the check for Thursday he started to take people in groups of ten to the office to intimidate them, saying that if they continued with the strike he was going to fire them. That he was going to fire them, and when one of them informed us that this was occurring we told him that we were not in agreement with that procedure. And to form a long line to pick up the checks and we did so and he didn't like that and he pushed several coworkers wanting to remove them from the office.
>
> And that is the time when I intervened as an employee representative to tell him not to do that. Because he was provoking the co-workers and that I was going to remain there until the last check was passed out. I showed him that on the part of my co-workers there would not be any violence and I remained there up until the last paycheck was handed out and everything occurred orderly then.
>
> Q. Now Mr. Martinez, you referenced this particular incident. Did you ever see any of the strikers push him back, Mr. Gaytan?
>
> A. At no time. They merely surrounded him saying that they were upset, but one doing the pushing was he.
>
> Q. How far were you from the group of employees that surrounded Mr. Gaytan?
>
> A. Approximately four to five feet.
>
> Q. And how soon after that happened did you intervene?
>
> A. Right away, approximately two or one minutes.

This testimony is curious indeed. If such an incident occurred, and it was the General Counsel's intent to demonstrate that Gaytan harbored some sort of personal animosity against the employees, surely others would have corroborated Martinez. But corroborating testimony was not offered. Here again, Martinez has over-answered the question. Counsel for the General Counsel sought only to elicit a denial, but Martinez couldn't stop after a simple answer. He took the opportunity to take a swipe at Gaytan, telling a short story designed to impugn an opponent's witness and simultaneously presenting himself as the employees' protector.

But on cross, Martinez went on, testifying about matters not in the complaint and without any personal knowledge. He was out of control.

> Q. [BY MR. MICHALSKI] And [Gaytan] said if they continued to strike he would fire them?
> A. Yes,
> . . . .
> Q. And you heard him say that to them?
> A. Yes, a co-worker of ours came out to tell us and inform us that Gaytan was following that procedure.
> Q. Who was the person that told you?
> A. I don't recall the name right now.
> Q. You don't remember?
> A. No.
> . . . .
> Q. Did you hear Miguel Gaytan tell any worker that they would be fired if they continued to strike?
> A. Not myself hearing it specifically.

Thus, it is no surprise that during his cross he gave the following evaluations of other witnesses' testimony:

> Q. So would Mr. Luna be lying if he testified that you did?
> . . . .
> A. Exactly, he would be lying.

And later:

> Q. So if Mr. Gaytan had testified that you were in front of those vans screaming at him he would be lying?
> A. He is lying.
> Q. Just like Mr. Luna; correct, like Mr. Luna is lying?
> A. Just like him and many others.
> Q. Who else?
> A. All the co-workers who came to testify against us.
> Q. They are all lying?
> A. I think that the majority of them, yes.

Martinez simply cannot be credited. His testimony seems to be made up on the spot. He clearly has little interest in describing what really happened, no doubt because it does not fit his view of how things should be. He is a union steward, supposedly a person of integrity and objectivity. However, he has allowed both his integrity and his objectivity to vanish in favor of character attacks on others, even deceiving himself into believing he had taken heroic acts to protect his fellow strikers. His testimony cannot be trusted. That being the case, his testimony certainly does not rebut the testimony given by Luna to the effect that he made threats of physical harm to Luna, to Luna's wife and to security guard Duran concerning Gaytan and Wilson.

Luna also placed Custodio and Quintero at the hotel the day after the spitting incident, saying they, along with Martinez, threatened to have nonconsensual sex with his wife. Custodio and Quintero both deny saying anything like that. However, surrounding that allegation is at least one other by Luna and more allegations by still other employees.

Additionally, Luna testified that on two occasions he observed Custodio and Quintero following him as he drove home after work. The first occurred on the second day of the strike after he left the Albertson's lot. On that occasion, he observed a blue "tall car" (probably an SUV, though he later called it a Ford station wagon)[49] behind him at a stoplight. Custodio testified that he drives a blue SUV, a GMC Jimmy. As Luna waited at a stoplight, the blue vehicle driven by Custodio began revving its engine in a threatening manner, "inching" forward toward him. To Luna it appeared as if they were going to rear-end him as he waited for the light to change. He pulled into a gas station at that corner and they didn't follow. The next incident occurred some days later. This time Luna had left the hotel and was driving on a one-lane street. He again observed the same car in the mirror; then he saw Custodio and Quintero waving obscene gestures out of their vehicle. He found his way to an Interstate 10 on-ramp and lost them, though he says he was so frightened he was unable to drive as safely as he normally would have. Apparently, he reached unsafe speeds as he tried to get away.

Custodio denies following Luna or acting as if he was going to rear-end him. He says he normally takes Arrow Boulevard, on his way home. He also denies making any threatening gestures toward Luna. He says he never even saw Luna. In addition, he denies Quintero was with him at all.

Hector Sanchez, the then-recently-promoted production supervisor, also gave testimony about Custodio's behavior during the strike. He knew Custodio as a jig leader. At that time Custodio was with three other men on top of a railcar overlooking the specials area near the rail spur entrance. Two were Juan Chavez and Ezequiel Santos (Perez); the third, according to Sanchez, was a union official whose name he does not know. Sanchez testified Custodio shouted down at him in the specials area:

> We are going to be waiting for you outside. It doesn't matter how long you take to come out because we are going to f—k you up. It doesn't matter if you stay there inside or that you remain with those sons-of-bitches, we are going to be waiting for you here outside and it doesn't matter how long you take to come out because now we are going to really f—k you up.
>
> You are a son-of-a-bitch, you f—king—you like to suck the owner's cock and you are a f—king ass kisser and I already told you it doesn't matter how long it take(s) for you to come out, we are going to f—k you up anyway.

Aside from the tirade and the abusive language, Respondent argues that the statement contains a threat of physical harm. I agree. Clearly Custodio is quoted as saying that no matter how long it took, he and his fellows were going to wait for Sanchez inside to come out, and when he did so, he would be beaten. The other two named strikers also made remarks, but they will be described below.

---

[49] TRANSLATOR FREEMAN: Your Honor, another clarification from the Interpreter. At this point, having heard that there was a tall station wagon, the interpreter used the word station wagon as he was told of this by the witness. That is I heard there was a tall one. It could also qualify as a SUV, so we have three, SUV, a station wagon or a truck. I am not for sure.

From that vantage point, Custodio was seen throwing rocks into the specials area. Sanchez and Leadman Angel Barragan[50] both saw him do so. Now it should be said that no rocks struck them and it does not appear that Custodio threw them with an intent to strike them, for the rocks only came close and were not thrown hard. Even so, the rocks were 2–3 inches in diameter. Custodio denies the rock-throwing in its entirety. He only acknowledges calling the nonstrikers "sons of bitches."

Elsewhere, Custodio agrees that he told nonstrikers that the Immigration authorities were coming to get them. Even there, however, he was somewhat inconsistent with his affidavit in which he had said in Spanish, "I am going to call the Migra on you assholes." Curiously, he explained the variance not on memory due to passage of time, but on the Board agent, saying that is perhaps the way the Board agent *interpreted* it. But, the affidavit was taken in Spanish by a Spanish-speaking Board agent and interpretation was not an issue. Respondent characterizes this as evasiveness. Whether evasive or not, it certainly demonstrates that Custodio is willing to put blame on someone other than himself.

On the stand, perhaps in an effort to demonstrate that Custodio drove in a safe manner, the General Counsel elicited some curious testimony concerning an incident which occurred when Custodio was following the daily convoy from the plant to the motel on Foothill Boulevard. He had described the incident in his investigative affidavit, but in minimalist fashion. In the affidavit he said he was originally behind two vehicles, the leading bus and the vandriven by Gaytan. He simply described passing Gaytan's van on the left and then sliding ahead of him in an ordinary way.[51]

His direct and cross took a different turn, suggesting that his maneuvering had a more rebellious purpose:

> A. [WITNESS CUSTODIO] I was driving behind Mr. Miguel Gaytan. It was the bus.
>
> The bus, Miguel Gaytan, and I was in the other lane, in the middle one.
>
> Q. [BY MR. FONG] Was Mr. Gaytan to your right or to your left?
>
> A. He was to the right.
>
> Q. Was he next to you, ahead of you, or behind you?
>
> A. No. We were next to each other.
>
> Q. And could you go ahead and describe further?
>
> A. When they were arriving at the hotel, there was much traffic. So, at that time, they had to cross over to their left to get to the hotel. They were slowing down their speed and braking because they were approaching. When there was a chance, I switched lanes and I ended up between them two, in between the bus and Mr. Gaytan.
>
> Q. Now, when you switched lanes in between Mr. Gaytan and the bus, how much space was between Mr. Gaytan and the bus?
>
> A. About 20 feet.
>
> Q. And, when you switched lanes, did you intend to cause any accident between the two vehicles?
>
> A. No, because I ended up in the middle of the two and the bus already had its signal on to go the hotel.
>
> Q. Let me get this clear. Was the bus behind you or in front of you?
>
> A. No. The bus was ahead of me.
>
> Q. And you were immediately behind the bus?
>
> A. Yes. I ended up in the middle between the bus and Mr. Miguel [Gaytan].

It can now be seen that Custodio was originally behind Gaytan, but he had pulled to Gaytan's left to pass even though the bus preceding them was signaling a lane change prior to a left turn. This would mean that Gaytan, too would be moving to the left as he followed the bus into the left turn at the hotel entrance.

But on cross, Custodio said:

> Q. [BY MS. TORABIAN-BASHARDOUST] And you got in between the two cars?
>
> A. Yes. I was going to move over to my right, since I had been driving on the left.
>
> Q. And you did it to separate the two cars, didn't you?
>
> A. No. I did it because I had to—well, they were about to arrive where—at the location where they were going to unload the people.
>
> Q. Mr. Custodio, once again I'd like to ask you . . . You gave a declaration to the government that you signed as being true, correct?
>
> A. Yes.
>
> Q. And in that statement you said 'I did it,' referring to separating the two cars, 'to separate them?'
>
> A. The thing is they were going to go to, well, the bus had to make a left turn and I had to get in between them because I had to make a right turn myself.
>
> . . . .
>
> Q. And in that statement you didn't say anything regarding how the bus or the minivan was turning, correct?
>
> A. Correct.
>
> Q. And you didn't say anything about why you changed lanes, did you?
>
> A. No.

Of course, counsel was referring to the last quoted line of the affidavit, that Custodio had changed lanes to separate the bus from the van. Clearly that maneuver was not dictated by traffic vicissitudes. Yet, even that explanation makes little sense. Custodio testified that he wanted to go to his right (probably to find a parking space off the hotel property). Why, then, only moments earlier, did he pass Gaytan on the left and then cut back in front of him, for he knew Gaytan was going to move to the left lane, the one he had just vacated? What exactly was he doing? He knew where the caravan was going; he knew he

[50] Barragan only knew Custodio by his nickname, "Pony." His physical description was also accurate.

[51] Affidavit:

> I also noticed was driving [sic] a minivan behind the bus driven by Miguel Gaytan. At one point, I drove ahead and, before a stop light, I got in between the bus and Miguel Gaytan's minivan. So on the same lane, the bus was first, I second and Miguel Gaytan third. I did it so Gaytan could see me. I did it with plenty of space and there was no way to have caused an accident. *I did it to separate them.* [Emphasis added.]

wouldn't be allowed to park at the hotel lot and he knew they were changing lanes in preparation for the left turn. Why was he on Gaytan's left if he knew he had to make a lane change to the right prefatory to parking across from the motel?

Because of his peculiar driving, I think it is reasonable to conclude that Custodio was weaving. Moreover, the weaving had only one purpose, to harass Gaytan and his passengers. That no accident occurred is beside the point. The incident demonstrates Custodio's anger and his reckless approach to the nonstrikers. He is willing to imperil both himself and others. Furthermore, his affidavit deliberately omitted these details. If they had been included, the Regional Director may well have seen the same irresponsibility Custodio testified to here and approached the evidence differently. Certainly that trait affects my assessment of Custodio's credibility. It has become clear to me that Custodio is entirely capable of committing the acts which various witnesses have attributed to him. This man was angry, frustrated, and willing to give vent to that frustration in a variety of ways, not all of which were acceptable.

Respondent has shown that it had a good-faith belief that Custodio had engaged in striker misconduct. Furthermore, I am obligated to find that the General Counsel has failed to rebut the evidence showing that Custodio threatened nonconsensual sex with Luna's wife, that he followed Luna home on two occasions, once sufficiently frightening him to take refuge and once into a high-speed escape. He also threatened Sanchez with being beaten, later throwing stones from a boxcar into a work area inhabited by Sanchez and Barragan. It makes no difference that the stones were not well directed; the risk of injury was simply too high. In any event, the stone-throwing itself was designed to intimidate, if not actually injure, those who remained in the plant to work. His behavior meets the criteria for striker misconduct set forth in *Clear Pine Mouldings*.

Quintero's situation differs only slightly. Clearly Quintero took part in following Luna home. Luna also quotes him as participating in the threat to have nonconsensual sex with his wife, using a fight-provoking tone, resulting in a police officer's intervention. Quintero, like Custodio, denies the events, saying he never saw Luna at the motel.

In addition, security guard Duran quotes Quintero at the front gate threatening bodily harm to the entrants: After some prefatory invective Quintero yelled, "We're gonna f—k you all up." Duran also places Quintero at the scene of the vandalized windshield of a job applicant. The applicant had parked some distance up Sultana from the main gate and in answer to a question posed by the strikers, told them he was applying for a job. A few minutes later, Duran heard the sound of safety glass crunching and he observed Quintero and another near the applicant's car, casually walking away. He couldn't see the car from that distance and didn't realize what he had seen until the applicant reported the broken windshield some time later.

And, Quintero let his temper get the better of him on the Friday when Gaytan was passing out checks at the front gate. Quintero took the opportunity to demand that the Company sign the contract proposal. According to Quintero, it was a bit aggressive but entirely innocent:

> I told Miguel Gaytan, why do not you people reach an agreement with the union to end this and that way, we could all return to work and things could continue better. He said to me, sign and take your check and leave.
>
> So, I said, why, can I not talk? He would repeat, sign, take your check and leave. So, at that time, I said to him, do you not like what I am saying? Then, put something in your ears. He said, sign, take your check and leave because you are insubordinating. I said nothing else. I got my check and I left.

Gaytan agrees that he did not want to engage in any conversation with the strikers at that time. He was trying to get people quickly paid in what for him was a trying circumstance.

Gaytan testified that speaking in Spanish Quintero started by saying, "And if you would just sign the contract we wouldn't have to go through all this." He responded, "Hector, we're just here to pass out checks and that's all." "So he said [ ], If you don't like it, well, you can cover your ears. Anyway, it's a free country and I can say whatever I want." He repeated, "Hector, we are here just to pass out the checks, that's all. So, just sign up for your check and then you, you may leave." Quintero became more belligerent: "Well, then if you [plural] don't like it, you [plural] can take me out." Gaytan said, "Hector, we are here just to pass out the checks, nothing more." Quintero then said, "And you take me out yourself then if you want to. I'm not afraid of you." At that point a security guard started coming over and Quintero turned and started to walk away. As he turned away he turned back and he said to Gaytan, "That's okay, I'm going. That's fine. *But we'll see each other another day. I'll be waiting for you (singular) outside.*" (Emphasis added.)

Gaytan said Quintero's behavior was unusual for him and that he seemed very serious as he looked straight at Gaytan while making his remarks. According to Gaytan, Quintero was "somewhat upset. Angry. He's normally a quiet person. He seemed more, I don't know if the word's somber, angry . . . . Before the strike he's, we'd greet each other in a normal . . ., he's kind of formal, good morning, good afternoon. Very matter of fact. This time he seemed a little more, much more, well, somewhat emotional, or expressing more emotion."

Human Resources Assistant Glenda Ortiz corroborates Gaytan. She was at the table actually handing over the checks. She recalls Quintero saying to Gaytan, "I am not afraid of you. Do you think you are a big shot?" She said Gaytan just looked at him and said, "I am not going to tell you (say)[52] anything about it," in English. Quintero, in Spanish then said, "Well, then, *I am going to wait for you outside because I am not afraid of you and you will have to come out."* (Emphasis added.)

[52] Ortiz is bilingual, but her syntax here suggests that she thinks in Spanish, not English. The Spanish verb "decir" means both "to tell" and "to say." In English, there is a distinction between the two, "tell" often having an imperative or forceful implication while "say" is usually neutral. Yet, "decir" is commonly translated from Spanish without care for the distinction. Ortiz did that here, meaning "say." She was really saying that Gaytan told Quintero that he didn't want to get into a discussion about the strike at that moment and would not be drawn into one.

Ortiz went on to describe Quintero's manner:

> I never expected to see Hector like that during the strike, never. He was very, very mad and upset.
>
> JUDGE KENNEDY: Let me ask you. You used some English words to describe him. Your first language is Spanish, is it not?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KENNEDY: If you were to choose a Spanish word to describe him, what Spanish word would you use to describe his demeanor?
>
> THE WITNESS: He seemed like—[speaks Spanish]
>
> THE INTERPRETER: Quite upset.
>
> THE WITNESS: And—[speaks Spanish]
>
> THE INTERPRETER: And very abusive and gross.

Clearly the evidence shows that Quintero was angry with Gaytan and would wait outside until Gaytan came out. Then he intended to fight Gaytan.

As with the other two, I find that Quintero's behavior did not comport with the requirements of *Clear Pine Mouldings*. His denials are simply insufficient to rebut Respondent's more credible evidence, evidence which establishes its good-faith belief of Quintero's misconduct. Certainly, he threatened to have nonconsensual sex with Luna's wife; he was with Custodio as Custodio followed Luna home and participated in that threat. He also threatened Gaytan with bodily harm. This allegation of the complaint will be dismissed. The fact that Gaytan is a manager is of no assistance to the General Counsel. *Clear Pine Mouldings* bars strikers from threatening both employees and nonemployees alike.

k. Ezequiel Santos Perez (22), Jose Becerril (2), and Fidel Burciaga (3)

Ezequiel Santos Perez (referred to here as Santos) had worked for Respondent for 4-1/2 years prior to the strike. He had worked in the specials area, but when the strike began was working "on the tables."

Specials employee Angel Barragan testified that Santos was one of three or four individuals who were present during the rock throwing described above concerning Custodio. He knew Santos well and could recognize his voice. Barragan did not see Santos throw rocks (he saw Custodio and Chavez do that) but he heard Santos threaten to kill production supervisor Hector Sanchez who was also in that area. The people in Specials had begun to back away from the stones when Barragan heard Santos "shout to Hector that he was going to kill him and that he would be waiting for him outside." Barragan testified that Santos said he was "going to shoot him down."

Sanchez testified that Santos yelled that he had a gun in his car and "You know what, you son-of-a-bitch, mother f—ker, I got a gun and this time I going to shoot you mother f—ker, I going to be waiting, waiting . . . I know this guy . . . it doesn't matter if you would stay there, anyway we will be waiting for you, and, you know what, you son-of-a-bitch, mother f—ker, I got a gun and this time I going to shoot you mother f—ker, I going to be waiting, waiting."

Sanchez said he didn't know whether Santos actually had a gun, but had no reason to doubt him because he recalled that long before the strike Santos had said he owned one because he had "enemies."

Security guard Duran says he observed Santos throw three rocks from atop a boxcar into the specials area near where three employees were working. He says Santos was also yelling threats from that location.

Santos denies all of it. He testified that he never said anything like Sanchez described, saying he didn't own a gun nor had he ever said that he did. While he agrees that on two or three occasions he was at the rail entrance, he was unable to recall who was with him there. He does remember seeing Barragan and Sanchez, but never got on a boxcar and never threw rocks nor did he make any threats.

Glenda Ortiz recalled an incident involving Santos on the day she was assisting Gaytan hand out the paychecks at a table near the front gate. Santos came to her, obtained his check and said in Spanish: "Miguel, I would like to take your secretary with me to see her naked and to touch her buttocks and her breasts. I know that I am going to make her happy and that she is going to be happy after her on top of me and under me" and then he said, "I would like to f—k her." When she arrived at the gate the following morning, she said Santos approached her car window while making kissing motions with his lips, throwing the kisses and calling "Oh, Baby!" ("Mamacita"). She tried to ignore him and then passed into the yard.

Santos admits that while he was getting the paycheck he told Ortiz that she was very pretty, but says he said nothing more. He says she reacted by asking why he didn't go back to work. He promptly left without saying anything more.

Frankly, I am disinclined to believe Santos. Her detail struck me as entirely convincing. It is also consistent with the attitude of sexual intimidation which was rampant at the time. If he was trying to meet her on a civil basis, even the remark he acknowledges would be unlikely. Furthermore, why would she, as he claimed, respond with a terse "why don't you go back to work?" Such a response would have been inappropriate for the occasion, particularly coming from a junior such as she. Someone of Gaytan's stature might have said something like that, but she would not have. His credibility is severely clouded.

I suppose love can be stranger than fiction, but even telling the attractive boss's assistant in the middle of a stressful strike that she is pretty does not seem plausible. It was the wrong comment at the wrong time. If Santos was not trying to meet her civilly, the only other choice is the strike-related bullying that Ortiz described. I credit her version and find that he used the quoted language and behaved crudely the following day. He was not acting in a social fashion. And, although one may argue, as the General Counsel has, that the conduct is too mild to warrant discharge, given the atmosphere surrounding this strike, I must conclude that Santos was simply trying to intimidate Ortiz because of the strike's lack of success. Beyond that, such conduct is unacceptable under sexual harassment principles. Publicly and crudely announcing one's sexual desires and fantasies simply isn't appropriate for the workplace, strike or no strike. Employers are not obligated to recall individuals who have demonstrated that they treat the workplace as a location for sexual harassment.

I, therefore, find that the General Counsel's evidence is insufficient to rebut Respondent's good-faith belief that Santos threatened to kill Sanchez and sexually intimidated Ortiz. Such conduct does not meet the *Clear Pine Mouldings* test.[53] This portion of the complaint should be dismissed.

Jose Becerril has worked for Respondent for almost 8 years, most recently in plant maintenance. He is alleged to have made threats of bodily harm and to have been involved in rock-throwing. He speaks and understands some English but testified through the official translator.

As discussed above, when the strike began, Respondent sought to convoy the employees to work from several pickup locations near the plant. It would also try to bring the employees through gates other than the main gate to avoid confrontations there. At some point, early in the strike, it decided to try to bring employees from the rear of the plant, through the rail spur gate. Because there was no roadway in that area, vehicles would have to cross the tracks without a grade crossing. Driving across the rails was difficult and risked damage to the undercarriage of the vehicles as well as possibly undermining the roadbed and/or dislodging the tracks. Initially, the passengers were dropped off on Lime Street some distance from that gate and they had to walk across the branch line and the spur to the gate. Confrontations with strikers occurred and Respondent, apparently at the railroad's behest, decided to build a drive-over berm up to and across the tracks. It hired a contractor to perform the work, which required at least one employee driving a small grading tractor known as a Bobcat. It also assigned the security company to protect the contractor's employee(s).

On the day in question, security guard Norman Sayeg testified he observed Becerril, with whom he had become acquainted before the strike began, holding a pair of picket sign sticks in his hands and using them to flick small stones at the Bobcat driver. Sayeg testified: "He just had the sticks. He had two of them together. He walked up to the side of the Bobcat and he started skidding them and he is digging into the rocks and creating the rocks to kick up in the air hitting the Bobcat. The driver on the Bobcat looked at me. I told Jose Becerril to stop. He then turned towards me and started kicking the rocks up with the sign, the sticks at me—and then they hit me."

Sayeg called for backup and shortly thereafter Duran arrived. Sayeg says they attempted to get the tractor back into the yard, but as they did so Becerril continued to flick stones at them and the driver. Sayeg says the stones hit him, but apparently they were small enough, were without sufficient velocity or fell low enough to do no harm. Becerril also called out to Sayeg, calling him "a f—king porky" and saying he was "going to barbecue" him. Sayeg says that throughout the course of the strike Becerril continually told him he "was a fat f—k" and he was "going to barbecue" Sayeg and eat him. That was followed by a threat to go to Sayeg's house and "play Sancho" while he was working.[54] When two other security guards arrived a short time later, Becerril departed. Duran corroborates Sayeg and adds that after he told Becerril to stop, Becerril propelled rocks at him, as well. They did no damage. He recalls Becerril yelling at Sayeg, "He was his bitch and that he was going to shove his dick in him." Duran said Becerril was both flicking rocks and swinging his sticks to hit them hard.

In another incident, nonstriker Pedro de la Rosa says Becerril called him a faggot and that he should go f—k his mother. Later, de la Rosa was led to say that on another occasion that Becerril challenged him to a fight. He did not accept the challenge.

Becerril denies it all. He admitted only to being at the rail gate on one occasion. He denied he hit stones with picket sticks and denied the quotes attributed to him. I do not think his denials here are sufficient. Respondent's witnesses had reasonably good recall and the detail is compelling.

Nonetheless, I am unable to find that the evidence is sufficient for Respondent to have denied him his job at the end of the strike. It appears that the stone flicking was nothing more than an annoyance. No one was hurt and it does not appear that Becerril was attempting to injure anyone. The small stones which he flicked could have been delivered with far more force or recklessness. I do not discount Duran's testimony that some rocks were hit hard, but in the final analysis, they must be regarded as feints. Instead, Becerril seems to have been trying to aggravate or, given the "Sancho" reference, to provoke an incident. He was unsuccessful. Becerril's conduct here was far less dangerous than throwing much larger rocks from a boxcar.

Accordingly, I find that Respondent's evidence of striker misconduct concerning Becerril to be insufficient justification for denying him reinstatement. Refusing to do so is a violation of Section 8(a)(3) and a remedial order will be issued.

The third alleged rock-thrower here was Fidel Burciaga. Burciaga has worked at the plant for over 20 years. At the time of the strike he was 56 years old, working as a sawman. He did not appear to be particularly agile, at least compared to the many younger workers there.

Security officer Duran did not really know Burciaga, but accepted an identification from another employee. Duran testified that during a perimeter check one afternoon, he encountered some employees in the specials area saying someone was throwing rocks at them. He went to the rail gate and saw an

---

[53] It is unnecessary to make findings regarding whether Santos actually threw rocks from a boxcar into the Specials area. Barragan did not see him and Duran, who said he did, was some distance away.

[54] The "play Sancho" reference here is similar, but of a slightly different genre than the threats of nonconsensual sex seen elsewhere in this decision. Witnesses familiar with this slang term said that it referred to a man substituting himself as the husband with the wife, while the authentic husband is away at work, on a trip, etc. Research has shown that the slang may have had its origin with the Hispanic population in U.S. prisons; that a Sancho is the man who becomes the wife's lover while the husband is incarcerated. See Jonathon Green, *Cassell's Dictionary of Slang*, Cassell & Co., London, 2000. Also William K. Bentley and James M. Corbett, *Prison Slang: Words and Expressions Depicting Life Behind Bars*, McFarland & Co., Jefferson, N.C. and London, 1992. "Sancho: a man on the 'street' who dates or steals an inmate's wife or girlfriend." ("When I called home last night, Sancho answered the phone."); Dagoberto Fuentes y Jose A. Lopez, *Barrio Language Dictionary: First Dictionary of Calo*, El Barrio Publications, La Puente, Calif., 1974. "Sancho: the lover of a married woman."

While it does not seem to carry with it the threat of rape, it nevertheless implies that the wife is a whore. It is a powerful Hispanic insult, clearly designed as a provocation.

individual throw a rock which proved to be about one inch in diameter. He had seen the individual once before hanging from the side of a boxcar trying to look inside the fence. Duran testified inconsistently that the man was throwing them from a location on the ground and from a boxcar.

> Q. BY MR. MICHALSKI: Now were they—when they climbed up on the car, were they throwing rocks from the car?
>
> A. [Witness DURAN] That particular person, I don't think he had a chance to because he seen me and he scattered.
>
> Q. BY MR. MICHALSKI Earlier you said there was—he was throwing rocks and you said they were about this large, right? When that was happening, where was he?
>
> A. [WITNESS DURAN] On the cart (sic).
>
> Q. On the train? A Yeah.

Duran acknowledges that he had to ask one of the workmen the name of the individual in question as he didn't know the man and that the man was about 20 feet away. He also described Burciaga as "about 5'9," medium build. About mid-30s." However, Burciaga looks every bit his 56 years. Furthermore, climbing on boxcars does not seem plausible given his age and lack of agility.

On balance, I conclude that Duran has misidentified Burciaga and that the man Duran described was someone else. Respondent's action in refusing to reinstate Burciaga was based upon Duran's mistake. Such a mistake is no defense to failing to call Burciaga back to work. See generally *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Accordingly, I find the General Counsel has rebutted Respondent's evidence supporting is refusal to recall Burciaga at the end of the strike.

l. Rafael Mandujano (16)

Rafael Mandujano's prestrike complaint has been discussed in section II,A, above. After declining the job offer he returned to the bargaining unit where he continued as a lead quality control person. The engineer responsible for that process is Kevin Stemrich. He is Jennifer Stemrich's father. She is an employee who directly suffered unprotected indignities at the hands of Juan Valle Espinoza, discussed infra. Respondent asserts that Mandujano made unacceptable verbal threats to Kevin Stemrich. Mandujano denies them. Stemrich and Mandujano know each other, but perhaps not well, as Mandujano has worked with the evening crew, yet within Kevin Stemrich's area of responsibility. And, as noted above, Mandujano speaks English moderately well.

Normally Kevin Stemrich works in the office, but during the strike he was called upon to do other things. One of the tasks he performed early one Tuesday or Wednesday morning during the middle of the strike was to use a forklift to move large quantities of lumber to serve as a shield between the fence line and the spur.

Stemrich had worked with the forklift building the wall of lumber for about half an hour when Mandujano appeared on the other side of the fence. Stemrich testified that upon his arrival Mandujano began to "razz" him, speaking English. It started with the relatively moderate "I'm going to kick you ass," but then escalated. Mandujano told him that he had 15 guys to help him with the ass kicking. Then, Stemrich says, Mandujano said he knew where Stemrich lived and he knew Jennifer. (As he likely would, since Mandujano had worked in the office himself.) Upon hearing that, Stemrich told Mandujano, "Hey man, do not go there." But Mandujano went on: "I am going *to do* your daughter." (The slang phrase "to do [someone] generally means to rape or kill the someone.) Stemrich described Mandujano's demeanor as "agitated . . . pumping his fists." At that point the two were only 3-feet apart, separated by the fence. Disgusted, Stemrich, who had stepped down from the forklift before the razzing to perform some manual adjustments, got back on the lift truck and drove away. As he turned a corner to leave, he encountered a security guard, Robert Covington, heading toward the same area he had just left. Looking back, he saw Mandujano drop a baseball-sized rock and walk away. Earlier, he had observed that a number of similarly sized rocks were scattered in the specials area and had picked them up; if not removed, they would cause problems for the rolling equipment. He did not see Mandujano throw any rocks. Stemrich said that size rock is common to the railroad roadbed.

Mandujano said he only spoke to Kevin [Stemrich] once during the strike, as he worked with a forklift stacking lumber against the fence line. He says the only thing he said to Kevin (in English) was "Don't you know that it is illegal to cover those things for the firefighters? . . . It was illegal to put lumber—that it was illegal to lumber on the—on the sides and on the top of the fire hydrants." He says Kevin replied he was only following orders. Mandujano denies saying anything else to Stemrich on that occasion. He saw Kevin one other time during the strike driving a van across the picket line but had no opportunity to speak to him. He denied that he ever said he would kick Kevin's ass or that he made any threat about Jennifer, denying he knows the slang term "to do." He also denied being involved in any rock throwing or even handling any rocks. In his affidavit, he acknowledged that the police were called to investigate rock-throwing, but says he knows nothing about it.

The curious thing about this entire episode is that both Stemrich and Mandujano appear to be regarded as truthful and honorable people. Mandujano had been seriously considered as a candidate for the production supervisor's job. Why would he threaten "to do" Jennifer Stemrich? Did he mean "rape" or "kill?" Why would Kevin Stemrich make up such a story? They had no negative history between them.

I think that the moist plausible explanation is that Mandujano was still upset over not getting the raise he thought he should and also regarded the strike as liberating him from normal social constraints. Hadn't the Union (at least according to many other strikers) told them they could say anything they wanted? (Mandujano does say the Union instructed him not to make threats.) Given those two circumstances, I am obligated to discredit his denials and to credit Stemrich who had no reason to make up any story, particularly one as despicable as this. Therefore, I find that Mandujano threatened to rape or kill Jennifer Stemrich. The threat was directed to her father, who as an engineer is probably a professional employee; he does not regard himself as a supervisor. Furthermore, it was aimed at

intimidating both Stemrichs from performing work during the strike. It clearly ran afoul of the *Clear Pine Mouldings* proscriptions. Accordingly, I find that Respondent had a good-faith belief that Mandujano had committed an act of striker misconduct. It was not obligated to bring Mandujano back. Indeed, given the nature of the threat, how could any employer bring back an employee who was making rape threats, never mind the threat to kill? This portion of the complaint will be dismissed.

m. Enrique Luqueño (15)

Enrique Luqueño worked for Respondent as a truss assembler. He had been with the Company about 1 year and 8 months when the strike began. I cited Luqueño's testimony earlier concerning the nature of the instructions given the strikers by union officials, noting that the instructions had given the strikers the option of saying nearly anything they wanted. I also observed that such an attitude might have led some strikers beyond the limits set by *Clear Pine Mouldings*. Respondent accuses Luqueño of verbal threats to employees. All of Respondent's evidence comes from the testimony of security guard Miguel Duran. Duran did not know Luqueño before the incident itself and had to ask a nonstriker for his name. In essence, Duran quotes Luqueño as he said things to particular employees. None of those employees testified about the remarks themselves.

At some point, not clearly described, Duran was in the specials area near the railway spur gate. An employee whose last name appears to be Bildoña was working there. Duran says Luqueño was on the other side of the fence and called to Bildoña that he should not be working for his "Sancho," i.e., the man who replaces you in bed with you wife. See footnote 54. He also quotes Luqueño as saying to Bildoña, "When you come out we're going to get you all alone . . . and we're going to f—k you up."

Although Luqueño testified about his presence near the Specials area, he puts the matter differently. It is not necessary to parse his version to determine if it is credible, because in my opinion Respondent's evidence falls short of demonstrating that the statements amounted to striker misconduct. Duran did not really know Luqueño and Duran asserted that the remarks were directed to someone else—Bildoña, a person whose name he could not pronounce, suggesting that he didn't really know that person's name, either. We do know from other evidence that Leadman Angel Barragan and assembler Martin Bedolla Angeles worked in that area. Did Duran mean one of them?

Either way, Respondent did not present anybody else who heard the remark and it is without corroboration. No one named Bildoña appeared, nor were Barragan and Bedolla Angeles asked about Luqueño. In a sense Duran's testimony stands somewhat naked, barren of much context, and not really recognizable as a threat. First, it occurs in an insulting context, the reference to the employee working for Sancho, who was having sex with the employee's wife while the employee was working. That is followed by the "we'll wait for you to come out and then f—k you up" statement that Respondent regards as the improper threat. I agree that "f—k you up" is harsher and more perilous than the "kick your ass" or "beat the shit out of you" rhetoric which have become almost without meaning. Indeed, elsewhere I have found the phrase to be evidence of a credible threat. Yet, here I am not as persuaded. The remark came from some distance (according to Luqueño any statement must have been from behind a visibility barrier, either piled lumber or black plastic sheeting) so anyone shouting could not have known to whom they were addressing the threat. All in all, the evidence is unimpressive. I find it to be insufficient to have given Respondent a good-faith belief that Luqueño engaged in strike misconduct. Accordingly, Respondent's refusal to reinstate Luqueño at the end of the strike violated Section 8(a)(3) and a remedial order will be entered.

n. Juan Lopez (14)

Juan Lopez is a striker with 8 years experience. At the time the strike began he was a jig leader. His nickname is "Juanito." He is accused of directing some invective at HR Manager Gaytan and of throwing rocks at nonstrikers in the floor truss area.

Simon Garcia is also a jig leader. He has been with the Company for almost 2-1/2 years. He chose not to participate in the strike. He knew Lopez by his nickname, but was uncertain about his last name, yet, correctly ventured that it was Lopez. The incident occurred about 4 days into the strike. He testified:

> Q. [BY MR. MICHALSKI] Okay. Now what did Juan—well, Juanito, okay, going by his nickname—what did Juanito do or say?
>
> A. [WITNESS GARCIA] He, as I was working, because I worked most of time in an area called floor truss—. . . . And he came and threw some rocks and he said, to [me], "Simon," and he mentioned my name, "I guarantee that the next time I see you I am going to beat the crap out of you, so you don't go around as a lowlife working at the Company."
>
> Q. And what did he look like when he said it?
>
> A. I was about 50 feet away from him so I couldn't really distinguish very well but I think he had been drinking.
>
> Q. Was he yelling?
>
> A. Yes.
>
> Q. What was his tone of voice?
>
> A. Loud and offensive.

And, on one of the mornings that the checks were being passed out, Lopez, in the presence of Glenda Ortiz, called out, according to Gaytan, "F—king Gaytan! You racist!," referring to the earlier discharge of Lopez' brother. "Racist. Asshole." "If you're a man, why don't you come out here [so I] can beat the crap out of you?" (At another point, "Kick your ass!")

Lopez acknowledges the racist portion and that he accused Gaytan of being a discriminator, saying Gaytan "would pay for it with a judge," apparently referencing the brother's (never filed) wrongful discharge claim.

The principal problem with Respondent's claim that it held a good-faith belief that that Lopez had engaged in misconduct, based on Garcia's testimony, is that Garcia's rock-throwing testimony is very vague. Garcia said it occurred in the floor truss area (which is different from the specials area near the perimeter), but does not describe it further than that. He also

describes Lopez using words which the Board has held are usually hyperbole "kick your ass."[55] He does say that Lopez was 50 feet away and was acting as if he were drunk, but he does not describe the rock throwing with any detail. Garcia did not testify that Lopez threw a rock at him or at anyone else. He does not describe any target or direction the rocks were thrown. Indeed, he does not say how many rocks Lopez threw nor their velocity. Garcia's testimony is simply too vague to generate a good-faith belief that Lopez engaged in striker misconduct.

Similarly, Lopez' calling Gaytan names is insufficient to conclude that Lopez was engaged in striker misconduct. His claiming that Gaytan would pay for his supposed racism in front of a judge is no threat at all. The only thing approaching a threat is the invitation to come outside so Lopez could kick Gaytan's ass or beat the crap out of him. As noted, these types of comments must be taken as hyperbole, and not actual threats. I do not condone them by any means, but these phrases rarely lead to violence, and Gaytan certainly knew that.

I find, therefore, that Respondent did not have a good-faith belief that Juan Lopez had engaged in strike misconduct. Respondent violated Section 8(a)(3) of the Act when it failed to reinstate him. A remedial order will be entered.

o. Juan Valle Espinoza (7)

Juan Valle Espinoza had worked for Respondent for 2 years prior to the strike. When the strike began he was a jig leader. He says he neither speaks nor understands English, using only Spanish in the workplace. He is 24 years old.

Jennifer Stemrich is the assistant to the general manager of operations and controller and works in the main office. She has a general familiarity with the production employees, knowing all by sight, at the very least. She appears to be in her late 20s or early 30s. During the strike she sometimes served as a van driver convoying employees to and from the pickup locations.

At 4:30 a.m., on April 23, she was driving a van containing employees and was at the main gate awaiting entry. Testimony elsewhere shows that the sheriff's deputy controlled the convoying through that gate. His practice was to allow the pickets to parade in front of each vehicle for as much as 5 minutes,[56] and then tell the pickets to allow the vehicle to pass. He followed the same procedure for each van.

Stemrich says that as she waited for a break in the picket line so she could pass, Juan Valle Espinoza[57] came up to the driver's window, first shining a flashlight in her face and then throughout the van to see who was inside. She eventually got through, but made a second trip 30–45 minutes later.

It was still dark when she made her second trip across the gate. This time she was second, behind another vehicle. Being second, she had to wait while the deputy followed his procedure. Stemrich testified that while she waited for the vehicle in front to clear the gate, Valle Espinoza again came up and shone the light in her face. This time he began to yell things both in Spanish and English. He yelled, "[Spanish] F—king whitey![58] [English] Look at me. I want to see your face. I want to see what you look like so I remember what you —your face when I'm f—king you."

He then left her window and jumped on the front bumper, bouncing the van, Stemrich says, for about a minute, apparently to disturb the passengers. When he got off the bumper, according to Stemrich, "He was doing a dance thing, kind of thrusting [his] pelvis, kind of standing up and just, basically, like humping the air, as I would call it." During the entire time Valle Espinoza was shielded from the deputy by the van in front and the deputy took no action. Sayeg seems to corroborate her, adding that he complained to the deputy.[59]

Valle Espinoza testified he does not know Jennifer Stemrich. He says that he was at the front gate during the strike but said the only thing he said to the nonstrikers was that they were a "bunch of assholes . . . that they weren't worth a shit." While he admits that he observed females crossing the picket line he denies shining lights in their faces, saying he never had a flashlight. He also denies calling any female "f—king whitey," that he ever jumped on a van bumper, performed a suggestive dance or said anything to anyone regarding sex with her. On cross, he admitted calling at least one female who crossed, a "Swiss cow." He also agrees that other strikers did carry flashlights in the early morning.

Frankly, his denials ring hollow in the face of Stemrich's more detailed recollection. Furthermore, Stemrich satisfactorily identified Valle Espinoza as the individual involved. Clearly, Valle Espinoza's behavior was designed to terrify her. Instead of just threatening to physically injure her, he threatened her in a more despicable, more degrading, fashion. He wouldn't simply batter her (hardly approvable itself); he would force her into humiliating sexual submission.[60] Accordingly, I find that Valle Espinoza threatened Stemrich with sexual assault.[61] Such intimidation cannot be condoned and is far be-

[55] See fn. 40.

[56] According to security guard Sayeg.

[57] Stemrich knew Valle Espinoza by sight, but not by name. After the incident she asked HR Manager Gaytan what his name was, and learned it from Gaytan. There is no suggestion that the identification process was inaccurate. The Board has held such an identification process to be sufficient to meet the good-faith belief test. *Axelson, Inc.*, 285 NLRB 862 (1987).

[58] "Whitey" is the official translation. Fong suggested that the word used, "guera," means "blondie." The translator allowed that to be another possibility. Even so, the translator stated that in this context, "whitey" appears to be the most probable translation as it most likely refers to skin color. Stemrich does, however, have blonde hair. In the overview, the difference is insignificant.

[59] Sayeg gave testimony about the incident, but attributed the behavior to Jose Gonzalez. He seems to have misidentified the men. Certainly he did not know them as well as Stemrich, whose testimony I credit.

[60] Compare, *Georgia Kraft Co.*, 275 NLRB 636 (1985), on remand from 696 F.2d 931, 939–940 (11th Cir. 1983), where the Board applied *Clear Pine Mouldings* and declined to reinstate drunken strikers who had used profanities and threatened "to take care of" a nonstriker in front of his pregnant wife and small child at their home.

[61] This went far beyond socially unacceptable vulgarities. Compare *Nickell Moulding*, 317 NLRB 826 (1995), enf. denied sub nom. *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996). There, the Board found a violation for refusing to reinstate a striker who had used such vulgarities. Threats were not found there or in the cases cited by the administrative law judge, and recited to me in the General Counsel's brief. Arguably, they did not involve circumstances of intimidation or

yond the protection of the Act. No employer can be expected to ignore the risk that returning this employee to work would carry. This portion of the complaint will be dismissed.

p. Juan Carlos Vazquez (27)

Juan Carlos Vazquez[62] had worked for Respondent for almost 6 years prior to the strike. He says he does not speak English but understands "a word here and there." At that time he was a night-shift jig leader. He also said the Union gave him no instructions regarding how he should behave during the strike. Respondent denied him reinstatement after the strike because of evidence principally concerning things he said. Respondent presented evidence relating to threats made against nonstriker Jose (Diablo) Uribe and threats made to security guard Norman Sayeg. In addition, it points to two automobile-related incidents. Vazquez denies that the threats and the incidents occurred. He offers the alibi that he wasn't there due to his wedding on April 26 and that after that date he wasn't present at the picket line.

Uribe testified that one afternoon as he was being dropped off at the Fontana Motor Lodge Vazquez was standing near the motel swimming pool. As he walked to his car, he heard Vazquez shout, "Diablo, now you're about to have a very bad time . . . Now you're gonna get it . . . Anyway, I already know where you live so I can go and beat the crap out of you." Uribe and Vazquez had been coworkers at the same work station and they knew each other well. Uribe had no doubt that Vazquez knew where he lived. Uribe also testified that Vazquez dressed and acted as if he were a "Cholo," a Mexican word meaning "tough guy," "thug" or even "gang member." Uribe did not trust Vazquez because of the demeanor he projected.

Some days later, Uribe and some others were dropped off at the Albertson's supermarket parking lot where he had left his car. He observed that Vazquez and some others had followed them there. Uribe and some passengers got into his car but when they tried to exit the lot driveway into the street, Vazquez blocked Uribe's exit with his vehicle and refused to move for some time. Uribe could not say how long the blocking lasted, saying he is not good with estimating time.

Security guard Norman Sayeg testified to a variety of unpleasant encounters he had with Vazquez. In one, he recalled Vazquez at the picket line, about 15 feet away, simultaneously mocking and threatening him using both English and Spanish. Calling Sayeg "Porky," he made a picket sign with a pig drawing covered by a traffic-control style red circle with a slash through it. Once, when Sayeg was by himself, Sayeg reports Vazquez as saying in English "'Porky,' I kill you, porky." He continued. He goes, "I kill Porky, you, Porky," and he pointed to me." . . . "I eat Porky." . . . "I kill you. You die." "Porky, I f—k you up." "He also said he would "barbecue you, Porky."

Vazquez then began saying things in Spanish that Sayeg did not understand. He called security guard Miguel Duran over to translate for him. Sayeg testified: "I eat you," was in Spanish and then he told me in Spanish that he was going to f—k Porky, Porky is [my] bitch, he is going to—he continued going, 'Porky, Porky, you die, Porky, I kill you, Porky,' and then he would go into Spanish, telling me, "Porky, you are going to get f—ked, I f—k you. I f—k you up."

Sayeg says that although Vazquez continued to mock him throughout the strike, the above event was the only time Vazquez threatened to kill him.

Sayeg also say that same evening as he was driving home, he observed a car following him as he drove on the freeway system. He says the person in the backseat of that car was Vazquez. As a result, he reversed direction and returned to the plant. He made a report the sheriff's deputy, but chose to remain overnight at the facility.

Before me, Vazquez said he had been on the picket line for only 3 or 4 days and had once gone to the motel, but on May 6, the day HR Manager Miguel Gaytan told him that he was not to be recalled, told Gaytan that he was "blowing it" because he hadn't even been in the strike. That was an overstatement. He had been there frequently enough to hear other strikers call Sayeg "Porky" but says he didn't do so himself. He simply thought it was funny. He denies making any threatening remarks. He admits he knows Uribe, but says he doesn't know where Uribe lives.

Two things give me pause about Respondent's evidence; at the same time, I found Vazquez' testimony and alibi a little too innocent. Still, Respondent's evidence is the principal problem. First, Sayeg never actually described how he came to know who Vazquez was and how he recognized him. Sayeg was not initially very familiar with any of the strikers when he first arrived at Respondent's facility shortly before the strike began. He often had to rely on secondary identifications, most of which were no doubt correct. Second, is the testimony's weight. Moreover, there is an obvious problem with Sayeg's thin skin. As a security guard in a strike situation he knows or should know that insults are frequent and imaginative. I believe he did not expect the level of the "Porky" ridicule. It made him look weak and foolish. His hurt was obvious. The question, then, is whether he has allowed his personal feelings to intrude into his testimony or became confused on a matter of identification.

Even so, assuming Sayeg accurately described what Vazquez said to him, it all smacks of baiting and hyperbole. His reference to Sayeg as a pig to be barbecued is far from a death threat, even when joined by the threat to kill him. Given the translation limitations that Duran possesses (see fn. 37), it would not surprise me if the word he translated as "kill," actually meant was "slaughter," as in slaughtering an animal for food. The latter would be more consistent with the barbecue reference and the general baiting which the pickets were leveling at Sayeg. In that light, the entire scenario was one of playful (if mean-spirited) rhetoric, and not a threat at all. Accordingly, I reject the evidence Respondent has proffered to demonstrate that it had a good-faith belief that Vazquez had engaged in misconduct in this incident.

Likewise, I am unimpressed with Sayeg's claim that Vazquez had followed him on the freeway. Even if Vazquez was in the car which Sayeg says followed him, it is not clear that he was actually being tailed. Sayeg easily lost the car

---

inferable threats. On review, the Eighth Circuit disagreed and found the comments reasonably tended to coerce and intimidate.

[62] Misspelled Vasquez in the complaint.

when he reversed direction. Had the car been following him, it would have closer to him and would not have so easily been dodged. I believe Sayeg honestly believed he was being followed; I simply find that his belief is not persuasive proof that he was. That incident is insufficient to have given Respondent a good-faith belief in Vazquez' misconduct.

Finally, turning to Uribe's evidence that Vazquez threatened to beat the crap out of him, even with Uribe's recollection that Vazquez said he knew where Uribe lived, it sounds of rhetoric. See footnote 40. It seems to me that Uribe regards Vazquez as a "Cholo," a tough guy of whom he is suspicious and wishes to avoid. In this sense, I believe Uribe's recollection, while accurate with respect to the words Vazquez used, does not supply him with the proper tone. It is sometimes difficult to separate posturing from legitimate threats. I think Uribe here failed to make that distinction.

Given these findings, it becomes unnecessary to determine the validity of Vazquez' alibi. I note he said he was married on Friday, April 26, and did not go to the picket line after that date. Even if his testimony is accurate, it still leaves him 6 workdays to have committed the acts. He admits he was on the line for at least three of those six. I am of the view that his alibi, if accepted, would not insulate him of culpability, had the statements been legally sufficient to be found intimidating.

In the final analysis, the evidence does not support Respondent's claim that it held a good-faith belief that Vazquez committed acts of striker misconduct. I, therefore, find that Respondent's failure to reinstate Vazquez at the end of the strike violated Section 8(a)(3). A remedial order will be entered.

q. Miguel Angel Padilla (21) and Alfredo Raya (24)

These two individuals are processed together because of the similarity of the behavior in which they engaged, although the incidents are discrete. Miguel Angel Padilla was a jig leader at the time of the strike. He had worked at the plant for about 4-1/2 years. Alfredo Raya[63] had worked there for well over 3 years. Respondent accuses them both of having made verbal threats that exceed the bounds set by *Clear Pine Mouldings.*

For the purpose of this discussion, the only question is, assuming Respondent's witnesses are being truthful, whether they have described behavior that gave Respondent a good-faith belief these two had committed verbal acts constituting striker misconduct. I conclude in each case that they did not.

Padilla supposedly told HR Manager Miguel Gaytan to "f—k himself" and made obscene gestures with his hands. Padilla is also said to have used offensive language toward nonstriker Simon Garcia. In addition, he is said to have told Simon Garcia that he would beat the crap out of him and made gestures interpreted as "cholo" signs meaning the same thing.

Similarly, Raya, while at the Albertson's dropoff point, supposedly said to nonstriker Pedro de la Rosa, "I'm going to beat the crap out of you, I'm going to beat you up and just go f—k your mother and you're an idiot."

In both cases the testimony was most cursory. I have no reason to doubt that he words attributed to the strikers are reasonably accurate. However, as pointed out in footnote 40, these phrases are do not automatically become threats unless there is a context in which a threat can reasonably be discerned. Moreover, the obscenity uttered to Gaytan simply cannot be characterized as a threat. It was only a sneer of contempt. While under *Clear Pine* threats made to nonemployees such as Gaytan are not protected any more than if they would be made to an employee, the ban does not extend to obscene or scornful remarks, even if they are made insolently or disrespectfully.

Respondent did not meet its burden of showing that it had a good-faith belief that these individuals had engaged in misconduct. Accordingly, I find that its refusal to reinstate them at the end of the strike violated Section 8(a)(3) of the Act. A remedial order will be entered.

r. Jose L. Gonzalez (10) and Rodolfo Navidad (20)

Jose L. Gonzales was a first-shift stacker for Respondent. He had been employed for about 2 years before the strike. Respondent accuses him of making sexually intimidating and degrading remarks to female employees including General Manager Karen Wilson. He denies all of the incidents cited, except one.

Security guard Miguel Duran described Gonzalez' behavior at the front gate. He is corroborated to some extent by fellow guard Norman Sayeg. Both said that Gonzalez picked on the women who crossed the line or who were standing near the gate. The women included General Manager Wilson, Ingrid Reich, and others identified as Shirley and Julie.[64] The language was invariably rough name calling, using Spanish words for "whore," "bitch," and the like. He often referred to their "chi-chis" (Spanish slang equaling "titties") and how he would like to suck them. He was very graphic. Gonzalez' only admission on the point was that he once told a woman (not shown to be an employee) who had been so provoked by another striker at the gate that she got out of her car and slapped him. Upon seeing that, Gonzalez says he told her he wanted to "suck her asshole." He admits he also told another woman "to stick it up your ass and stick it up your mother's."

In any event, Duran testified that several times when Wilson appeared at the gate accompanied by HR Manger Miguel Gaytan, he heard Gonzalez say things like "stick your dick in her, Gaytan," "do it with your fingers," "we're going to f—k you," "You're a big chi-chi," "we're going to suck on your breasts; we're going to f—k you; I want a piece of your ass; we want you to give us a piece of ass." Sayeg corroborates Duran, as Duran would simultaneously translate what he heard Gonzalez say.

According to both Duran and Sayeg, on one of the occasions that Ingrid was a van passenger, Gonzalez told her "she wasn't worth more than 50 cents and that he was going to f—k her." Sayeg also says Gonzalez told other females crossing the line he "would f—k them so they could come in" . . . "they were bitches, that they were the dogs, that they belong[ed] under his feet."

[63] This individual's complete name is Alfredo Raya Medina.

[64] I found earlier that Sayeg had mistakenly attributed misconduct directed to Jennifer Stemrich to Gonzalez when it had actually been committed by Valle Espinoza.

Wilson recalled being at the gate on the Tuesday before the strike ended. Duran and Sayeg were nearby. She saw Gonzalez and fellow striker Rudolfo Navidad. They were shouting Spanish at her. Since she didn't understand it, she asked Duran to translate. He didn't want to. After she insisted, he translated it as "They are saying they are coming to your house tonight and that they [are] going to f—k [you]. And they . . . he said that they were saying, 'Big titty mommie . . . I am going to suck on you tonight.'" She took the threat seriously enough to post security guards at her house round the clock.

Gonzalez denied these accounts, but agrees that Wilson is "a bit plump" and is well endowed. He also admits he saw her in the company of two guards who fit Duran and Sayeg's description.

Based on these facts, I am unable to credit Gonzalez' denials. His behavior went well beyond acceptable picket line rhetoric. Almost single handedly he created a totally unacceptable atmosphere of sexual harassment. His most serious act was to threaten to invade the home of the general manager and rape her. No employer could tolerate that sort of behavior. It certainly gave Respondent a good-faith belief that he had engaged in striker misconduct. His discredited denials do nothing to rebut it.

Recognizing the problem, the General Counsel has taken another tack. He argues that Respondent condoned Gonzalez' misconduct. This will be discussed below.

Rodolfo Navidad[65] was a group leader on the morning shift when the strike began. He had worked for Respondent about 2 years. When the strike began on April 18, he was on vacation and did not join the strike until about April 23. He says he was only at the picket line seven or eight times.

Respondent accuses Navidad of the identical sexual intimidation seen with Gonzalez. In addition to denying the conduct, Navidad testified that the language ascribed to him is not language he uses. He regards himself as a man of God and if he were to use that sort of language, it would be testimony (in a religious sense) inconsistent with his spiritual values and beliefs. He wants to set a good example for others so he does not speak vulgarly.

Duran testified he knew Navidad before the strike began as he had issued Navidad a parking citation and they had argued over it. Navidad said no such thing ever happened. Given the fact that Navidad was on vacation beginning Monday, April 15, one wonders when the citation would have been issued relative to when the guard service (Starside) first placed Duran at the site. So far as I can determine, that date is not in the record, nor is it easily inferred. Duran said only that he was "on call" for 4 weeks, apparently for the 2 weeks of the strike and for some time thereafter. He never said how long before the strike began that he had given Navidad the citation. Nor is it clear how he actually identified Navidad when he did so. It seems probable to me that Duran has made a mistake here, particularly if the citation had been issued during the first part of the week of April 15, since Navidad was not on site during that period.

[65] The complaint did not include Navidad's maternal surname, Carillo. He gave when testifying, but to be consistent with the complaint, he will be referred to as "Navidad."

Given Navidad's earnestness in saying that he never uses obscenities or vulgarities and tries to live an exemplary life for spiritual reasons, it seems entirely improbable that Navidad acted in a manner inconsistent with that trait. The error seems even more probable when one compares Duran's testimony concerning Gonzalez with that he gave concerning Navidad. The testimony is almost a carbon copy, down to the disgusting misogynous details, which will not be repeated here. And, while it is accurate to say that Sayeg corroborates Duran, there is nothing to suggest that Sayeg's identification was not based on Duran's initial mistake. If so, the corroboration only compounds Duran's error.

Accordingly, Navidad is credited here. Among other things, pure congruence of testimony as Duran described is unlikely, although it does suggest that two persons were standing next to each other. Moreover, the distance at which the remarks were made is enough for a listener to mistake one of those persons for the other. Clearly someone was yelling the things Duran described; I find it was only Gonzalez, not Navidad.

Here, Respondent has made a mistake. It mistakenly concluded Navidad had engaged in striker misconduct. Since I find that he had not, the General Counsel has proven a violation of Section 8(a)(3). See generally *NLRB v. Burnup & Sims*, supra.

s. Sergio Fuentes (8)

Sergio Fuentes had worked at the plant for about 6 years. At the time of the strike he was a leadman in specials. When the strike ended he was not reinstated; he has been accused of several different acts which Respondent contends constitute striker misconduct. These include allegations that he blocked and chased a nonstriker with his car, driving in a reckless, dangerous manner as he did so; that he threatened a nonstriker and broke the window of his car; that he threatened a nonstriker with bodily harm; and that he threatened sexual assault against General Manager Karen Wilson. In general, Fuentes denies behaving as Respondent alleges, although he does admit to being in some of the places when the misconduct is said to have occurred.

Martin Bedolla Angeles was one of Fuentes' coworkers in the specials department. He had worked at the plant for about 2 years, most recently as an assembler. He chose not to strike and was one of the individuals who was transported from a pickup location to the plant. He testified that about 5 a.m., one morning midway through the strike he drove to the Albertson's supermarket lot to meet the company van. When he got there, he was informed that the pickup location had been changed. When he attempted to enter Foothill Boulevard from the lot on his way to the new location, a burgundy sedan ("like a [Ford] LTD") coming down the street stopped in front of him, blocking the driveway and denying him access to the road. After a short while the burgundy car allowed him to leave, proceeding to a stoplight where it halted for a red light. Bedolla Angeles stopped next to him in the lane on the sedan's left. Through the sedan's open window, Bedolla Angeles recognized the driver as Sergio Fuentes. Bedolla Angeles reports that for the next 2 miles, the sedan continually cut in front of him as they drove along Foothill Boulevard. Bedolla Angeles testified, "As I was

driving he kept cutting me off like trying to block my way and trying to make me crash into him, I think."

Fuentes denied the incident occurred. He asserted, "I would never use my car except for from the house to work and from the work back to the house." He admitted, however, that he drives a burgundy-colored sedan, but says it is a 1985 Buick LeSabre.

Nonstriker Pedro de la Rosa testified that he knows Fuentes because before the strike Fuentes occasionally gave him a ride home from work. He says on one occasion where he left his car at the Albertson's supermarket pickup point, he encountered Fuentes. De la Rosa testified, Fuentes said, "I know where you live, and you'll see what happens to you." Fuentes went on to say, "Be careful because [I am] going to beat the crap out of [you]" and "it was around that time when he left, kind of writing down my license plate number and, after that, the following day, is when I found my [auto's] glass had been broken." Fuentes denied the incident, also saying he never wrote down anyone's license plate number.

Specials department assembler Enrique Dominguez testified that one afternoon while walking to his car after being dropped off at the Albertson's market, he saw Fuentes, his lead person, about 14 feet in front of his car. Dominguez lowered his eyes to avoid acknowledging Fuentes in an effort to diminish the insults which the nonstrikers normally heard. Dominguez said Fuentes shouted loudly at him, "Hey! I already know where you live you son-of-a-bitch, I am going to beat you up." Again Fuentes denied the remark.

The fourth incident involved General Manager Karen Wilson. According to security guard Norman Sayeg, on two different days Fuentes responded to Wilson's appearance at the front gate in a similar fashion. The first time was a morning shortly after she had driven a transport van with nonstrikers in from a pickup point. The second time was an afternoon when she returned after delivering departing nonstrikers to their dropoff site. Sayeg says the behavior would continue for minutes on end until Wilson left the area. He says Fuentes' demeanor was harsh and menacing while he screamed in English and Spanish at the top of his lungs:

> Fuentes started grabbing his balls in his groin and said, "F—k you, Karen," and he called her a puto [faggot]. He told her—he kept—then he went up to his chest and raised his hands and says, "Suck on your chi-chis." . . . He was saying to Karen that he was going to suck on her tits. He wanted to f—k her. He wanted to put his dick in her pussy. He continued how he wanted to have sex with her and if she didn't like it, he would do it anyway. He told her he was going to f—k her. He continued up the—he continued to say he was going to f—k her up the ass. . . . He continued to grab his groin. He made references to his chest when he was referring to her chest. He put his thumb by his—he kept going like this when he was referring he was going to f—k her up the ass.

Wilson remembers an incident with Fuentes occurring on the Monday before the strike ended. It happened between 7 and 7:30 a.m. near the main gate. She was in her car waiting to go through. He was about 5 feet away. Her testimony:

> WITNESS WILSON: He started acting out, sexually.
>
> Q. [BY MR. MICHALSKI] What does that mean?
>
> A. It means that he was making very obscene gestures, and yelling obscenities.
>
> Q. What language?
>
> A. Spanish.
>
> Q. And what were his gestures?
>
> A. He would grab his private parts and do hand motions with his hands, point to me. He would do like pelvic motions, point back, yell different things.
>
> Q. What were the pelvic motions?
>
> A. Back and forward type of motion.
>
> Q. All right. And do you recall what words, phrases, what he said to you?
>
> JUDGE KENNEDY: These are the Spanish words that he used. Do you remember the Spanish words?
>
> THE WITNESS: I probably won't be able to pronounce them very well.
>
> JUDGE KENNEDY: Well, do the best that you can. And Mr. Freeman here, will assist.
>
> THE WITNESS: Coher [coger].
>
> JUDGE KENNEDY: Coher?
>
> INTERPRETER: To have sex. Or another translation would be, to f—k.
>
> JUDGE KENNEDY: All right.
>
> Q. BY MR. MICHALSKI: What else?
>
> A. Agarme.
>
> INTERPRETER: Grab me.
>
> Q. BY MR. MICHALSKI: Anything else?
>
> A. General—then other normal ones, like chi-chi and putas, and—
>
> Q. Breasts and faggots. Anything else?
>
> A. No, not that I recall.
>
> Q. Was he making the pelvic gestures, as he was saying this?
>
> A. Yes.
>
> Q. And this lasted how long?
>
> A. For about three to five minutes, while they were waiting for me to go in.

As with the other incidents, Fuentes denied the behavior.

Given the detail and the good recollections of the witnesses upon who Respondent relies, I credit their versions of what happened on each occasion. Fuentes' denials are simply unpersuasive. Accordingly, I find that he recklessly harassed Bedolla Angeles with his car, first blocking him from entering traffic and then frequently cutting in front of him for a distance of about two miles. This was designed, if not to cause an accident, to frighten Bedolloa Angeles and to drive him to stop working during the strike. This was an act of intimidation as prohibited by *Clear Pine Mouldings*. Second, I find that Fuentes threatened de la Rosa with bodily harm, simultaneously saying he knew where de la Rosa lived. Fuentes further intimidated him by taking down his license number. While I do not find that Fuentes was the one who broke de la Rosa's car window, it is clear that Fuentes' message of intimidation was delivered. (*"You'll see what happens to you."*) And, I find that similar behavior can be seen in the threat to "f—k up" Dominguez.

Finally, I find that his sexual street theater in front of General Manager Wilson went beyond acceptable behavior. His words and acts carried the message that he was going to commit a sexual assault on her. The fact that he dressed it up with dancing on one day does not diminish the threat. In essence, he did it three times, twice observed by Sayeg and once by Wilson. An employer need not reinstate an individual who has threatened sexual assault against it general manager. This portion of the complain will be dismissed.

III. FURTHER ANALYSIS

Condonation Issues—Jose L. Gonzalez

Above, I found Jose L. Gonzalez had committed acts of striker misconduct, specifically that he had created an atmosphere of sexual harassment and had threatened to rape General Manager Karen Wilson. The General Counsel nonetheless asserts that there are facts extant which warrant Gonzalez' reinstatment despite his misconduct.

Specifically, when the strike ended Respondent and the Union reached an accommodation whereby employees were to report to work at the beginning of their regular shift on Monday, May 6. On that morning, Respondent put in place a system at the gate in which employees who were being accepted back to work were given passes to go to a meeting room. Those who were not given passes were given letters of discharge and turned away. Exemplars may be found in the General Counsel's Exhibit 4 series. Most of these were dated May 6, though some were May 7.

At 6 a.m., on May 6, Gonzalez presented himself ready to go to work. Gaytan turned away all of the persons listed in the complaint except for Gonzalez and Navidad.

Gonzalez testified without contradiction that he and perhaps 35 others were placed in a conference room. Wilson then gave the assembly a lecture that Gaytan translated. The message basically was, now that the strike is over, and even though the collective-bargaining issues have not been resolved, Respondent expected all employees to behave properly and return to work. If they did not conduct themselves appropriately while at work, Respondent would not tolerate it and dismissals would occur.

Navidad asked a question about those who had not been invited to the meeting; where were they? Gaytan explained that those individuals had been terminated for misbehavior during the strike. Navidad then protested and asserted that if the Company could fire those people, it could also fire the returnees. He led a group out of the meeting and they stood outside for several minutes grumbling about what the Company was doing. Eventually, someone, Gonzalez thinks it was security guard Sayeg, told them all that there wasn't to be any work that day, and they should all return on Tuesday morning. At that, many of the group went to the union hall. At the hall, union officials advised them all to return to work the following day as instructed. Apparently, the Union would deal with the discharges in another way (presumably through filing the instant unfair labor practice charges).

On Tuesday morning, Gonzalez reported to work and worked the entire shift. At the end of the shift, he was directed to see Gaytan. Upon doing so, Gaytan told him he was being discharged and handed him General Counsel's Exhibit 4(q), his discharge letter, accompanied by an appropriate paycheck.

Based on these facts, counsel for the General Counsel asserts that Respondent condoned whatever misconduct Gonzalez may have committed (though it continues to assert he committed no act warranting discharge).

The labor law concept of condonation is of very long standing. A good example, but by no means the oldest, is its decision in *Kohler Co.*, 128 NLRB 1062, 1105 (1960), enfd. in part and remanded sub nom. *Auto Workers Local 833 v. NLRB*, 300 F.2d 699 (D.C. Cir. 1962), cert. denied 370 U.S. 911 (1962). The Board's analyses in subsequent cases over the next 22 years triggered a scholarly review and clarification of the law in *General Electric Co. (Hotpoint)*, 292 NLRB 843, (1989). There, the Board, at 844 said:

> The doctrine of condonation applies where there is *clear and convincing evidence that the employer has agreed to forgive the misconduct, to "wipe the slate clean,"* and to resume or continue the employment relationship as though no misconduct occurred. "The doctrine prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven." [Emphasis added; footnotes omitted.]

Thus, for the doctrine to apply, there must clear and convincing evidence that the Employer had decided to forgive the transgressions. In *White Oak Coal Co.*, 295 NLRB 567, 570 (1989), that requirement was satisfied when the employer's vice president and manager, and the one who had seen the misconduct, went to the homes of the unreinstated workers and personally asked if they wanted to come back. Observing that the employees had never been told they were terminated, the Board found that their misbehavior had been condoned and the employer was not free to discharge them later absent some new and intervening good cause. The Board there said that there "were no magic words" suggesting the forgiveness and observed that condonation was not to be lightly inferred. On those facts, the Board found an 8(a)(3) violation when the employees offered to return to work.

Therefore, the General Counsel is arguably correct that by putting Gonzalez back to work for a day constituted condonation of his otherwise reprehensible conduct. But generally, there must be some positive act by the employer indicating forgiveness and an intention of treating the employee as if the misconduct had never occurred. However, mere recall of an employee does not necessarily mean his misconduct has been forgiven. See *Fibreboard Corp.*, 283 NLRB 1093, 1097 (1987), and cases cited; also *Sioux City Dressed Beef*, 180 NLRB 1030 (1970); *Longview Furniture Co.*, 100 NLRB 301 (1952), enfd. as modified 206 F.2d 274 (4th Cir. 1953). Also *Alaska Pulp Corp.*, 296 NLRB 1260, 1275–1276 (1989) (offer of reinstatement to toll backpay not evidence of condonation). In each of these cases, evidence of forgiveness was not "clear and convincing" due to factual anomalies. Neither the employer nor the employees had reason to believe that the misconduct had been forgiven and the slate wiped clean.

It has been said that *White Oak Coal*, supra, stands for the proposition that offering reinstatement to a striker accused of

misconduct condones it. *Pratt Towers*, 338 NLRB 61 (2002) (Administrative Law Judge Jesse Kleiman). Based on the cited cases, I do not believe the *White Oak Coal* holding to be so brittle. Such an approach would not take into the account the level of the misconduct, the possibility of mistake or the failure to promptly discover the misconduct. Judge Kleiman even recognized that later in his decision; moreover, the misconduct there was secondary boycott picketing. Such misconduct, while unprotected, is not conduct which brings into question the suitability of reinstating someone who has threatened rape of the manager and demonstrated an inability to work with the opposite sex, free of sexual harassment proclivities. Instead, I apply the rule of *General Electric (Hotpoint)*, supra.

Applying that rule results in a relatively easy finding that Respondent never took any action constituting clear and convincing evidence that it has forgiven Gonzalez for his rape threats and for his disgusting misogynous treatment of females. It can be observed that Respondent did not offer any evidence to deal with the issue, for it was not pleaded in the complaint and the evidence came near the end of a 17-day hearing. Despite that, it seems to me that it is most likely that Gonzalez, through some administrative error, escaped the eye of the decisionmakers for a day. When the omission was discovered, he was promptly discharged. I simply cannot see Wilson forgiving such a threat, much less that there is clear and convincing evidence that she did so. The only reasonable explanation is that an error occurred. Moreover, the doctrine of condonation cannot be treated as a trap for the unwary. Notice of its invocation as an issue is required. No such notice occurred. Accordingly, the General Counsel's argument is rejected. No condonation occurred and the complaint, as it relates to Gonzalez should be dismissed.

IV. THE REMEDY

Having found that Respondent unlawfully failed to reinstate striking employees Jose Becerril, Fidel Burciaga, Jose Ramon Flores, Juan Lopez, Enrique Luqueño, Eduardo Martinez Mejia, Rodolfo Navidad, Miguel Padilla, Alfredo Raya, and Juan Carlos Vazquez on May 7, 2002, Respondent will be ordered to offer them full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without impairing their seniority or other rights and privileges, dismissing, if necessary, any person hired as a replacement. Respondent is further ordered to make these employees whole for any loss of earnings or other benefits suffered by them because of Respondent's unlawful failure to offer them reinstatement on May 7, 2002, until such time as it makes them a proper offer of reinstatement. Backpay shall be computed on a quarterly basis from May 7, 2002, to the date of a 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).

CONCLUSIONS OF LAW

1. Respondent, Universal Truss, Inc., a Division of Universal Forest Products, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by failing and refusing to offer reinstatement on or about May 7, 2002, to striking employees Jose Becerril, Fidel Burciaga, Jose Ramon Flores, Juan Lopez, Enrique Luqueño, Eduardo Martinez Mejia, Rodolfo Navidad, Miguel Padilla, Alfredo Raya, and Juan Carlos Vazquez.
4. Respondent did not commit the other unfair labor practices alleged in the complaint.

[Recommended Order omitted from publication.]