

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

LM WASTE SERVICE, CORP.

and

CASES 24–CA–10837  
24–CA–10894

UNION DE TRONQUISTAS DE  
PUERTO RICO, LOCAL 901, IBT

and

MARVIN J. CARDONA  
An Individual

and

DS EMPLOYMENT AGENCY, INC.  
Party in Interest

*Ayesha K. Villegas Estrada, Esq. and  
Maria M. Fernandez, Esq.,*  
for the General Counsel  
*Mr. José Budet,* for the Charging Party  
*Carlos George, Esq. (O’Neill & Borges),*  
for the Respondent

**DECISION**

**Statement of the Case**

**KELTNER W. LOCKE, Administrative Law Judge:** Respondent violated Section 8(a)(1) Act by various coercive statements and Section 8(a)(1) and (3) of the Act by discharging four employees. Respondent did not, as alleged in the Complaint, unlawfully cause the discharge of a fifth individual jointly employed by Respondent and by a temporary labor service.

**Procedural History**

This case began on January 14, 2008 when the Union, Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters, filed an unfair labor practice charge

against the Respondent, LM Waste Services Corp. The Board’s San Juan, Puerto Rico regional office docketed this charge as Case 24–CA–10837. The Union amended this charge on February 7, 2008 and again on March 31, 2008.

5 On April 4, 2008, Marvin J. Cardona, an individual, filed an unfair labor practice charge against DS Employment Agency, Inc. The Board’s San Juan office docketed this charge as Case 24–CA–10894. Charging Party Cardona amended this charge on April 29, 2008 to allege that LM Waste Service Corp. and LM Recycling were joint employers with DS Employment Agency, Inc.

10 On August 6, 2008, Charging Party Cardona again amended the charge in Case 24–CA–10894. This amendment had the effect of dropping LM Recycling as a charged party. LM Waste Service Corp. remained a charged party, as did DS Employment Agency, Inc. The charge, as amended, alleged, in part, that LM Waste Service Corp. and DS Employment Agency, Inc., as joint employers, terminated Cardona’s employment on about March 17, 2008, because of his activities on behalf of the Union.

15 On July 31, 2008, the Regional Director for Region 24 of the Board issued a Complaint and Notice of Hearing in Case 24–CA–10837. Respondent filed a timely Answer.

20 On September 16, 2008, the Regional Director issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing. This pleading consolidated Case 24–CA–10837, filed by the Union, with Case 24–CA–10894, filed by Cardona. For brevity, I will refer to it simply as the “Complaint.” The Complaint named DS Employment Agency as a party in interest.

25 In taking these actions, the Regional Director acted for, and with authority delegated by, the Board’s General Counsel (the “General Counsel”).

30 Respondent filed a timely Answer.

On October 7, 2008, a hearing opened before me in San Juan, Puerto Rico. The parties called witnesses and presented evidence on October 7, 8, 9 and 10, 2008. I then recessed the hearing.

35 On November 21, 2008, after counsel had the opportunity to review the transcripts and exhibits, the hearing resumed by telephone conference call and counsel presented oral argument.

### 40 **Admitted Allegations**

In its Answer, Respondent admitted the allegations in Complaint paragraphs 1(a), 1(b), 1(c), 1(e), 1(f), 2(b), 4, 5, and 11(a). Based on these admissions, I find that the Charging Parties filed and served the charges as alleged in the Complaint.

45 In making these findings, I note that Respondent denied the allegations in Complaint paragraph 1(d) for lack of information. That paragraph alleged that Charging Party Cardona filed the charge in Case 24–CA–10894 on April 4, 2008 and that a copy was served by regular mail on the party-in-interest, DS Employment Agency, Inc., on April 7, 2008. Respondent has not disputed these allegations except to assert a lack of information. Based upon the affidavit of

service (General Counsel’s Exhibit 1(h)), the absence of any evidence to the contrary and the presumption of administrative regularity, I find that the charge in Case 24–CA–10894 was filed and served as alleged in Complaint paragraph 1(d).

5           Additionally, based upon the admissions in Respondent’s Answer, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that it meets both the statutory and discretionary standards for the Board’s assertion of jurisdiction.

10           Based on Respondent’s stipulation, I find that the following individuals are its supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Operations Manager Armando Ramos; Human Resources Director Maria Montalvo; Operations Coordinator Lilliam Curret; Supervisor Julio Torres and Residential Route Group Leader José G. Santiago.

15           Respondent has admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

20           Respondent also has admitted, and I find, that about January 14, 2008, Respondent discharged its employees Rafael Maldonado, Rafael Cruz, Felipe Espada and Reinaldo Santiago.

25           Complaint paragraph 11(b) alleges that about March 17, 2008, Respondent caused the termination of employment of Marvin J. Cardona, an employee of DS Employment Agency, Inc. (The full name of this individual, who testified during the hearing, is Marvin José Cardona Torres. For consistency with the Complaint, and to prevent confusion, this decision will refer to him as Marvin Cardona.)

30           Respondent has not admitted that it caused DS Employment Agency to discharge Mr. Cardona, as Complaint paragraph 11(b) alleged. However, its Answer stated that “it is admitted that Marvin Cardona was an employee of DS Employment Agency, Inc. It is affirmatively alleged that on March 17, 2008, DS Employment Agency, Inc. notified Mr. Cardona that his temporary contract to provide services as a chauffeur to Respondent was not renewed.”

35           Based on this admission and uncontroverted evidence, I find that Mr. Cardona’s employment with DS Employment Agency terminated on or about March 17, 2008. The disputed issue, concerning what role, if any, Respondent played in this termination, will be examined later in this decision.

### 40           **Contested Allegations**

#### **Complaint Paragraphs 3(a), 3(b) and 3(c)**

45           Taken together, the three subparagraphs of Complaint paragraph 3 allege that Respondent and DS Employment Agency, Inc. constitute a joint employer of certain employees.

          More specifically, subparagraph 3(a) alleges that “At all material times LM Waste Service, Corp., and DS Employment Agency, Inc., have been parties to a contract which provides that DS Employment Agency, Inc., is the agent for Respondent in connection with the utilization of employment referral services by Respondent when they need employees for its

facility located in Juana Diaz, Puerto Rico.” Respondent’s Answer denied this allegation.

Complaint paragraph 3(b) alleges that “At all material times Respondent has exercised control over the labor relations policy of DS Employment Agency, Inc., for the employees of DS Employment Agency, Inc.” Respondent’s Answer denied this allegation.

Complaint paragraph 3(c) alleges that “At all material times Respondent and DS Employment Agency, Inc., have been joint employers of the employees of DS Employment Agency, Inc.” Respondent’s Answer denied this allegation.

DS Employment Agency, Inc. also denied the allegations raised by Complaint paragraph 3.

The evidence establishes that Respondent entered into a contract with DS Employment Agency which included, among others, the following terms:

1. DS Employment Agency Inc. will supply the required personnel by LM Waste Service Corp. (herein known as the client), to cover the positions that the client requests.
2. That said personnel will be employed by DS Employment Agency Inc. even when it supplies services in the client’s facilities.
3. That it will be the responsibility of DS Employment Agency Inc. to administer everything concerning the payroll and the charges this requires by law.
4. That the supervision of said employees will be the responsibility of the Client’s personnel.
5. That all contracted personnel will be obligated to follow the conduct rules established by the Client.
6. That for this service DS Employment Agency Inc. will bill the Client the sum they have agreed on after discussing the submitted proposal.

\* \* \*

13. That the Christmas bonus will be paid by DS Employment Agency, Inc.

Thus, the agreement between Respondent and DS Employment Agency expressly provided that personnel were *employed by* DS Employment, which had responsibility for the payroll, but that they would be supervised by the “client,” that is, by Respondent.

The Board has held that two or more entities are joint employers of a single work force if they “share or co–determine those matters governing the essential terms and conditions of employment.” *Aldworth Co., Inc.*, 338 NLRB 137 (2002) Both the supervision of employees and their pay fall within the meaning of “essential terms and conditions of employment.” In this instance, Respondent supervised the workers and DS Employment was responsible for paying them. Therefore, I conclude that the General Counsel has proven that Respondent and DS Employment Agency, Inc. were joint employers, as alleged in the Complaint.

**Complaint Paragraph 6(b)**

Complaint paragraph 6(b) alleges that at all material times Dinelia Santiago held the position of president of DS Employment Agency, Inc., and has been an agent of Respondent within the meaning of Section 2(13) of the Act. Respondent denied that Santiago was its agent.

At hearing, the General Counsel and DS Employment Agency, Inc., entered into a proposed stipulation regarding Santiago, but the Respondent did not agree to it. Based on the record as a whole, I cannot conclude that the General Counsel has proven the allegation raised in Complaint paragraph 6(b).

**The Union Organizing Drive**

The General Counsel alleges that Respondent committed unfair labor practices in the context of a union organizing drive. This effort began at the end of December 2007.

On January 14, 2008, the Union filed a representation petition in Case 24–RC–8588, seeking to represent a unit of employees at Respondent’s facility in Juana Diaz, Puerto Rico. On February 29, 2008, the Board conducted an election, which the Union won, resulting in the Union’s certification as exclusive bargaining representative on March 3, 2008.

**Complaint Paragraphs 7(a) and 7(b)**

Complaint paragraph 7(a) alleges that about January 11, 2008, Respondent, by Armando Ramos, while at Respondent’s facility in Juana Diaz, interrogated its employees about their Union activities and solicited their support to get rid of the Union. Respondent has denied this allegation.

Complaint paragraph 7(b) alleges that about January 11, 2008, Respondent, by Ramos, threatened its employees with discharge if they continued with their support for the Union. Respondent has denied this allegation.

During oral argument, the General Counsel stated that on January 11, 2008, Ramos, who is Respondent’s operations manager, interrogated employees Santiago, Maldonado and Espada about their Union activities “and solicited their support to get rid of the Union.”

Reinaldo Santiago Rodriguez (referred to below as “Santiago”) testified that on January 11, 2008, he was working in the shop area when Operations Manager Ramos called him in to Ramos’ office. According to Santiago, Ramos “told me that he had received information from a trustworthy source, that I was helping the guys with the syndicated movement.” (Santiago testified in Spanish and the words “syndicated movement” are the official interpreter’s translation. The interpreter explained that the term “syndicated movement” referred to the union organizing efforts.)

Santiago replied to Ramos that he, Santiago, was not doing anything illegal. Rodriguez quoted Ramos as saying “to give it thought, that work — that jobs were scarce these days, to think about my family, and that if I had any doubts or any situation or anything that I was concerned with, to come to him and tell him. After that, he told me to think about it and then he shook my hand.”

Respondent contends that Santiago was a supervisor within the meaning if 2(11) of the Act. If so, the statements he attributes to Ramos would not violate the Act because not made in the presence of an “employee.” However, for reasons discussed below in connection with Santiago’s discharge, I conclude that he was not a statutory supervisor, but rather an employee of Respondent.

Santiago was not present when, that same day, Ramos met with two other employees, Rafael Maldonado Leon (referred to below as “Maldonado”) and Felipe Espada Gonzalez (referred to below as “Espada”).

5 Maldonado testified that he was called to a meeting with Operations Manager Ramos in the latter’s office. According to Maldonado, Ramos said that he had received information from a good source that Maldonado “was making efforts to coordinate something with the union, and he wanted to know if I was clear with what I was doing, because this was a Puerto Rican company that was beginning and that the union did — and what the union did was actually to hassle small companies like that.”

10 Maldonado further quoted Ramos saying “to please help him and that if I continued on with the syndicated effort, that I could end up without a job.” Maldonado testified in Spanish and the words “syndicated effort” are the English translation by the official interpreter. From the record as a whole, including the interpreter’s explanation quoted above, I conclude that “syndicated effort” referred to the union organizing drive.

15 The other employee present, Espada, partially corroborated Maldonado’s testimony. In describing the conversation, Espada referred to Rafael Maldonado as “Rafita.” According to Espada, Operations Manager Ramos “asked Rafita that he had good source informing him that he was involved in conversations with the union, and he told — he answered that that was no crime, and I got really nervous when they began talking about the union thing. I don’t remember very well.”

20 Espada did not corroborate the portion of Maldonado’s testimony concerning the alleged threat of discharge. It seems likely that Espada would have remembered Ramos making the statement attributed to him by Maldonado, that he, Maldonado, could “end up without a job” if he continued his Union activities. Espada testified that he “got really nervous when they began talking about the union.” Considering that Espada already was apprehensive, a threat to discharge another employee would resonate on existing fears and be difficult to forget.

25 Moreover, Maldonado had a reason to exaggerate his testimony to include the “end up without a job” statement he attributed to Ramos. Maldonado had lost his job and is one of the discriminatees alleged by the Complaint. The “end up without a job” threat would, if credited, constitute persuasive evidence of unlawful motivation.

30 Ramos generally denied ever threatening an employee concerning the employee’s union activities, and he specifically denied meeting with any of the three men on January 11, 2008. However, Ramos’ denials do not extend to the impression of surveillance allegation. Thus, Ramos did not specifically deny telling Maldonado that he, Ramos, had a good source who reported that Maldonado was involved with the Union. I find that Ramos did make this statement, which created an impression of surveillance.

35 Moreover, I am skeptical of Ramos’ denial that he met with employees on January 11, 2008. Respondent offered documentary evidence to bolster the claim that Ramos was in other places and therefore could not have met with the workers on that date. However, this evidence does not persuade me. Additionally, it is possible Ramos met with the employees on another occasion around January 11, 2008 but not on that particular date.

Three different employee witnesses attributed very similar statements to Ramos, and all three testified that Ramos made them on January 11, 2008. Crediting these witnesses, I find that Ramos did make the statements on that date.

Because all three employee witnesses attributed to Ramos remarks to the effect that he had a trustworthy source who reported that the employee was engaged in the union organizing effort, and because Ramos did not specifically deny making it, I find that he did. Clearly, a statement of this sort creates the impression of surveillance.

Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in Complaint paragraph 7(a), but it did not violate the Act as alleged in Complaint paragraph 7(b) because it did not engage in that alleged conduct.

**Complaint Paragraph 7(c)**

Complaint paragraph 7(c) alleges that in or about late January 2008, a more precise date being presently unknown to the General Counsel, Respondent announced and/or promised to its employees that it would be providing them with a new break/lunch area. Respondent has denied this allegation.

During oral argument, the General Counsel noted the testimony of Noel Colon, that at past meetings which management held with employees every one or two months, the employees would ask for a lunch area, “but although Respondent would always tell employees that they were working on it, nothing was ever done.” Respondent finally brought the trailer to the facility one or two days before the election.

As noted above, the Union filed its representation petition on January 14, 2008. Respondent’s human resources director, Maria Montalvo Colon (“Montalvo”), received a copy of the petition by facsimile the next day.

Later in January 2008, the Respondent called its employees to a meeting. At this meeting, Respondent’s Human Resources Director Montalvo, indicated that management was aware of the Union organizing drive. She further said that employees did not need a union.

From the testimony of Noel Colon, it appears that the subject of the lunch break trailer arose during this meeting. However, Colon’s testimony is somewhat difficult to follow, and it is possible he was referring to some other meeting. Colon testified that a manager said that the trailer was “on its way.” He further testified that the trailer actually arrived at the facility one or two weeks before the election.

As the Board observed in *Network Dynamics Cabling*, 351 NLRB No. 98 (December 31, 2007), although 8(a)(1) allegations are typically analyzed under an objective standard, and motive is irrelevant, see *American Freightways Co.*, 124 NLRB 146, 147 (1959), the Board evaluates promise-of-benefit allegations under the framework established by *NLRB v. Exchange Parts*, 375 U.S. 405 (1964). Such an assessment does require an inquiry into motive.

Motive may be inferred from context. Where, as here, management called employees to a meeting at which it expressed opposition to unionization, an alleged promise of benefit clearly

may be associated with the overall objective of the meeting, persuading employees not to select a union to represent them.

For example, in *Gelita USA Inc.*, 352 NLRB No. 059 (April 30, 2008), the employer called employees to a meeting the day before they were to vote on the question of union representation. During that meeting, a supervisor named Wood told the workers that he knew their workplace was understaffed and his first goal was to get it staffed because there was a lot of work but not a lot of people. The Board held that this statement constituted an unlawful promise of benefits:

Wood made this statement in conjunction with a request to employees to reject the Union, and there is no evidence that Gelita had been planning to remedy the understaffing irrespective of the Union’s campaign. In these circumstances, we find that Wood’s statement could reasonably be construed by employees as a promise of a benefit in exchange for rejecting representation by the Union.

However, in the present case, as the General Counsel acknowledged during oral argument, employees had requested a lunch break area well before the union organizing campaign, and more than once. On those occasions, management would respond that they were “working on it.”

Thus, the present facts diverge from those in *Gelita USA Inc.*, in which there was no evidence the respondent “had been planning to remedy the understaffing irrespective of the Union’s campaign.” Here, well before the union organizing campaign, Respondent announced to its employees that it was working on the problem, and other evidence supports that statement. Human Resources Director Montalvo submitted a purchase requisition dated September 20, 2007 for a trailer to be used as the employees’ lunch break area. Montalvo testified that higher management approved this requisition immediately, but that the trailer was not delivered to the facility until January 2008.

In these circumstances, I cannot conclude that opposition to the Union motivated Respondent to announce that the employees would be getting a trailer to use as their lunch area. Accordingly, I recommend that the Board dismiss the allegation raised in Complaint paragraph 7(c).

**Complaint Paragraph 8**

Complaint paragraph 8 alleges that about January 13, 2008, Respondent, by Lilliam Curet, while away from Respondent’s facility in Juana Diaz, engaged in surveillance of employees engaged in Union activities. During oral argument, the General Counsel moved to amend this allegation by substituting the name of Armando Ramos for Lilliam Curet. Respondent has denied the allegation and opposes the motion to amend it.

Section 102.17 of the Board’s Rules and Regulations provides that a complaint may be amended upon terms that are deemed just. In evaluating whether a proposed amendment is just, the Board considers three factors: (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated. *Stagehands Referral Service, LLC*, 347 NLRB 1167 (2006), citing *Cab Associates*, 340 NLRB 1391, 1397 (2003).

In the present case, the General Counsel did not propose the amendment until after both sides had rested. Thus, the proposed amendment comes as a surprise to Respondent. Additionally, the General Counsel did not offer a valid excuse for the delay in moving to amend. On the other hand, it would appear that the matter was fully litigated.

The first two factors weigh in favor of denying the amendment and, I conclude, they outweigh the third factor. Therefore, I deny General Counsel’s motion to amend the Complaint.

The record does not establish the facts alleged in Complaint paragraph 8. Therefore, I conclude that the General Counsel has not carried the government’s burden of proof.

**Complaint Paragraph 9(a)**

Complaint paragraph 9(a) alleges that on about January 15, 2008, Respondent, by José G. Santiago, while away from Respondent’s facility in Juana Diaz: (i) created the impression among its employees that their Union activities were under surveillance, and (ii) informed its employees that they were discharged because of their activities on behalf of the Union. Respondent denies these allegations.

To prove these allegations, the government offers the testimony of Rafael Cruz, who had been employed by Respondent from July 3, 2006 until his discharge on January 14, 2008. According to Cruz, he had to appear in court on January 15, 2008 concerning an accident involving Cruz while he was driving one of Respondent’s vehicles. One of Respondent’s supervisors, José Santiago, drove Cruz to the courthouse.

Respondent had discharged Cruz the day before. Santiago told Cruz that “he felt sorry for our — the fact that we had been fired and that that had been searched by ourselves, because we unionized.” (Cruz testified in Spanish and the testimony just quoted is a translation into English by an interpreter who was present during the hearing. The interpreter then clarified her translation as follows: “We brought it upon ourselves because we decided to unionize.”)

According to Cruz, Santiago also told him that they (meaning the employees) had been photographed when they attended a Union meeting, that the Respondent’s Operations Manager Ramos had hired a private detective, “and that they had proof of us sitting in the chairs and everything.”

Supervisor Santiago did not testify, and thus Cruz’ testimony is unrebutted. However, I hesitate to credit it because of doubts about its reliability. In particular, some differences between his testimony on direct and cross examination raise questions.

Initially, Cruz testified that in November 2007, management changed his job assignment to driving a small pickup truck because he did not have a license authorizing him to drive Respondent’s larger trucks. However, when confronted with his pretrial affidavit, Cruz admitted that he had been assigned to drive the pickup truck in May 2007.

The difference is significant because Respondent contends that Cruz’ assignment to the pickup truck was temporary, to allow him to upgrade his driver’s license to a category allowing him to operate any of Respondent’s trucks. However, Cruz admitted that he did not take steps to

upgrade his license. Respondent fired Cruz on January 14, 2008 for failing to have obtained the necessary license. Whether Cruz had failed to act over a 2–month period or over an 8–month period is relevant to assessing Respondent’s motivation.

5 My doubts about Cruz’ testimony, however, do not outweigh the fact that it is uncontradicted. Accordingly, I credit it.

10 In analyzing whether Santiago’s statements to Cruz unlawfully created an impression of surveillance, I follow the Board’s decision in *Waste Management of Arizona*, 345 NLRB No. 114 (December 9, 2005). Therefore, I consider whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Flexsteel Industries*, 311 NLRB 257 (1993); *Schrementi Bros., Inc.*, 179 NLRB 853 (1969). See also *Frontier Telephone of Rochester*, 344 NLRB 1270 (2005).

15 In *Waste Management of Arizona*, a manager told an employee that he knew the employees had held a union meeting. The Board held this evidence insufficient to prove that the manager had created an unlawful impression of surveillance because the General Counsel had not shown that the union meeting had been secret, and thus the manager could have learned about the meeting in a number of lawful ways. In the present case, the government also has not established that the meeting was a secret.

20 If the secrecy of the meeting were the only factor to be considered, I would conclude that *Waste Management of Arizona* was squarely on point and controlling. However, the Board’s test requires consideration of *all* relevant circumstances. Supervisor Santiago’s statement that Respondent had photographs of the meeting removes the possibility that management simply had learned of the meeting through public sources and had no special curiosity about it. Respondent would have no reason to photograph the attendees except to learn which of its employees supported the Union.

25 The Board long has held that absent proper justification, photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate. *F. W. Woolworth*, 310 NLRB 1197 (1993); *Saia Motor Freight Line, Inc.*, 333 NLRB 784 (2001). Creating the impression that management was photographing employees engaging in protected activity causes exactly the same harm, by making them fearful of reprisal.

30 Santiago’s statement about management hiring a private detective also must be taken into account. An employee reasonably would assume that Respondent did not hire the detective merely to find out about one meeting but rather to keep an ongoing watch on the Union’s organizing campaign.

35 Applying an objective standard, I conclude that Santiago’s statements reasonably would lead employees to believe that Respondent had engaged, and presumably continued to engage, in surveillance of the protected activity.

45 During oral argument, Respondent asserted that the General Counsel had failed “to establish that José Santiago acted as an agent of Respondent when he allegedly made the comments.” However, during the hearing, Respondent stipulated that certain named individuals, including José Santiago, were its supervisors within the meaning of Section 2(11) of the Act *and*

its agents within the meaning of Section 2(13) of the Act. Because Respondent has stipulated to Santiago’s status as agent, the General Counsel fully met the government’s burden of proof.

**Complaint Paragraph 9(b)**

5

Complaint paragraph 9(b) alleges that in or about January 2008, Respondent, by José G. Santiago, at Respondent’s facility in Juana Diaz, interrogated its employees about their Union activities. At the time of oral argument, the General Counsel moved to amend this subparagraph by substituting the words “while away from Respondent’s facility” for the words “at Respondent’s facility.” The Respondent has denied the allegation and opposes the motion to amend.

10

As discussed above in connection with Complaint paragraph 8, the Board weighs a motion to amend a complaint by considering three factors: (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated.

15

Certainly there appeared to be some surprise and the General Counsel did not explain the reason for the delay. The matter pertains to the same conversation which is the focus of Complaint paragraph 9(a), discussed above, and was fully litigated.

20

However, this proposed amendment carries far less chance of prejudice to Respondent than the proposed amendment to Complaint paragraph 8. That amendment would have changed the name of the supervisor who allegedly committed the unfair labor practice. Respondent reasonably would have had to spend additional time investigating the matter and preparing a defense.

25

On the other hand, the present proposed amendment changes nothing but the location. The Complaint, although alleging the wrong location, correctly identified the supervisor who allegedly made the coercive statement. Therefore, from the day it received the Complaint, Respondent knew whom to interview to prepare a defense.

30

The General Counsel presented only one witness to support the allegation and this witness, Cruz, testified during the second day of the hearing, which lasted four days (not counting the resumption for oral argument). Respondent did not request a continuance.

35

In sum, I conclude that Respondent would not be prejudiced by the proposed amendment to Complaint paragraph 9(b). Therefore, I grant the General Counsel’s motion to amend it.

40

The statements made by Supervisor Santiago to Cruz have been described above in connection with Complaint paragraph 9(a). Although I have concluded that some of Santiago’s remarks created an unlawful impression of surveillance, it is difficult to find in them any interrogation.

45

Accordingly, I recommend that the Board dismiss the allegations raised in Complaint paragraph 9(b).

**Complaint Paragraph 9(c)**

5 Complaint paragraph 9(c), as amended at the hearing, alleges that about March 17, 2008, Respondent, by José G. Santiago, informed an employee that Respondent had discharged said employee because of his Union activities. Respondent denies this allegation.

10 Marvin José Cardona Torres, who will be referred to below as Cardona, was employed by DS Employment Agency and assigned to work for Respondent as a driver. On March 17, 2008, he received a letter terminating his employment. Cardona then contacted one of Respondent’s supervisors, José Santiago, and arranged to meet with him.

15 When they met, Cardona asked Santiago why he had been fired. Cardona testified that Santiago told him, “do you remember the other time, about Rafita and Felipe and the reason why they were fired? That’s the reason why you were fired. And the comments that got to Julio, that’s why you were fired, because you were — because you were participating in the Teamsters Union.”

20 Santiago did not testify and Cardona’s testimony is uncontradicted. Therefore, I credit that testimony.

25 Cardona was not employed when Santiago made the statement to him on March 17, 2008. However, I conclude that he falls within the definition of “employee” in Section 2(3) of the Act. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978). Accordingly, Santiago’s statement to him, that he was fired because he was participating in the Teamsters Union, interferes with, restrains and coerces an employee.

30 I recommend that the Board find that, by the conduct alleged in Complaint paragraph 9(c), Respondent violated Section 8(a)(1) of the Act.

**Complaint Paragraph 10**

35 Complaint paragraph 10 alleges that in or about late January 2008, Respondent changed its employees’ pay date from biweekly to weekly. Complaint paragraph 12 alleges, in part, that this action violated Section 8(a)(1) of the Act.

40 The General Counsel and Respondent entered into a written stipulation that Respondent began paying commercial drivers in Juana Diaz their salaries on a weekly basis starting on pay period January 18 through January 28, 2008. The Party–In–Interest did not sign this stipulation. However, it may be treated as an admission by Respondent of the allegation raised in Complaint paragraph 11.

45 It is well established that a grant of benefits made by an employer during a union organizing campaign violates the Act unless the employer can demonstrate that its action was governed by factors other than the pending election. The employer has the burden of showing that it would have conferred the same benefits in the absence of the union. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958 (2004).

Respondent has a number of jobsites in Puerto Rico. Its human resources manager, Maria Montalvo, credibly testified that in February or March 2007, it began changing its payroll system so that employees would receive a paycheck once a week rather than once every two weeks. Respondent did not change the payroll practice of all sites at the same time, but rather, it appears, proceeded from site to site.

This process coincided with the installation of a new, computerized punch clock system which was supposed to make the process more efficient. However, management encountered problems with the punch clock which slowed the implementation. Because of this delay, Respondent did not implement the system at the Juana Diaz facility until January 2008.

Based on Montalvo’s testimony, which I credit, I conclude that Respondent has met its burden of showing that its action was governed by factors other than the pending election. Further, I conclude that Respondent would have taken the same action in the absence of a union organizing campaign.

Accordingly, I conclude that Respondent’s implementation of the new payroll practice in January 2008 did not violate the Act, and recommend that the Board dismiss this allegation.

**Complaint Paragraphs 11(a) and 11(c)**

Complaint paragraph 11(a) alleges that about January 14, 2008, Respondent discharged its employees Rafael Maldonado, Rafael Cruz, Felipe Espada and Reinaldo Santiago. Respondent has admitted this allegation.

Complaint paragraph 11(c) alleges that Respondent engaged in this conduct because the named employees joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Respondent denies this allegation.

**1. Discharge of Rafael Maldonado**

Respondent hired Rafael Maldonado on April 28, 2006. He began work as a helper and later was promoted to driver.

Maldonado started the organizing effort. He contacted the Union, signed an authorization card, told his coworkers about a Union meeting and spoke at that meeting.

As described above in connection with Complaint paragraphs 7(a) and 7(b), Operations Manager Ramos called Maldonado to his office on January 11, 2008. Ramos told Maldonado that he had received information from a good source that Maldonado “was making efforts to coordinate something with the union.”

On January 14, 2008, Respondent discharged Maldonado. The discharge letter did not state a reason.

Respondent asserts that it had received complaints from customers that their trash had not been picked up, conducted an investigation into those complaints, and discovered that Maldonado had not visited these customers during the daytime but after hours, resulting in trash

not being picked up. Respondent also asserts that in January 2008, it received information from an employee who had been Maldonado’s helper until June 2007. This employee said that Maldonado was picking up trash for someone who was not Respondent’s customer, and then taking payment from that person.

5  
10  
15  
The lawfulness of Maldonado’s discharge will be analyzed under the framework the Board established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees’ protected activity and the adverse employment action. More specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. See, e.g., *North Hills Office Services, Inc.*, 346 NLRB 1099 (2006).

20  
In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089; *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989), enfd. in relevant part 939 F.2d 361 (6th Cir. 1991). See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

25  
Clearly, the government has established the first *Wright Line* element. Maldonado contacted the Union, signed a Union authorization card, told employees about a Union meeting, and spoke at that meeting.

30  
The General Counsel also has proven the second element, Respondent’s knowledge of Maldonado’s protected activity. Just three days before Maldonado’s discharge, Respondent’s operations manager told him that a good source said Maldonado “was making efforts to coordinate something with the union.”

35  
The government also has established that Maldonado suffered an adverse employment action. Respondent has admitted that it discharged him.

40  
Finally, the General Counsel also has proven the fourth *Wright Line* element, a nexus between the protected activity and the adverse employment action. Ample evidence establishes this connection.

45  
Significantly, Operations Manager Ramos, who told Maldonado that a “good source” had reported Maldonado’s involvement with the Union participated in the decision to discharge. Ramos’ remarks to Maldonado and other employees reflects hostility to the Union organizing effort. The record offers no reason to believe that Ramos left that hostility behind in deciding to fire Maldonado.

Moreover, the discharge came only 3 days after Ramos’ comment to Maldonado about the latter’s involvement with the Union. The timing itself warrants an inference that Maldonado’s Union activity was a substantial or motivating factor in Respondent’s decision to

discharge him.

Ramos testified that he did not receive notice of the Union’s organizing drive until January 15, 2008, the day after Maldonado’s discharge. However, I do not credit Ramos’ testimony. Ramos hardly could have accused Maldonado of involvement with the Union if he knew nothing of the organizing campaign.

Three employee witnesses contradicted his testimony that he did not meet with those employees on January 11, 2008. Crediting those employee witnesses, I have found that Ramos did, in fact, meet with them on or about January 11, 2008 and, with one exception, made the statements they attributed to him. Accordingly, I do not conclude that Ramos’ testimony is reliable.

Moreover, other evidence directly links the discharge decision with Maldonado’s protected activities. Marvin Cardona, a driver supervised by José Santiago, testified about an encounter he had with Santiago in January 2008. Although Cardona did not pinpoint the date the conversation took place, Santiago’s remarks strongly suggest it was January 14, 2008, the day Respondent discharged Maldonado and certain other employees.

Cardona was driving a truck when Supervisor Santiago approached with the news that “they fired Rafita and a couple of other guys.” (“Rafita” refers to Rafael Maldonado.) According to Cardona, Santiago then added “they fired Rafita and Felipe, plus two other guys. Rafita was the leader. He’s the one who brought the union movement to the Juana Diaz facilities.”

Supervisor Santiago did not testify and no other witness contradicted Cardona’s testimony, which I credit. Respondent has admitted that Santiago is its supervisor and agent, and his statements, quoted above, constitute admissions imputable to Respondent.

Based upon all of this evidence, I conclude that the General Counsel has proven all four *Wright Line* elements. Therefore, the burden shifts to Respondent to establish that it would have taken the same action even in the absence of protected activities.

Respondent has not presented evidence showing that it has discharged other employees in circumstances similar to those in Maldonado’s case. However, it is not the law that an employer can prevail only by showing prior identical misconduct and discipline. *Sara Lee d/b/a International Baking Company*, 348 NLRB 1133 (2006)

Nonetheless, the record does not persuade me that Respondent considered discharging Maldonado before it became aware of the Union organizing drive. Indeed, Operations Manager Ramos testified that Respondent had received a customer complaint concerning Maldonado in November 2007 and recommended that it be investigated. The record, however, does not reflect such an investigation.

Perhaps the absence of any investigation may be attributed to the absence of the human resources director, who was on medical leave because of a high-risk pregnancy. However, the record does not disclose any investigation even after her return. Certainly, it does not indicate that management ever confronted Maldonado with the allegations and gave him the opportunity to explain.

5 The Board does not seek to impose on an employer any particular standards for investigating employee misconduct before taking disciplinary action. However, in deciding whether a respondent's real reason for discharging an employee is the same as the reason the respondent asserts, it is appropriate to consider whether management's actions signify that they took the asserted reason seriously.

10 The record here does not establish that management would have taken the same action against Maldonado in the absence of his protected activities. Therefore, Respondent has failed to meet its rebuttal burden.

In sum, I conclude that Respondent discharged Maldonado in violation of Section 8(a)(3) and (1) of the Act.

15 **2. Discharge of Rafael Cruz**

20 Rafael Cruz began working for Respondent, as a residential driver, on July 3, 2006. He held a "Category 6" driver's license, which did not authorize him to drive the larger trucks in Respondent's fleet. Management assigned him to drive a small one which his license authorized him to drive.

25 In March 2007, management informed Cruz that he would have to upgrade his driver's license to a "Category 8" or "Category 9" so that he could drive any of Respondent's trucks. A March 19, 2007 memo to Cruz from Supervisor Julio Torres states, in English translation, as follows:

Notification

30 Your file confirms that you have a category 6 drivers' [sic] license, which does NOT apply to drive the trucks that are assigned to the residential routes and that you use daily as a work tool.

35 You are hereby notify [sic] that as soon as possible you undertake the necessary endeavours to obtain the category 8 license. Should you fail to carry out those endeavours, we will be force[d] to dispense wit[h] your services immediately.

We hope to count with your collaboration.

40 Three days later, Operations Manager Ramos sent Cruz a letter which stated, in English translation, as follows:

45 As a reminder, the public service commission license is a requirement to hold a position as driver in our company and, therefore, to travel on the roads of Puerto Rico. On various occasions you have been asked to take the pertinent steps to obtain the same and as of today you have not done so.

50 On the basis of the foregoing, as of today you have 10 business days to deliver to us a copy of the same. Should you fail to do so within this time frame, we will take the corresponding disciplinary measures, such as suspension from employment and salary or permanent dismissal.

5 Cruz did not obtain a “Category 8” license or deliver it to Ramos within 10 days. In fact, he did not obtain such a license at all. He testified that he made efforts to do so until management assigned him to drive a pickup truck, which his “Category 6” license allowed him to do. It appears that Cruz assumed his assignment to drive the pickup truck meant that it was no longer necessary for him to upgrade his license.

10 Cruz testified that from the time of his assignment to drive the pickup truck until his discharge on January 14, 2008, no one told him that he needed to change his driver’s license category or else his employment would be terminated.

15 On January 13, 2008, Cruz attended a Union meeting and signed a Union authorization card. The next day, Respondent discharged Cruz.

20 On January 15, 2008, Cruz had a conversation with Supervisor José Santiago which is discussed above in connection with Complaint paragraphs 9(a), 9(b) and 9(c). Cruz considered Santiago to be a personal friend, as well as his immediate boss.

25 Santiago told Cruz he felt sorry for the employees who had been fired, and that they had brought it on themselves because they unionized. He also said that the Respondent’s operations manager had retained a private detective and that the employees who attended the Union meeting had been photographed.

30 Evaluating the evidence under the *Wright Line* framework, I conclude that the General Counsel has proven all of the initial four elements. Clearly, Cruz engaged in protected activity when he signed an authorization card at a Union meeting on January 13, 2008. Thus, the government has proven the first *Wright Line* element.

35 Respondent’s discharge of Cruz the next day certainly constitutes an adverse employment action. Thus, the third *Wright Line* element has been established.

40 Supervisor Santiago’s statements to Cruz the day after his discharge establish both the second *Wright Line* element, Respondent’s knowledge of the protected activity, and the fourth, a connection between the protected activity and the adverse employment action. Thus, Santiago told Cruz that management had hired a private detective and had photographs of people at the January 13, 2008 Union meeting.

45 The timing of the discharge, one day after the protected activity, also suggests a nexus between the two. See, e.g., *Desert Toyota*, 345 NLRB No. 113 (December 23, 2005).

Additionally, Supervisor Santiago’s remarks to Cardona, discussed above, further support the conclusion that a link exists between the protected activities and the discharge decision. It is true that Santiago did not identify Cruz by name, instead saying that “they fired Rafita and Felipe, plus two other guys.” Cruz, discharged at the same time as Maldonado and Espada, clearly was one of those “other guys.”

Because the General Counsel has established the four initial *Wright Line* elements, the burden of proceeding shifts to the Respondent, to establish that it would have taken the same action even in the absence of protected activity. To establish this affirmative defense, an employer cannot simply present a legitimate reason for its action, but must persuade by a

preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Desert Toyota*, above.

Respondent contends that it requires its drivers to hold licenses allowing them to operate any of Respondent’s trucks, regardless of size. However, Respondent did not present evidence establishing that it had strictly enforced this policy in the past, even in the absence of Union activity.

Moreover, even assuming such a policy exists, Respondent did not enforce it in the present case until the Union began its organizing campaign. Thus, Respondent’s March 22, 2007 letter to Cruz gave him “10 business days to deliver a copy” of such a license. However, 10 business days came and went without Cruz producing a copy of such a license, and Respondent did not fire or suspend him.

To the contrary, it arranged for him to drive a smaller pickup which Cruz was licensed to operate. Crediting Cruz, I find that months then went by without management again demanding that Cruz upgrade his license or provide a copy of such an upgraded license. This arrangement thus appeared to be satisfactory to Respondent until the Union began its organizing drive.

At that point, management’s treatment of Cruz abruptly changed. Rather than informing him that he still must obtain the higher category license, rather than giving him the opportunity to do so, and rather than allowing him either to remain assigned to drive the pickup truck or to continue to work as a helper, which required no license, it discharged him.

Respondent’s actions on the day after Cruz attended a Union meeting departed so drastically from the way management previously had treated Cruz, a cogent and persuasive explanation would be necessary to dispel the impression that Union activity played a substantial, motivating role in the discharge decision.

However, Respondent has not offered such an explanation. It also has not documented any other instance, before the Union organizing campaign began, in which it treated an employee the same way it treated Cruz.

Accordingly, Respondent has failed to rebut the General Counsel’s case. I conclude that Respondent discharged Cruz because of his Union activity and to discourage other employees from engaging in activity. Further, I recommend that the Board find that Respondent thereby violated Section 8(a)(3) and (1) of the Act.

**3. Discharge of Felipe Espada**

Felipe Espada began work for Respondent on July 3, 2006 as a driver. At that time, he held a “Category 6” license, which did not authorize him to drive the larger trucks in Respondent’s fleet. Espada sought to upgrade his license in June 2007, but instead, the Department of Transportation and Public Works suspended his license because of unpaid fines. The suspension was to last 6 months.

At that point, Espada lawfully could not drive Respondent’s trucks. Respondent reassigned him to work as a helper.

In late December 2007, Espada attended a Union meeting. On January 11, 2008, Respondent's Operations Manager Ramos called Espada to a meeting in his office. Another employee, Rafael Maldonado also had been summoned.

5 As discussed above in connection with Complaint paragraphs 7(a) and 7(b), Ramos told Maldonado, in Espada's presence, that he had received information from a trustworthy source that Maldonado was helping with the Union campaign.

10 Espada attended another on January 13, 2008. The next day, Respondent discharged him.

Analyzing the facts using the *Wright Line* framework, I conclude that the government has met its burden of proving the initial four elements.

15 Clearly, Espada engaged in protected activity, attending Union organizing meetings and signing an authorization card. Thus, the General Counsel has established the first *Wright Line* element.

20 The meeting in Operations Manager Ramos' office on January 11, 2008 establishes that Respondent knew about Espada's participation in the Union campaign. Although Ramos had focused on Maldonado, telling him that a trustworthy source had reported Maldonado's involvement with the Union, the fact that Ramos required Espada to attend the meeting suggests that Ramos also knew of Espada's involvement.

25 Supervisor Santiago's January 15, 2008 comments to employee Cruz, discussed above in connection with Complaint paragraphs 9(a) and 9(b) also support a finding that Respondent knew about Espada's involvement with the Union. Thus, Supervisor Santiago said that employees had been photographed when they attended the Union meeting on January 13, 2008. Espada was one of the employees attending.

30 In sum, I conclude that the government has satisfied the second *Wright Line* criterion.

35 Espada's discharge clearly constitutes an "adverse employment action" sufficient to satisfy the third *Wright Line* requirement.

The government also has proven the fourth *Wright Line* element, a connection between the protected activities and the adverse employment action. The timing alone – Respondent discharged Espada the day after he attended the Union meeting – provides circumstantial evidence of such a nexus.

40 Supervisor Santiago's January 15, 2008 remarks to Cruz constitute direct evidence. Moreover, as noted above, Santiago also told another driver, Cardona, "they fired Rafita and Felipe, plus two other guys." Santiago's further comments linked the discharges to the employees' protected activities.

45 Additionally, Operations Manager Ramos' statements to employee Maldonado on January 11, 2008 also provide evidence of animus. Thus, ample evidence establishes the fourth *Wright Line* element.

The burden of proceeding thus shifts to Respondent to demonstrate that it would have discharged Espada in any event, regardless of protected activity. Respondent has failed to carry that burden.

5

At the time of his discharge, Espada was working as Maldonado’s helper. No evidence suggests that his work performance displeased management. Respondent has offered no plausible reason for removing him from that position. The asserted reason, Espada’s failure to have a valid driver’s license needed to drive a truck, seems less than credible considering that Espada’s job didn’t involve driving a truck, but only riding on it from stop to stop.

10

This inherently implausible reason might gain some credibility if Respondent had shown that it discharged other employees in circumstances which were similar except for the absence of protected activity. However, Respondent has provided no evidence of similar instances when, without the specter of a union organizing campaign, it removed a helper, whose job does not require a driver’s license, for failing to have one.

15

In sum, Respondent has not met its rebuttal burden. I conclude that Respondent’s discharge of Espada violated Section 8(a)(3) and (1) of the Act, and recommend that the Board so find.

20

#### **4. Discharge of Reinaldo Santiago**

Reinaldo Santiago Rodriguez (as noted above, he is referred to herein as “Santiago”) began working for Respondent in April 2006 as a mechanic. At the time Respondent discharged him on January 14, 2008, Santiago was working as a group leader. His duties and responsibilities will be discussed below in connection with Respondent’s assertion that Santiago is a supervisor within the meaning of Section 2(11) of the Act.

25

On September 27, 2007, Santiago and a shop employee, Pedro Rodriguez, were involved in an incident which Respondent later would cite as one reason for Santiago’s discharge. Santiago and Rodriguez were supposed to take a transmission to a repair shop. When Santiago’s supervisor called them, one of them told the supervisor that they were at the repair shop when, in fact, they were not. Instead, they had called the repair shop to report that they were lost. The supervisor, Lilliam Curet, wrote a memo to Operations Manager Ramos concerning these events. In the memo, Curet stated that when Santiago and Rodriguez finally got to her office “they arrived drunk.” This matter will be discussed further below in examining the reasons for Santiago’s discharge.

30

35

On October 8, 2007, Santiago received a written warning because he could not account for all 10 brake chambers which had been received in the shop. The letter stated, in part, “Remember that it is your responsibility as group leader to watch over and maintain control of the parts and shop equipment inventory.” (English translation)

40

On December 27, 2007, Respondent’s attorney, Juan Carlos Toro, questioned Santiago about a matter which had occurred on December 17, 2007 and which concerned Pedro Rodriguez, an employee in Santiago’s group. From the “minutes” of that interview, it appears that Rodriguez had left work without telling anyone. Santiago related that Rodriguez had called him on December 19, 2008 and said that he, Rodriguez, had left because of he was in pain.

45

Respondent later cited this Rodriguez matter as one of the reasons it discharged Santiago and I will return to it later when examining Respondent’s defense.

5 As discussed above in connection with Complaint paragraphs 7(a) and 7(b), on January 11, 2008, Operations Manager Ramos called Santiago into Ramos’ office. Ramos told Santiago that he had received information from a trustworthy source that Santiago was helping the Union organizing effort. Ramos also told Santiago that jobs were scarce these days and he should think about his family.

10 On January 13, 2008, Santiago attended a Union meeting, where he signed an authorization card.

The next day, Respondent discharged him.

15 Respondent contends that Santiago is a statutory supervisor and was discharged for failing to perform his duties well. Respondent cites the matters described above – the September 27, 2008 transmission errand incident, the October 8, 2007 warning for failure to keep track of inventory, and Rodriguez leaving work without notifying Santiago on December 17, 2007 – as reasons for the conclusion that Santiago’s employment should be terminated.

20 If Santiago is a statutory supervisory, then he would not fall within the Act’s protection. Therefore, I will begin with that issue.

25 The Act defines “supervisor” to mean “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” See 29 U.S.C. § 152(11).

30 Thus, to warrant a conclusion that a particular person meets the statutory definition of supervisor, the evidence must establish three elements: (1) That the individual had authority to perform one of the functions listed in the statute; (2) that the individual exercised this authority in the interest of the Employer, and (3) that the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

35 The burden of proving supervisory status rests with the party asserting such status. *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *Alois Box Co., Inc.*, 326 NLRB 1177 (1998); *Youville Health Care Center, Inc.*, 326 NLRB 495, 496 (1998).

40 Santiago denied that, as team leader, he had authority to hire, discharge, or discipline employees or to recommend such actions. He did not participate in interviewing job applicants and did not evaluate the performance of any employees.

45 Santiago further testified that while he was a team leader, he did not possess authority to grant annual or sick leave and also could not authorize overtime. Based on my observations of the witnesses, I conclude that Santiago’s testimony is reliable and credit it.

5 Having credited Santiago’s testimony, I must reject Respondent’s position, as stated by its counsel during oral argument, that Santiago “had the authority to interview, direct, supervise and discipline or recommend disciplinary actions to employees.” Credible evidence does not support these assertions.

10 Similarly, I must reject Respondent’s contention that Santiago also had the authority to assign work to employees. Credited evidence establishes that Santiago made work assignment recommendations to his supervisor and conveyed the supervisor’s decisions to the employees on his team. However, the record does not indicate that Santiago’s work assignment recommendations were other than routine.

15 Santiago was paid by the hour, received overtime pay, and wore a uniform. He did not have an office and did not attend supervisory meetings.

Credited evidence does not establish that Santiago met the Section 2(11) definition of supervisor. I conclude that he was not a supervisor but rather was an employee within the protection of the Act.

20 Turning to the *Wright Line* criteria, the record clearly establishes that Santiago engaged in protected activity, including attending a Union meeting and signing a Union authorization card. Thus, the government has satisfied the first *Wright Line* criterion.

25 Operations Manager Ramos’ comments to Santiago on January 11, 2008, discussed above in connection with Complaint paragraphs 7(a) and 7(b), establish that Respondent not only had received word of Santiago’s Union activities but also was confident the information was correct. Thus, Ramos told Santiago he had received this information from a “trustworthy source.” The General Counsel has proven the second *Wright Line* element.

30 Santiago’s discharge clearly constitutes an “adverse employment action” which meets the third *Wright Line* requirement.

35 The comments of Operations Manager Ramos on January 11, 2008 establish the necessary link between the protected activity and the discharge. Ramos’ not-so-subtle threat, reminding Santiago that jobs were scarce and urging him to think about his family, amounts to a rattle before the strike, clearly signaling Respondent’s intention to discharge Santiago if he continued engaging in Union activity.

40 Santiago didn’t heed Ramos’ warning, instead attending a Union meeting two days later. The day after that, Respondent fired him. The sequence of these events, so close in time, as well as Ramos’ threat, satisfy the fourth *Wright Line* requirement.

45 Because the government has met its initial burden of proving the four *Wright Line* elements, Respondent must present evidence establishing that it would have taken the same action in any event, regardless of protected activity. Respondent has not met this burden.

The record does not establish that, in the absence of protected activity, Respondent treated similarly situated employees the same way it treated Santiago. Additionally, although Respondent presented evidence to show that Santiago previously had been disciplined or had

engaged in conduct warranting discipline, the significance of this evidence fades upon close examination.

5 Certain evidence suggests that in September 2007, Santiago and another employee, Pedro Rodriguez, went out to deliver a transmission to a repair shop, did not tell the truth when their supervisor called and asked for their location, and returned “drunk.” Although Santiago’s supervisor made a written report to her boss, the record does not establish that Santiago ever received discipline. (The record indicates that during oral argument, Respondent’s counsel referred to this incident as occurring in December 2007 rather than September 2007. Possibly, 10 this is a transcriptional error. In any event, I find that the incident occurred in September 2007 rather than later.)

15 The Board does not presume to tell an employer what conduct warrants discipline and what does not. Rather, the Board looks to the employer’s own standards and its own history of applying them, to determine whether it departed from those standards in a given case. Here, in the absence of evidence that Respondent disciplined Santiago for the asserted conduct, I must conclude that Respondent either did not consider it serious or else did not consider Santiago to have been at fault.

20 Respondent did issue a written warning to Santiago in October 2007 for failing to keep track of certain parts which the shop had received. The record does not establish, however, that under Respondent’s past practice, an employee who had received such a warning would be discharged for any later infraction.

25 Moreover, the record does not establish that Santiago committed any additional infraction warranting discipline under Respondent’s system. In late December 2007, Respondent’s lawyer questioned Santiago about another shop employee leaving work without telling Santiago. Respondent suspended the other employee in early January, but did not then take any action against Santiago.

30 The fact that Respondent did not discipline Santiago at the time it suspended the other employee appears easy to explain: Santiago didn’t engage in any wrongdoing. It was the other employee, not Santiago, who went AWOL. However, Respondent then discharged Santiago the day after he engaged in protected activity.

35 This sequence of events leads me to conclude that Respondent’s asserted reason for discharging Santiago was a pretext. A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminates absent their union activities. *Rood Trucking Co.*, 342 NLRB 895 (2004), citing *Golden State Foods Corp.*, 340 NLRB 382 (2003)

40 In sum, I conclude that Respondent’s discharge of Santiago violated Section 8(a)(3) and (1) of the Act, and recommend that the Board so find.

45 **Complaint Paragraphs 11(b) and 11(d)**

Complaint paragraph 11(b) alleges that about March 17, 2008, Respondent caused the termination of employment of Marvin J. Cardona, an employee of DS Employment Agency, Inc. Complaint paragraph 11(d) alleges that Respondent engaged in the conduct described in paragraph 11(b) because Respondent mistakenly believed that Cardona joined and/or assisted the

Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

Respondent has admitted that Marvin Cardona was an employee of DS Employment Agency, Inc. and that this employer notified Cardona on March 17, 2008 “that his temporary contract to provide services as a chauffeur to Respondent was not renewed.” However, Respondent has not admitted that it caused DS Employment Agency, Inc. to discharge Cardona. Respondent denies the allegations in Complaint paragraph 11(d).

As discussed above in connection with Complaint paragraphs 3(a), 3(b) and 3(c), I have concluded that DS Employment Agency, Inc. (which I will refer to as “DS” for simplicity) is a joint employer with Respondent. DS provided Respondent with employees, particularly temporary or short-term employees.

DS assigned Cardona to be a driver for Respondent. Under Respondent’s agreement with DS, Respondent provided the supervision for the employees furnished by DS. José Santiago, a supervisor and agent of Respondent, supervised Cardona.

Cardona testified about an encounter with Santiago some time in January 2008: “I was performing my route through the Rio Jueyes sector and suddenly, out of nowhere, José Santiago showed up. I get out of the truck and José Santiago tells me, they fired Rafita and a couple of other guys.” (From the record, it appears that “Rafita” referred to Rafael Maldonado.)

According to Cardona, Santiago explained “they fired Rafita and Felipe, plus two other guys. Rafita was the leader. He’s the one who brought the union movement to the Juana Diaz facilities.”

Santiago then asked Cardona if he also had attended the Union meetings. Cardona replied that he had not. Santiago then told Cardona he needed proof that Cardona had not attended the meetings. Then, Santiago left.

As noted above, Santiago did not testify and no other evidence contradicts Cardona’s testimony, which I credit.

On March 17, 2008, Supervisor Santiago told Cardona to go to one of Respondent’s offices when he had finished driving his route. When Cardona arrived at the office, Supervisor Julio Torres gave him a letter from an administrative assistant at DS. In pertinent part, the letter stated, in English translation, as follows:

The present is to inform you that the contract expires today Monday, March 17, 2008. We appreciate the work performed by you in the company you were assigned to.

In the following payroll you will be receiving your corresponding liquidation.

Because Respondent and DS are joint employers, for clarity it may be helpful to review the employment relationship which was terminated. As explained below, I conclude that Cardona’s relationship with DS was severed completely and, necessarily, so was his employment relationship with Respondent.

As discussed above in connection with Complaint paragraphs 3(a), 3(b) and 3(c), DS has entered into a contract with Respondent whereby it would provide Respondent with workers who would be employees of DS and paid by DS. (Respondent’s payment to DS included reimbursement for these payroll expenses.)

5

The letter from DS, quoted above, terminated Cardona’s employment *with DS*. Some evidence suggests that DS may later have offered to rehire Cardona for referral to another DS client, but the record is somewhat sketchy on this point and it is not necessary to make any findings regarding it. However, I do find that the letter which Cardona received on March 17, 2008 completely terminated his employment with DS. It didn’t just end his assignment as a driver for Respondent.

10

After receiving the letter, Cardona telephoned Supervisor Santiago and arranged to meet with him in a parking lot. According to Cardona, Santiago referred to the earlier discharges of Maldonado and Espada and said that Cardona had been fired for the same reason. Cardona quoted Santiago as saying “the comments that got to Julio, that’s why you were fired, because you were — because you were participating in the Teamsters Union.” (“Julio” referred to Respondent’s supervisor, Julio Torres.) I credit Cardona’s uncontradicted testimony.

15

As already noted, Respondent has admitted that Santiago is its supervisor and agent, and his statement to Cardona constitutes an admission imputable to Respondent. Moreover, Santiago was Cardona’s supervisor, and it is plausible he would know the reason why someone under his supervision had been discharged.

20

With respect to the first *Wright Line* element, Cardona did not engage in any Union activity. However, Respondent believed that he had, as demonstrated by Santiago’s statements to Cardona. Discharging an employee because of a mistaken belief that the employee had engaged in Union activities violates Section 8(a)(3) and (1). Accordingly, I conclude that the government has established the first *Wright Line* element.

25

(Additionally, it may be noted that although Cardona did not engage in any *Union* activity, I stop short of concluding that he engaged in no protected activity of any kind. In January 2008, Supervisor Santiago asked Cardona for proof that Cardona had not participated in the Union’s organizing drive. Obviously, Respondent lawfully could not require an employee to prove that he hadn’t engaged in protected activity. If Cardona had explicitly refused to provide such proof, that refusal certainly would constitute protected activity. Cardona’s tacit noncompliance with this unlawful requirement would also, I believe, fall within the Act’s protection. An employer certainly may not condition continued employment on an employee’s willingness to prove that he had not exercised his statutory right.)

30

Santiago’s statements to Cardona satisfy the second *Wright Line* criterion, employer knowledge of the protected activity. In this instance, employer “knowledge” of the protected activity consists of management’s belief that it took place, but that is sufficient. On that basis, I conclude that the second *Wright Line* element has been established.

40

Cardona’s discharge constitutes an “adverse employment action” sufficient to satisfy the third *Wright Line* requirement.

45

5           Santiago’s remarks to Cardona – “that’s why you were fired. . .because you were participating in the Teamsters Union” – clearly prove the fourth *Wright Line* element. Supervisor Julio Torres testified that Santiago took no part in the decision to seek the termination of Cardona’s employment. That strikes me as somewhat implausible, considering Santiago’s involvement in the supervision of Cardona. In any event, as noted above, Santiago is Respondent’s supervisor, and his words to Cardona constitute an admission binding on Respondent.

10           Based on Santiago’s statements to Cardona, I conclude that hostility to the Union constituted a substantial or motivating factor in Respondent’s decision to cause Cardona’s termination. The burden thus shifts to Respondent to establish that it would have sought the termination of Cardona in any event.

15           Respondent called to the witness stand Julio Torres, its supervisor who oversees the employees collecting trash on residential routes. Torres gave two reasons for its decision to terminate Cardona’s employment. Cardona had deviated from the assigned routes, resulting in customer complaints. Respondent also received at least one customer complaint not arising from any route deviation.

20           On cross–examination, Torres acknowledged that he had not brought to the hearing the documents which recorded the customer complaints. However, I do not doubt Torres’ testimony about this matter because Cardona himself admitted the route deviations during his cross–examination.

25           Cardona also admitted an incident in which a customer complained that he had thrown water on a dog.

30           Respondent did not present evidence that other employees who had deviated from the established routes and who had thrown water on a dog had been treated exactly as it treated Cardona. However, it is not the law that an employer can prevail only by showing prior identical misconduct and discipline. *Sara Lee d/b/a International Baking Company*, above.

35           Respondent’s contract with DS includes a provision that “all contracted personnel will be obligated to follow the conduct rules established by the Client.” Thus, Cardona was not free to ignore Respondent’s instructions to drive the routes in a particular sequence and in a particular way.

40           Respondent had an important interest in making sure that the drivers followed its route instructions. Customers had developed expectations about the times their trash would be picked up. For example, if a customer, relying on past experience that the pickup be at 8:00 a.m., set out the trash at 7:30, only to discover that the truck already had been by, he would certainly be vexed.

45           Unauthorized changing of the routes by individual drivers also would damage Respondent’s reputation for reliability.

          Apart from customer satisfaction, Respondent had other reasons, such as efficiency and fuel economy, to make sure drivers didn’t deviate from its route schedule. A driver who

departed from the schedule without notifying management could cause significant problems.

Respondent also had a legitimate interest in maintaining a favorable corporate image and preserving customer goodwill. A driver throwing water at someone's pet – as Cardona admitted he did – would foster neither.

Cardona's actions create an impression of someone who acts unpredictably and sometimes with bad judgment. I conclude that Respondent would have terminated his employment in any event, even in the absence of any protected activity.

Therefore, I recommend that the Board dismiss the allegations arising from Complaint paragraphs 11(b) and 11(d).

### Conclusions of Law

1. The Respondent, LM Waste Service, Corp., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Union de Tronquistas de Puerto Rico, Local 901, IBT, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by the following conduct: Interrogating employees about their Union activities and soliciting their support to get rid of the Union; creating the impression among its employees that their Union activities were under surveillance; informing employees that they were discharged because of their activities on behalf of the Union; and discharging its employees Rafael Maldonado, Rafael Cruz, Felipe Espadx and Reinaldo Santiago.

4. Respondent violated Section 8(a)(3) of the Act by discharging its employees Rafael Maldonado, Rafael Cruz, Felipe Espadx and Reinaldo Santiago.

5. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

6. Respondent did not violate the Act in any other way alleged in the Complaint.

### Remedy

To remedy its unfair labor practices, Respondent must post the Notice to Employees set forth in Appendix A (in Spanish translation) and take the following actions: Offer immediate and full reinstatement to Rafael Maldonado, Rafael Cruz, Felipe Espadx and Reinaldo Santiago. and make them whole, with interest, for all losses they suffered because of Respondent's unlawful discrimination against them.

On the findings of fact and conclusions of law set forth herein, and on the entire record in this case, I issue the following recommended<sup>1</sup>

**ORDER**

5 The Respondent, LM Waste Service, Corp., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

10 (a) Interrogating employees about their Union activities and soliciting their support to get rid of the Union; creating the impression among employees that their Union activities are under surveillance; informing employees that they are discharged because of their activities on behalf of the Union; and discharging employees because of their union activities or to encourage support for any labor organization.

15 (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

25 (a) Offer Rafael Maldonado, Rafael Cruz, Felipe Espadx and Reinaldo Santiago immediate and full reinstatement to their former positions, or to substantially equivalent positions, and make them whole, with interest, for all losses they suffered because Respondent discharged them unlawfully.

30 (b) Within 14 days after service by the Region, post at its facilities in Juana Diaz, Puerto Rico, copies of the attached notice marked "Appendix A."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 January 11, 2008.

<sup>1</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

<sup>2</sup> If this Order is enforced by a judgment of the 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."

(c) 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 Regional Director attesting to the steps that the Respondent has taken to comply.

5 Dated Washington, D.C., June 10, 2009.

10

---

**Keltner W. Locke**  
**Administrative Law Judge**

APPENDIX A

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by 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 interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT interrogate our employees concerning their Union activities or the Union activities of other employees.

WE WILL NOT create among our employees the impression that their Union activities are under surveillance.

WE WILL NOT inform employees that they have been discharged because of their Union activities.

WE WILL NOT discharge our employees because they formed, joined or assisted a Union or to discourage membership in any labor organization.

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

WE WILL offer Rafael Maldonado, Rafael Cruz, Felipe Espadx and Reinaldo Santiago immediate and full reinstatement to their former positions or to substantially equivalent positions if their former positions are not available.

WE WILL make Rafael Maldonado, Rafael Cruz, Felipe Espadx and Reinaldo Santiago whole, with interest, for all losses they suffered because of our unlawful discrimination against them.

**LM WASTE SERVICE, CORP.**  
**(Respondent)**

**Dated:** \_\_\_\_\_ **By:** \_\_\_\_\_  
**(Representative) (Title)**

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

La Torre de Plaza, Suite 1002, 525 F. D. Roosevelt Avenue,  
San Juan, PR 00918-1002  
(787) 766-5347, Hours: 7:30 a.m. to 4:00 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (787) 766-5377