

**IN THE UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**BRUCE PACKING COMPANY, INC.,** )

Respondent, )

and )

**LABORERS' INTERNATIONAL** )

**UNION OF NORTH AMERICA,** )

**LOCAL No. 296,** )

Charging Party. )

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Case Nos. 36-CA-10496 and 36-CA-10595

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

Respectfully Submitted,

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Respondent Bruce Packing Company (“BrucePac” or “Employer”) submits this brief in support of the exceptions filed herewith to the National Labor Relations Board pursuant to 29 CFR § 102.46. This brief and the exceptions filed herewith are supported by the administrative record and the points and authorities contained herein related to the Consolidated Amended Complaint and Notice of Hearing (“Complaint”) issued in Case Nos. 36-CA-10496 and 36-CA-10595. *See* GC Exh. 1(l).

**I. THE PARTIES AND THE PROCEDURAL HISTORY**

BrucePac is a custom meat product designer and supplier. The company’s core business is supplying cooked protein products to a customer base that uses these products as a component in their meals or finished products. (Tr. at 261:4-262:24).<sup>1</sup> BrucePac satisfies the commerce requirements of the National Labor Relations Act as amended, 29 U.S.C. § 158 *et seq.* (the “Act”), and admits to the National Labor Relations Board’s (“Board”) jurisdiction.

Charging Party Laborers’ International Union of North America, Local No. 296 (“Union”) is a labor organization within the meaning of section 2(5) of the Act.

On July 17, 2009, the Union filed charge 36-CA-10496 alleging unlawful interrogation and threats of termination on or about June 18, 2009. *See* GC Exh. 1(a). On September 24, 2009, the Union amended the charge alleging BrucePac unlawfully discharged Manuel Coria (“Coria”) and Jose Carmen Maciel (“Maciel”) because of their union and/or protected concerted activity on or about June 29, 2009. *See* GC Exh. 1(c). A Complaint and Notice of Hearing was issued on October 28, 2009. *See* GC Exh. 1(e).

At the very end of the Section 10(b) period on December 28, 2009, the Union filed charge 36-CA-10595 alleging BrucePac unlawfully discharged Daniel Luna (“Luna”) and

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<sup>1</sup> The hearing transcript in this brief is cited to as “Tr. at \_\_\_.” Additionally, the General Counsel’s exhibits are cited as “GC Exh. \_\_\_” and the Employer’s exhibits are cited as “R Exh. \_\_\_.”

Federico Nieves Rojas (“Rojas”) in retaliation for their union activities and/or suspected union activities. *See* GC Exh. 1(j). A Consolidated Amended Complaint and Notice of Hearing issued on January 14, 2010. *See* GC Exh. 1(l).

The hearing was held in Portland, Oregon over a total of three days from February 8, 2010 through February 10, 2010. Post-hearing briefs were ordered to be filed by March 17, 2010. On April 8, 2010, a decision and order was rendered by Administrative Law Judge Lana H. Parke (“ALJ”). Exceptions were initially due on May 6, 2010. A request for extension of time to file exceptions and briefs in support thereof was filed and granted making the due date for exceptions May 27, 2010.

## **II. DECISION AND ORDER**

In the April 8, 2010 decision and order, the ALJ concluded BrucePac violated the Act in the following ways:

- Interrogating employees about their union sympathies;
- Impliedly threatening employees with unspecified reprisals if they engaged in union activities or supported the Union; and
- Terminating Manuel Coria, Jose Carmen Maciel and Daniel Luna because they engaged in union of other concerted, protected activities.

*See* Decision at pg. 15:9-19. As set forth below, BrucePac takes exception with several of the ALJ’s conclusions, findings and procedural rulings.

The ALJ denied General Counsel’s amendment request at the close of the hearing to add a promise-of-benefit claim. The ALJ also denied the complaint allegation regarding the termination of Federico Nieves Rojas. BrucePac takes no exception to these particular conclusions.

### **III. STATEMENT OF THE FACTS**

#### **A. BRUCEPAC'S BUSINESS AND OPERATIONS**

In general terms, BrucePac is a further processor of poultry, chicken, beef, pork, turkey and some fish products. (Tr. at 261). The company buys boneless products on the open market, cooks and prepares these products according to customer specifications (or new ones developed and sold to customers) to become a component in their finished products. (Tr. at 261-3). These specifications are broken down into 650 active product codes. (Tr. at 263-4). With the exception of one product (i.e., cooked sausage) constituting less than 1% of its sales, BrucePac does not sell branded products directly to retail stores. (Tr. at 261).

BrucePac has been in business since 1949. (Tr. at 263). The company had a production facility in Sublimity, Oregon, which closed approximately five years ago. (Tr. at 105-6). At all relevant times, BrucePac has had processing operations in Silverton and Woodburn, Oregon. (Tr. at 263). The Silverton facility is designed for shorter and smaller product runs. (Tr. at 263). The Woodburn facility is designed for longer product runs, though it does handle shorter product runs.<sup>2</sup> (Tr. at 263).

Eighty-five percent (85%) of BrucePac's production is made to order, which requires the company to remain flexible and adaptive in order to respond to these certain demands. (Tr. at 265-6). For example, weekly production schedules are fluid and changing anywhere from four to fifteen times during the actual week of production. (Tr. at 267). Some of these demands are submitted on very short notice. (Tr. at 266). These customers' demands have a direct effect on

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<sup>2</sup> A "short run" may be as small as 1,000 to 5,000 pounds of product, which can be run in a very short period of time. (Tr. at 263). By comparison, a larger run can be up to 40,000 pounds or an all-day run. (Tr. at 263-5).

the staffing patterns, including “operational sanitation” like the dayshift at the Silverton plant.<sup>3</sup> (Tr. at 266-7).

*1. Dayshift Sanitation Operations at the Silverton Facility*

Dayshift sanitation work at the Silverton facility is very low skilled, but physically demanding work. (Tr. at 294-5). Employees spend the vast majority of their time (1) hosing off and/or scrubbing equipment and cooking pans, (2) collecting garbage, and (3) cleaning around the building and parking lot. (Tr. at 25-33, 41-42, 111, 117, 375). Training is completed in 90 days. (Tr. at 294, 295, 337; *see* Tr. at 42). Much of the training involves a new employee simply watching someone else perform the work. (Tr. at 77).

*2. Supervisory Structure for Dayshift Sanitation at the Silverton Facility*

At all relevant times, Jorge Mesa (“Mesa”) has been BrucePac’s Sanitation Manager. (Tr. at 283). In such capacity, Mesa manages all sanitation functions at both the Silverton and Woodburn facilities. Directly under Mesa, Osmin Martinez (“Martinez”) has been an Assistant Sanitation Manager at all relevant times. (Tr. at 283 and 372). Martinez is responsible for the sanitation department’s operations and monitoring of the same. (Tr. at 373). Finally, Abel Esparza (“Esparza”) has been the Sanitation Supervisor at the Silverton facility at all relevant times. (Tr. at 283 and 373). Esparza reports directly to Martinez and ultimately to Mesa. (Tr. at 283, 373-4 and 428). While he works with his hands approximately twenty to thirty percent of the time, Esparza is directly responsible for supervising and monitoring the dayshift sanitation crew at the Silverton facility. (Tr. at 162, 283 and 428-9).

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<sup>3</sup> “Night” sanitation crews completely sanitize each facility every 24 hours in order to comply with federal regulations and inspection requirements. After these thorough night cleanings, BrucePac’s Quality Assurance employees review and test all areas, which are offered to federal government employees for inspection. (Tr. at 268-9; *see* Tr. at 375).

On the dayshift sanitation crew at the Silverton facility, there are two leads or foremen. (Tr. at 21, 110, 163, 283, 390, 429-30, 443). At all relevant times, Juan Luis Flores (“Flores”) and Juan Briones (“Briones”) have held these lead positions, which are *not* supervisor positions as defined by Section 2(11) of the Act.

**B. SUPERVISOR ABEL ESPARZA’S LONG-TERM PERSONAL RELATIONSHIP WITH JOSE CARMEN MACIEL AND MARIA ESTELLE CORTEZ**

Prior to the June 29, 2009 discharges, Esparza had a long-term personal relationship with Jose Carmen Maciel and his wife, Maria Estelle Cortez (“Cortez”). They met in the late 1990’s when they all worked together at BrucePac’s Subliminity, Oregon facility. (Tr. at 106-7, 223-4). The families became incredibly close. In the late 1990’s, Maciel asked Esparza to be a godfather to one of his sons, Carmello. (Tr. at 107:9-108:10, 224:5-21). As Maciel testified, this is an important designation in his culture tied to Catholic baptism, so he chose carefully in selecting Esparza for this role. (Tr. at 150:6-16). In Hispanic culture, parents and godparents are considered “compadres.” (Tr. at 431:18-432:5). Consistent with this status, Esparza refers to Maciel as “compa” and Cortez as “compadre.” (Tr. at 224:5-21, 431:18-432:5). Also, Esparza’s sister is a godmother to another one of Maciel’s sons, Misael. (Tr. at 148:4-8, 431:11-17).

Esparza still considered Maciel to be a friend at the time of his discharge. (Tr. at 432:6-8). For example, while he gave verbal reports to Martinez concerning Maciel’s performance problems, Esparza did not issue written discipline to Maciel. (Tr. at 446:21-447:4). As he testified, Esparza did not want to give written discipline to his “compa.” (Tr. at 447:3-4). Similarly, as Maciel testified, Esparza called him immediately after the June 29, 2009 reduction in force. While saying he did not know what was happening in the plant, Esparza encouraged his “compa” to get unemployment compensation. (Tr. at 126:1-22). A day or two after the

reduction in force, Esparza also tried to comfort an unhappy Cortez by telling her he was sorry for the decision, but he had nothing to do with it. (Tr. at 246:13-25, 438:6-18). Cortez stated that she believed Esparza. (Tr. at 246:19-25, 438:17-18).

### **C. SECRET UNION ORGANIZING CAMPAIGN**

Coria testified that he held three union meetings at his home, talked to his co-workers about the union at lunch, and passed out a union booklet, including giving a copy to one of the foremen, Juan Flores. (Tr. at 50-53; GC Exh. 2). Two of the alleged discriminatees, Maciel and Luna, attended these meetings, but Federico Nieves-Rojas did not attend them. (Tr. at 50, 128-29, 184). Additionally, other dayshift sanitation workers attended these meetings, but they were not discharged. (Tr. at 156). Further, inconsistent with his testimony, Maciel's affidavit stated he was not sure if the third meeting was held before or after his termination on June 29, 2009. (Tr. at 71:19-21)

On cross examination, Coria admitted these meetings and all of his union activities were done secretly. (Tr. at 67:13-15). Similarly, on cross, Federico Nieves-Rojas testified all union activity was secret. (Tr. at 195:9-22, 196:11-17). As he explained, they did not want everyone to know yet about their union sympathies. (Tr. at 195:17-22). They never discussed the union near supervisors, and supervisors never asked about the union. (Tr. at 195:9-15). Consistent with these employees' desires to keep their union sympathies and activities secret, all management witnesses (Golomski, de Soto, Martinez, and Esparza) testified to having no knowledge of union activities or sympathies in the Silverton sanitation department until *after* the June 29, 2009 reductions in force. (Tr. at 274-5, 305-6, 389, 392, 394-5, 432-4).

The lunchroom at the Silverton facility is shaped like an "L." (Tr. at 187-9; R. Exh. 2). Esparza shares an office at the far end of the room, i.e., near the top of the "L." (R. Exh. 2).

During lunchtime, Esparza eats his lunch in this office with his two sanitation leads, Briones and Flores. (Tr. at 48, 182, 197). Between May 1 and June 29, 2009, Esparza periodically closed his office door when he ate his lunch. (Tr. at 48, 203-4).

While other employees ate in this room, dayshift sanitation employees ate their lunch around the corner from Esparza's office – approximately 25 feet away from Esparza's office. (Tr. at 183; R. Exh. 2). While sitting around the corner, Federico Nieves-Rojas testified that he could see Esparza's office door by looking through two interior windows located near the corner of the L-shaped room. (Tr. at 202; R. Exh. 2). Moreover, the lunchroom was loud during breaks. (Tr. at 193-5). While he could close his door, Esparza's office was not quiet. There was a large exterior window overlooking a loud production floor. (Tr. at 193-5).

In May and June 2009, the four alleged discriminatees ate with each other at various times as well as other sanitation employees who were not discharged. (Tr. at 163, 196). In addition to some employees secretly discussing their union sympathies, they frequently discussed many other topics having nothing to do with the union. (Tr. at 192).

**D. JUNE 19, 2009 TELEPHONE CONVERSATION BETWEEN ABEL  
ESPARZA AND MARIA ESTELLE CORTEZ**

On June 19, 2009, Esparza telephoned Cortez. (GC Exh. 5 at pg. 8). According to Cortez, Esparza was upset. He called her to ask if she knew the person, Laura Cordova, who was allegedly accusing him of harassment. During a conversation spanning 79 minutes, they spent the vast majority of the time discussing Cordova and these allegations. (GC Exh. 5 at pg. 8). According to Cortez, Esparza changed the topic of conversation at one point. She testified that Esparza said she was forming a group to get the Union in there and that she was going to tell him, yes or no. (Tr. at 229). She responded there was no need to ask if he was telling her. According to Cortez, Esparza responded be careful because it is a delicate thing. While not alleged in the Complaint, Cortez testified Esparza said he could get a raise for Coria and her

husband, Maciel, plus an “accommodation” in order to get her a raise. (Tr. at 230-1). Finally, as Cortez testified, Esparza said the union was going to have a meeting the following day, and he would know by Monday if they had a meeting. (Tr. at 231).

On cross examination, Cortez testified that Esparza told her not to worry about the union thing because he was “with her.” (Tr. at 245). Further, according to Cortez, Esparza said it was okay to do this so she could “fuck the company.” (Tr. at 245). Cortez also testified Esparza was the only supervisor who ever mentioned the union to her. (Tr. at 245).

On direct examination, Esparza testified that he called Cortez to discuss some “gossip” involving Laura Cordova who was trying to get him in trouble for sexual harassment. (Tr. at 434). Approximately an hour before he called Cortez, another employee (Marcelina Vargas) called Esparza on the phone and said she heard gossip that Cortez was in the union. (Tr. at 436; 454).<sup>4</sup> In talking to Cortez, Esparza simply stated that he knew she was in the union. (Tr. at 435). As he testified, he told her not to worry because he would not tell anyone. (Tr. at 435). In fact, Esparza testified that he told no one because he promised his “compadre” that he would not tell anyone. (Tr. at 436). Esparza denied making any other statements concerning the union, or any statements at all concerning union meetings, raises or talking with the owner. (Tr. at 437-8).

#### **E. LAYOFF DECISION, PROCESS AND SELECTIONS FOR THE SANITATION DAYSHIFT AT THE SILVERTON PLANT**

Starting in 2007 and continuing into 2009, BrucePac’s business suffered. (Tr. at 265-266). In particular, the recession hit the company hard causing a “significant” drop in production volume and revenue. (Tr. at 271). For example, BrucePac’s production fell by more than fifty percent (50%) in late 2008 and early 2009. (Tr. at 271, 297, 376) As a result, BrucePac contemplated layoffs for more than a year. (Tr. at 271). While summers are normally a slower business cycle, summer business was especially slow in 2009. (Tr. at 272). After reviewing the

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<sup>4</sup> According to Esparza, Vargas told him she heard this gossip from someone else. However, she never gave a name or mentioned anyone else associated with the Union. (Tr. at 455).

situation carefully, BrucePac's owner, Larry Bruce, and Chief Executive Officer / President, Glen Golomski, made the tough, but necessary, decision to reduce staffing levels in June 2009. (Tr. at 271).

*1. June 24, 2009 Meeting between Golomski and de Soto*

On Wednesday, June 24, 2009, Golomski called a meeting with Human Resources Manager Jake de Soto ("de Soto"). (Tr. at 298). Golomski stated he had been contemplating a reduction in force because he believed they were overstaffed, and he wanted to know de Soto's opinion. (Tr. at 298). De Soto stated that he believed the company was overstaffed. (Tr. at 299). They discussed the mechanics of a reduction in force, how many may be affected, and how quickly the process could be completed. (Tr. at 299). De Soto expressed confidence the whole process, including check issuance, could be completed by that coming Friday.<sup>5</sup> (Tr. at 299).

*2. June 25, 2009 Managers' Meeting*

On Thursday morning, June 25, 2009, a meeting was called by Golomski and de Soto with BrucePac's top managers. (Tr. at 273, 300). While no set number was provided, managers were told BrucePac was seeking approximately a ten percent (10%) staffing reduction, i.e., somewhere between 40 and 50 employees, in five departments: operations, sanitation, accounting, quality assurance, and maintenance. (Tr. at 273, 300). The plan was to stay below fifty (50) discharges in order to avoid notice obligations under the Workers Adjustment and Retraining Notification Act ("WARN").<sup>6</sup> (Tr. at 301).

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<sup>5</sup> As he testified, de Soto conducted 400 person layoffs with his prior employer, Stahlbush Island Farms, in only one day. (Tr. at 281-2).

<sup>6</sup> Temporary employees were not mentioned at the June 25, 2009 meeting. (Tr. at 304). Immediately after the June 29 reduction in force, managers were told their use of temporary employees would be curtailed and monitored going forward. (Tr. at 305). As it was trying to save money, BrucePac wanted managers to actually make do with fewer employees, which could be ignored if managers simply hired more temporary employees. (Tr. at 305). BrucePac

Managers were told to try to keep the best employees by applying criteria such as attitude, enthusiasm, departmental needs and discipline. (Tr. at 273). Managers were told to make the selections themselves, though they could involve their assistant managers. (Tr. at 301). However, they were instructed to go no lower than assistant managers, who were expected to have the judgment to make such decisions, in an effort to keep these plans secret until they were ready to announce the decisions. (Tr. at 301). As de Soto testified, there were thirty (30) front-line supervisors with varying relations to many people in each facility. (Tr. at 301). For example, Esparza had two relatives (Gregory Esparza and Eduardo Velasco) working under him on the dayshift sanitation crew at the Silverton plant. (Tr. at 118:7-12; Tr. at 162-3). If front-line supervisors were told, BrucePac feared false rumors would start circulating through both facilities, which would lead to poor morale, possible violence, and workplace accidents. (Tr. at 302).

De Soto told managers that he wanted their lists by the end of that day or early Friday. (Tr. at 277, 302). He said he believed some departments could make their lists right on the spot in the meeting. (Tr. at 302). In fact, most departments did supply their lists before leaving the meeting. (Tr. at 303). There was no mention of any union or union activity during this meeting. (Tr. at 304).

Following this meeting, Jorge Mesa met with Osmin Martinez. Mesa explained sales were down and the company needed to reduce its workforce. (Tr. at 377). Because Martinez was more involved with the workers, Mesa directed him to determine how many to discharge and who should be discharged. (Tr. at 377-8). Martinez's selection process is discussed below

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created a daily report to monitor temporary employee usage. Additionally, Golomski or de Soto had to approve all new temporary employees. (Tr. at 305).

in the next section. After making his selections, Martinez made a list for each of the four sanitation shifts. (Tr. at 379-80; R. Exh. 9 – Martinez’s handwritten lists).

The sanitation and production departments provided their lists on Friday morning. (Tr. at 303). De Soto gathered the names of all employees to be discharged in order to prepare separation notices. (Tr. at 306). Mesa and Martinez called de Soto to come to their office where they provided the names of the sanitation employees selected by Martinez. (Tr. at 307, 382). Martinez read the names to de Soto off his handwritten lists he had prepared for each sanitation shift. (Tr. at 307-8, 367, 382; R Exh. 9). De Soto wrote the names on a scratch sheet of paper, which he threw away after preparing the separation notices. (Tr. at 308, 370).

Despite BrucePac’s original intentions, the reduction in force was not announced on Friday (June 26) due to a problem with the production department’s list. It included a female worker who was involved in an unrelated investigation on that very same day, so de Soto removed her name from the list to avoid any appearance of retaliation. (Tr. at 303). This issue and de Soto’s participation in the investigation made it impossible to cut all paychecks the same day. (Tr. at 304). After payroll prepared the checks over the weekend, the reduction in force was announced to employees on Monday, June 29, 2009. (Tr. at 304).

### *3. Osmin Martinez’s Selection Process*

As he testified, Martinez determined how many people to discharge from the sanitation department and which specific people to discharge. (Tr. at 377). Mesa did not tell Martinez how many people to discharge. He left this decision exclusively to Martinez. (Tr. at 378). Applying his nineteen years of experience, Martinez determined the minimum number of people he believed were needed to perform requisite work on each shift and, in doing so, set the number of positions to be eliminated from each sanitation shift at the two plants. (Tr. at 377-8). On the

sanitation dayshift at Silverton, Martinez decided to eliminate four positions. (Tr. at 377-80). Prior to June 29, 2009, this shift had sixteen (16) workers, including Esparza and the two leads (Flores and Briones).<sup>7</sup> (Tr. at 381; R Exh. 8 at pg. 1). Esparza had no role in selecting how many positions to eliminate on the sanitation dayshift at Silverton. (Tr. at 378).

As to the individuals selected, Martinez testified that he based his decisions upon his own personal observations and reports he received from his supervisors, including Esparza for the dayshift at Silverton. (Tr. at 378-9). He did not review personnel files. (Tr. at 379). He applied the same process for all sanitation shifts and selections. (Tr. at 379). As both Esparza and Martinez testified, Esparza had absolutely no role in selecting the four individuals on the sanitation dayshift at Silverton. (Tr. at 379, 440-5). In fact, he learned of the layoff on Friday, June 26 *after* Martinez had made his selections. (Tr. at 438-9).

*a. Jose Carmen Maciel*

Martinez selected Maciel based upon his own observations and reports he received from Esparza. (Tr. at 382). He received reports that Maciel's performance was poor, he was upset most of the time, and he pushed a table into a female co-worker and seriously injured her. (Tr. at 383-85, 445-6; GC Exh. 4; R Exh. 3). Martinez received these poor performance reports for at least a year prior to the June 2009 reduction in force. (Tr. at 384-85, 457). These reports indicated Maciel was taking longer to complete work than his co-workers. (Tr. at 385). For a year or more, Martinez also received reports that Maciel was very upset at work. (Tr. at 385). From his own observations, Martinez could see how upset Maciel was at work.<sup>8</sup> (Tr. at 385 and 389). Further, Esparza reported to Martinez that he tried to talk with Maciel about these problems, but he did not change. (Tr. at 446).

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<sup>7</sup> Just prior to the June 2009 reduction in force, the Silverton nightshift had 26 or 28 sanitation workers, Woodburn morning shift had 8 or 9, and Woodburn evening shift had 24 or 26. (Tr. at 381).

<sup>8</sup> According to Esparza, Maciel had many family problems prior to his discharge. (Tr. at 446).

In addition to Esparza's own reports, he also conveyed to Martinez some reports from the two sanitation leads. (Tr. at 386). Three times per month for a period of one year Martinez heard complaints from the lead employees about Maciel. (Tr. at 389). These reports stated that Maciel was upset, he had a poor attitude, and he worked less than other employees. (Tr. at 389).

Prior to the June 29, 2009 discharges, Martinez had no knowledge or suspicion of Maciel's union sympathies. (Tr. at 389). Esparza had no role in Martinez selecting Maciel for discharge. (Tr. at 382, 446-7).

*b. Manuel Coria*

Martinez selected Coria based upon reports he received from Esparza. (Tr. at 390, 444). Martinez received these reports for two years prior the June 2009 discharges. (Tr. at 392). According to these reports, Coria complained about one of the leads, Briones, checking up on him and sending him to do work. (Tr. at 390, 444; *see* R. Exh. 1). Coria did not like Briones telling him what to do, because he believed he knew more than Briones. (Tr. at 391, 444). On one occasion, Martinez received a report that Coria told Briones to send another worker to do something after Briones asked him to do it. (Tr. at 391). Martinez described this situation as an on-going problem. (Tr. at 392). Esparza reported to Martinez that he verbally counseled Coria on these problems. (Tr. at 445). As reported to Martinez, Coria's behavior improved for a period of time, but always reverted back to the same behavior. (Tr. at 445).

Prior to the June 29, 2009 discharges, Martinez had no knowledge or suspicion of Coria's union sympathies. (Tr. at 392). Esparza had no role in Martinez selecting Maciel for discharge. (Tr. at 382, 444).

*c. Federico Nieves-Rojas*

Martinez selected Federico Nieves-Rojas based upon Esparza's reports concerning his "very bad" attendance and tardiness problems. (Tr. at 394, 445). Esparza provided these reports to Martinez periodically for more than a year. (Tr. at 395, 445, 458; *see* GC Exhs. 6 and 7 – multiple disciplines for tardiness and no call / no shows). Rojas testified his work shift started at 5:00 a.m. on Mondays and 6:00 a.m. on the other days of the week. (Tr. at 159). According to his time card report, Rojas's attendance and tardiness problems continued well into 2009. For example, he was late *seven times* between January 26 and March 19, 2009, including three days when he was more than *two and a half hours* late. (R. Exh. 4).

Prior to the June 29, 2009 discharges, Martinez had no knowledge or suspicion of Rojas's union sympathies. (Tr. at 395). Esparza had no role in Martinez selecting Maciel for discharge. (Tr. at 382, 445).

*d. Daniel Luna*

Martinez selected Daniel Luna based upon Esparza's reports and his own observations.<sup>9</sup> (Tr. at 393-4). He received reports regarding Luna's poor attitude, poor treatment toward and complaints about working with Briones, and slow working style. (Tr. at 393-4, 441-3; *see* Tr. at 319). In October and November 2008, Luna received, respectively, oral and written warnings for resisting orders with foul language. (R. Exh. 5). Also, as he testified without contradiction, Martinez observed Luna talking a lot when he should have been working. When Luna noticed Martinez, he would quickly start to work. (Tr. at 393). Esparza also reported to Martinez that he talked with Luna about these issues, but his performance did not improve. (Tr. at 443-4).

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<sup>9</sup> General Counsel did not call Luna to testify at the hearing.

Prior to the June 29, 2009 discharges, Martinez had no knowledge or suspicion of Luna's union sympathies. (Tr. at 392). Esparza testified that he had no role in selecting Luna for discharge. (Tr. at 382, 440).

#### *4. Meeting with Affected Individuals on Monday, June 29, 2009*

Shortly after punching in for work on Monday, June 29, 2009, the four alleged discriminatees were told to report to Esparza's office. (Tr. at 45, 120, 176). As he was doing for all individuals selected for discharge, de Soto met with the four alleged discriminatees from the sanitation dayshift crew at the Silverton facility.<sup>10</sup>

De Soto stated they were being terminated due to the poor economy. (Tr. at 45, 121, 176, 178). In response, Coria said they should check the immigration "paperwork" for others and layoff the illegals first. (Tr. at 46, 122, 311). De Soto responded his statement was untrue and all employees' paperwork was in order. (Tr. at 123, 311). Maciel said it was okay if the economy was bad, but they should start with newer employees.<sup>11</sup> (Tr. at 46, 122). De Soto stated the decision had already been made, and there was no reason to debate it. (Tr. at 122, 311). According to Coria, Rojas stated that he saw it coming due to his absences. (Tr. at 46). Also, according to Maciel, Luna questioned why they did not discharge them on Friday. (Tr. at 123). In handing out their final checks, de Soto stated that they had been paid for two hours of "show up" pay. He also told the group they could reapply in the future through Express Personnel. (Tr. at 46).

According to Maciel, Esparza called him at home within an hour of the terminations being announced. Esparza said the "factory is a mess and he doesn't know what is going on."

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<sup>10</sup> Esparza was not present during this meeting. (Tr. at 47).

<sup>11</sup> Inconsistently, Rojas testified that he made this statement in the meeting. (Tr. at 178-9).

(Tr. at 126). Maciel responded, “If you don’t know, I surely don’t know.” (Tr. at 126). At the end of their brief conversation, Esparza said, “Compa, go get unemployment.” (Tr. at 126).

5. *Mauro Navarro’s June 29, 2009 Conversation with Esparza*

Bulmaro (a.k.a. Mauro) Navarro was a lead employee on the sanitation nightshift at the Silverton facility. (Tr. at 208). At the time, he had worked for BrucePac for approximately six (6) years. (Tr. at 206). Juan Rodriguez (“Rodriguez”) was his supervisor. (Tr. at 206). On June 29, 2009, de Soto and Rodriguez informed him that he and four others on the nightshift were being discharged. (R Exh. 9 at pg. 2). As he testified, Navarro was “very angry” about this news. (Tr. at 215). After talking with Mesa and de Soto, Navarro testified he drove to Esparza’s home. (Tr. at 212). He was looking for the reason why he was discharged. (Tr. at 212).

According to Navarro, when he asked why employees were let go, Esparza responded that he chose the people on the dayshift because they were stirring stuff up and meeting with the union. (Tr. at 213). Further, according to Navarro, he questioned why he was chosen because he had nothing to do with the union. Esparza said he did not know because Rodriguez picked him. (Tr. at 213-4).

As he admitted on cross examination, Navarro is a new Union member who attended a Union meeting in late 2009 with Coria where they talked. (Tr. at 216). When asked if he discussed the layoffs with Coria, Navarro became evasive and testified, “I don’t remember exactly.” (Tr. at 216). When asked to explain how he came forward to supply a Board affidavit on December 27, 2009 – one day before the Section 10(b) period expired on two of the alleged discriminatees – Navarro had no clear recollection as to how or why he came forward to provide an affidavit. (Tr. at 216-219). Following his layoff, Navarro was unable to clearly remember how long he was out of work, but he believed it was between two and four months. (Tr. at 215).

Esparza described Navarro as a casual friend, not a good one. (Tr. at 450). Esparza testified that Navarro did come to his home on June 29, 2009. Navarro was very upset. (Tr. at 450). He asked Esparza why he was laid off. Esparza said he did not know the reason. (Tr. at 450). More importantly, Esparza flatly denied telling Navarro that he chose the dayshift discharges or that they were stirring stuff up with the union. (Tr. at 451). He denied saying anything like this. (Tr. at 451).

#### *6. Esparza and de Soto's Interactions with Maria Cortez*

Within a day or two after the June 2009 discharges, Esparza was walking outside the Silverton plant when he noticed Maria Cortez looking extremely sad. Esparza told her that he was sorry about “compadre” (Maciel), but he had nothing to do with it. (Tr. at 246, 438). She said she believed him. (Tr. at 246, 438).

Shortly thereafter, Cortez was complaining to de Soto about a lead wanting to see her immigration papers. (Tr. at 323). During this conversation, Cortez told de Soto that she had spoken to Esparza. According to de Soto, Cortez said she believed Esparza had nothing to do with her husband's discharge because he was her “compadre.” (Tr. at 325). Inconsistently, Cortez testified that she told de Soto that Esparza had something to do with her husband's termination. (Tr. at 247).

#### **F. POST-LAYOFF SANITATION STAFFING LEVELS AND OPERATIONS**

On the sanitation dayshift at the Silverton facility, staffing levels have remained consistently at 12 or 13 employees following the June 29, 2009 discharges. (Tr. at 451; R Exhs. 7-8). Just prior to the layoffs, there were 16 employees on this shift. There have been changes on this sanitation crew since June 29, 2009, but all of these changes have been necessary to maintain headcount numbers.

BrucePac maintains a policy prohibiting certain relatives from working together directly. (GC Exh. 10). Shortly after the June 2009 discharges, a team member complained that a supervisor in another department was violating this policy. (Tr. at 332). De Soto sent a reminder to all managers about the policy, and he instructed one of his employees, Araceli, to figure out who else had close family members working for them. (Tr. at 332). As a result of this search, de Soto learned Esparza's brother, Greg Esparza, was working for him. (Tr. at 332-333). While Esparza was unaware of the policy and other managers interpreted the policy differently, de Soto moved quickly to transfer Greg Esparza to another department, which is the first course of action under the policy. (Tr. at 332, 416; GC Exh. 10). On July 13, 2009, Greg Esparza was transferred off the sanitation dayshift at the Silverton facility. (Tr. at 331-2; R Exh. 6 at pg. 1). He was promptly replaced by a temporary employee named Ricky Sinclair. (Tr. at 331-2; R Exh. 7 at pg. 2). While different temporary employees filled this one slot, the employee headcount did not increase. (R. Exh. 7).

In August 2009, Hipolito Claudio applied for and received a transfer to a new position in the maintenance department. (Tr. at 335-6; R. Exh. 6 at pg. 1). To accommodate his departure, a second temporary employee was added to sanitation dayshift in Silverton in August 2009. (Tr. at 335; R. Exh. 7). Similarly, as of the hearing in early February 2010, the sanitation dayshift in Silverton had 13 employees, including one temporary employee (Orlando Reyes) in training to replace Lupe Trevino who was retiring the following week. (Tr. at 452). Consistent with staffing levels set by Martinez in June 2009, the sanitation dayshift staffing level has remained at 12 or 13 regular employees following the June 29, 2009 layoffs. Further, there is neither evidence nor allegation that the dayshift sanitation crew in Silverton has been unable to clean the

facility with post-June 2009 headcount levels or the individuals actually selected to perform this work.

#### **IV. EXCEPTIONS AND SUPPORTING ARGUMENT**

**Exception Number 1:** BrucePac excepts to the ALJ's decision not to credit any of Osmin Martinez's uncorroborated testimony. BrucePac also excepts to the ALJ's findings supporting these decisions.

The ALJ did not "credit any of Mr. Martinez's uncorroborated testimony." *See* Decision at 8:16-30. The record and the ALJ's reasons do not support this conclusion.

Contrary to the ALJ's finding, Martinez's direct examination (given through an interpreter) was not vague. Similarly, he was not "resistant on cross examination." In support of this conclusion, the ALJ found that Martinez "bridled" at one question. As the record reflects, General Counsel asked a question that Martinez started to answer when the General Counsel immediately cut him off demanding a "yes or no" response. He asked if he had to answer that way or could he give a fuller answer. As subsequently instructed, he gave a simple "yes" answer.

It appears the ALJ's primary problem with Martinez's testimony is the system he employed to select the sanitation employees to be laid off from all of the shifts. Apparently skewed by a belief that a more deliberative approach was required, the ALJ described Martinez's approach as "implausible." *See* Decision at 8:18-23. The ALJ simply thought the process should have taken longer and Martinez should have reviewed personnel files. The ALJ's finding misses the fact that Martinez worked with and interacted with all of these employees on a very regular basis. Additionally, he received regular reports from his front-line supervisors.

The whole layoff process was expressly designed to move very rapidly. It is undisputed that some managers made their selections at the end of the June 25, 2009 meeting *immediately*

after being told they would have to lay off some people. While the ALJ may have preferred a more deliberative and drawn out process, the fact that BrucePac and Martinez moved rapidly does not invalidate the process or somehow translate into Martinez's testimony being "implausible."

The ALJ also found that Martinez "did not recall that Matias Rodriguez reported late to work eight times in 2008." *See* Decision at 8:27-28. This statement assumes a fact not properly in evidence. At the hearing, General Counsel verbally represented to Martinez that Rodriguez reported to work late eight times in 2008. (Tr. at 412:5-8:). While not shown the documentation, Martinez was then asked to confirm if "those attendance reports show that Matias Rodriguez reported late eight times in 2008." (Tr. at 413:15-17). Martinez testified that he did not know if the reports showed Mr. Rodriguez was late eight times in 2008. Contrary to the ALJ's implicit finding, there is no evidence in the record that Mr. Rodriguez, in fact, reported late to work eight times in 2008. The record simply reflects the General Counsel's representation. Similarly, Martinez's failure to precisely recall such a specific, obscure fact does not mean his testimony is implausible or vague.

Finally, the ALJ found Martinez could not "recall specifics" in that he did not recall whether Maciel had received a written warning for shoving a table into an employee. *See* Decision at 8:28-30. Contrary to the ALJ's conclusion, this fact is *consistent* with Martinez's testimony. On direct examination, Martinez clearly recalled the incident and Esparza's verbal report to him regarding the same. *See* Decision at pg. 7:2-3. These facts are not altered by Martinez's inability to recall detailed specifics about the disciplinary documentation itself. It is undisputed that de Soto prepared and signed Maciel's disciplinary paperwork, which was then placed in his personnel file. There is no evidence Martinez ever saw the paperwork or examined

Maciel's personnel file. Indeed, as he testified, it is undisputed that Martinez did not review personnel files as part of his decision-making process.

**Exception Number 2:** BrucePac excepts to the ALJ's decision to credit Navarro's testimony over Esparza's concerning their June 29, 2009 meeting.

The ALJ credited Navarro's testimony over that provided by Esparza concerning their brief June 29, 2009 meeting. *See* Decision at 9:11-24. This witness credibility resolution should be overruled because it is incorrect by a clear preponderance of all relevant evidence

Contrary to the ALJ's implicit conclusion, Navarro had a motive to fabricate his story. As he testified, Navarro was "very angry" with BrucePac's decision to lay him off. He missed up to four (4) months of work following his layoff. Coria and the Union gave him the perfect opportunity to strike back at BrucePac for laying him off. Coria brought Navarro into the Union membership and invited him to a Union meeting in late 2009. Shortly thereafter, Navarro provided an affidavit to Subregion 36 just prior to the Section 10(b) period expiring on the Section 8(a)(3) allegations involving Luna and Rojas. Contrary to the ALJ's conclusion that his testimony was clear, Navarro was evasive when asked about his conversations with Coria. Specifically, when asked if he discussed the layoffs with Coria, Navarro testified, "I don't remember exactly." (Tr. at 216:4-6).

By comparison, Esparza's description of the June 29 meeting is consistent with his own personal motivations and contemporaneous actions. As Coria testified, Esparza telephoned him at home *within one hour* of the June 29 layoffs. Again, as Coria testified, Esparza stated that he did not know what was going on, but he encouraged his "compa" [Coria] to apply for unemployment compensation. As Cortez testified, she believed Esparza had no involvement in the layoffs when he approached her a day or two after the layoffs.

Even assuming he had some role in selecting the four discriminatees for layoffs (which BrucePac denies), Esparza had strong motivation to not share this information with anyone. Less than two weeks prior to the June 29 layoffs, Esparza telephoned Cortez to discuss plant rumors that another female employee was threatening to sue him for harassment. While they discussed the union for a few minutes during this call, the vast majority of their seventy-nine (79) minute call focused on the harassment rumors apparently being spread by this other woman, who rode with Cortez in a car pool. In seeking Cortez's advice and assistance in dealing with this other woman's rumored claims, Esparza had no plausible motivation to alienate Cortez by somehow targeting her husband and his friend, Jose Maciel, for layoff only a few days later. Even assuming he did (which BrucePac denies), Esparza had zero personal motivation to tell others that he was somehow involved in Maciel's layoff or the layoffs in general for fear of alienating Cortez at a time that he was seeking her assistance in an important personal matter.

Based upon the foregoing, BrucePac respectfully requests that the ALJ's credibility resolution be overruled.

**Exception Number 3:** BrucePac excepts to the ALJ's conclusion that Abel Esparza unlawfully interrogated Maria Cortez on June 19, 2009.

As the ALJ correctly noted, supervisory questioning of employees about union activity is not a *per se* violation of Section 8(a)(1) of the Act. Rather, the test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with statutory rights. The words themselves, or the context in which they are used, must suggest an element of coercion or interference to support a finding of illegality. *Rossmore House*, 269 NLRB 1176, 1177-8 (1984).

While applying the correct standard, the ALJ drew the wrong conclusion when properly and fully viewed in context. Esparza and Cortez had been friends for many years. Esparza was

the godfather to one of Cortez's children. In his time of personal need, Esparza called Cortez to discuss plant rumors related to another employee's possible harassment claims. According to Cortez, Esparza stated that she was forming a group to get the Union in there and he wanted her to tell him, yes or no. (Tr. at 229:10-13). In response, Cortez said there was no need to ask if he was telling her. (Tr. at 229:14-17). Demonstrating the non-coercive nature of their conversation, Esparza told Cortez that he was "with her" on unionization and that he was okay with it so she could "fuck the company." These facts do not support a finding of coercion or interference. Consequently, the Board should reverse the ALJ's conclusion and dismiss the Section 8(a)(1) interrogation allegation.

**Exception Number 4:** BrucePac excepts to the ALJ's conclusion and associated findings that the General Counsel established a *prima facie* case for Daniel Luna and Federico Nieves Rojas.

The ALJ concluded the General Counsel met his *Wright Line* burden for both Luna and Rojas. BrucePac excepts to these conclusions as knowledge of both individual's union activity is lacking.

All union organizing was secret. Employees never discussed the union near supervisors, and supervisors never asked about the union. As the ALJ correctly found, there is no evidence that BrucePac was specifically aware of Rojas' very discreet union activity. However, the ALJ inferred knowledge solely from Esparza's alleged statement to Navarro. As argued above, the ALJ's credibility decision on this topic should be overruled, which necessarily changes the ALJ's *prima facie* conclusion.

The same reasoning holds true for the ALJ's similar conclusion concerning Luna. However, in discussing Luna, the ALJ also inferred knowledge from Esparza's June 19, 2009 phone conversation with Cortez. According to Cortez, however, Esparza mentioned only Coria

and Maciel during their conversation. As such, no knowledge should be inferred about Luna's union activities from this phone conversation.

**Exception Number 5:** BrucePac excepts to the ALJ's conclusion and associated findings imputing Esparza's knowledge of union activity to it.

The ALJ concluded it was appropriate to impute Esparza's union knowledge to BrucePac. In support of this conclusion, the ALJ "rejected Mr. Esparza's assertion that he did not inform anyone in management that he knew of employees' union activity." See Decision at 11:11-18.

While the Board can impute knowledge of union activity to an employer through knowledge of one of its supervisors, such a conclusion is not legally automatic. Though other exceptions are possible, the Board has not legally imputed knowledge in at least two circumstances: (1) where it is established that a supervisor who learned of union activity did not pass it on, and (2) when the supervisor is a promoter or supporter of the union. *Music Express East, Inc.*, 340 NLRB 1063, 1063-4 (2003) (Board unwilling to impute knowledge based upon low-level supervisor's knowledge where he expressed support); *Efficient Medical Transport*, 324 NLRB 553, 553 n.1 (1997) (while his reports led to discharge, knowledge of low-level supervisor was not imputed because he promoted the union), *Dr. Phillip Megdal, DDS, Inc.*, 267 NLRB 82, 82-3 (1983) (Board unwilling to impute knowledge where it is factually established supervisor with knowledge did not pass it on); *Central Plumbing Specialties*, 337 NLRB 973, 975 (2002) (Board unwilling to impute knowledge without particularized knowledge of alleged discriminatee's union activities); *Cardinal Hayes Home for Children*, 315 NLRB 583, 583 (1994).

Assuming arguendo that Esparza was aware of the four alleged discriminatees' union sympathies (which BrucePac denies) there is no basis under Board law to impute such alleged knowledge to Martinez or anyone else in management.<sup>12</sup> Contrary to the ALJ's finding, Esparza clearly and unequivocally testified that he told Cortez that he would tell no one about her union sympathies. Esparza testified that he maintained this strict confidence because Cortez was his "compadre." *Dr. Phillip Megdal, DDS, Inc.*, 267 NLRB 82, 82-3 (1983). Similarly, as discussed in Exception 2 above, Esparza had a strong personal motivation to keep his word to Cortez. There is no evidence to refute Esparza's testimony or to suggest that he told anyone in management. Consistent with Esparza's testimony and his promise to tell no one, Cortez's employment with BrucePac was not affected *in any way*.

Moreover, as Cortez testified, there is evidence that Esparza supported the union and her union sympathies. As Cortez testified, Esparza told her that he was "with her" when they were discussing the union. Further, he told Cortez that her actions were acceptable so she could "fuck the company." Again, Esparza's expression of union support makes it legally improper to impute knowledge to Martinez. *Efficient Medical Transport*, 324 NLRB 553, 553 n.1 (1997); *Music Express East, Inc.*, 340 NLRB 1063, 1063-4 (2003).

Based upon the foregoing, the ALJ's decision to impute Esparza's union knowledge to BrucePac should be overruled.

**Exception Number 6:** BrucePac excepts to the ALJ's conclusion and associated findings that it failed to rebut the General Counsel's *prima facie* case concerning Manuel Coria's selection for layoff.

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<sup>12</sup> In her decision imputing knowledge to BrucePac, the ALJ inadvertently stated the General Counsel proved BrucePac's knowledge of Coria's union activity, "as demonstrated by Mr. Martinez's statements to Ms. Cortez." *See* Decision at 11:9-10. There is no record evidence to support any statements between these two individuals. It is clear the ALJ was referring to Esparza's alleged statements to Cortez. BrucePac excepts to factual misstatement and requests the opinion be changed to reflect this correction.

The ALJ concluded that BrucePac failed to rebut the General Counsel's *prima facie* case concerning Coria's selection for layoff. *See* Decision at 11:35-12:5. In support of this conclusion, the ALJ found Esparza "at least had substantial input in the day-shift layoff selections." *See* Decision at 11:39-40. Additionally, the ALJ said BrucePac's failure to call Foreman Briones as a witness and to issue more *formal* discipline to Coria cast doubt upon BrucePac's defense.

The ALJ relies exclusively upon Navarro's testimony and Martinez's description of his "solitary and hasty selection of layoff candidates" in concluding Esparza had "substantial input" in the layoff selections. *See* Decision at 11:35-39. As explained in Exception 2 above, the ALJ's credibility resolution involving Navarro's testimony should be rejected. Similarly, as explained further in Exception 1 above, the ALJ's apparent belief that Martinez should have reviewed personnel files or taken more time does not undercut his testimony that he made the selections by himself, which was corroborated by Esparza.

As both Golomski and de Soto testified, BrucePac intended for the layoff process to move very quickly from start to finish. Further, while assistant managers could be used, de Soto testified that managers were told to make the selections without the involvement of front-line supervisors because many of them were related to employees in the plant and these rumors would spread rapidly. For example, Esparza's brother and first cousin worked under him on the dayshift sanitation crew prior to the June 2009 layoffs. The evidence is undisputed that the process did move very quickly, including several managers making their selections right at the end of the June 25, 2009 meeting when they were told they had to select people for layoff. While the ALJ viewed the process as being too hasty, the same process was applied to all 42 employees in the various departments affected by the June 2009 layoffs.

The ALJ found BrucePac's failure to call Foreman Briones to testify, without explanation for his nonappearance, cast doubt upon BrucePac's claims related to Coria's work performance issues. This finding is misplaced. Foremen are not supervisors. However, as Coria testified that Foreman Flores was his "supervisor" who had knowledge of his union organizing (Tr. at 53), BrucePac saw no strategic value in calling any foremen as witnesses and possibly opening the evidentiary door to a Section 2(11) finding. More fundamentally, the ALJ prohibited large portions of testimonial evidence concerning the work performance of the four alleged discriminatees. The ALJ's scope of relevancy was extremely limited to only reports actually made to Martinez. (Tr. at 440:11-24; Tr. at 443:20 – 444:8). Applying this ALJ's procedural ruling, Foreman Briones' testimony was not relevant because, while the foremen did complain about Coria, Esparza actually received the complaints from foremen and conveyed them to Martinez. (Tr. at 390:6-11, 391:14-392:19, 444:16-445:12). Esparza testified that he reported these complaints to Martinez, who corroborated that he received them from Esparza.

Finally, the ALJ's finding that BrucePac's failure to issue *formal, written* discipline to Coria for several years undercuts any possible conclusion that he had performance issues. As Martinez and Esparza testified, Coria's problems with Foreman Briones ebbed and flowed for approximately two years prior to the June 2009 layoffs. As Esparza testified, he *verbally counseled* Coria on these problems. (Tr. at 445:6-12). As reported to Martinez, Coria's behavior would improve for a period of time before he reverted back to the same behavior. (Tr. at 445:11-12). Further, discipline was not the only suggested layoff selection criteria. Managers were simply told to try to keep the best employees by applying criteria such as attitude, enthusiasm, departmental needs and discipline.

Based upon the foregoing, BrucePac properly rebutted the General Counsel's *prima facie* case concerning Coria's layoff selection.

- A. The Conclusion of the ALJ that BrucePac Failed to Rebut the General Counsel's *Prima Facie* Case Concerning Jose Carmen Maciel's Selection for Layoff Should Be Reversed.

**Exception Number 7:** BrucePac excepts to the ALJ's finding that no evidence exists that any supervisor counseled or warned Maciel about unsatisfactory attitude or performance during the year prior to his termination.

In concluding BrucePac failed to rebut the General Counsel's *prima facie* case, the ALJ found "no evidence exists that any supervisor counseled or warned Mr. Maciel about unsatisfactory attitude or performance during the year in which his deficiencies assertedly persisted. Had supervisory displeasure been so significant as to generate several comments a month, it is reasonable to expect the Respondent would at least have mentioned the problem to Mr. Maciel." *See* Decision at 12:27-32. Contrary to the ALJ's finding, there is evidence in the record demonstrating such counseling. First, Martinez testified that Esparza spoke to Maciel "several times" about his performance and attitude. (Tr. at 421:12-15). He testified that he had talks with Maciel about his performance issues, and he reported these talks to Martinez and the fact that Maciel did not change his behavior, which corroborated Martinez's testimony. (Tr. at 446:7-19). Maciel did not rebut Esparza's testimony. Moreover, as discussed in detail below, it is undisputed that Maciel was formally disciplined in February 2009 by HR Manager de Soto for becoming angry and violently pushing a table into a female co-worker, which necessitated her seeking medical care. (R. Exh. 3).

Based upon the foregoing, BrucePac respectfully requests the Board to overrule the ALJ's finding that no evidence exists that any supervisor counseled or warned Maciel about unsatisfactory attitude or performance during the year prior to his termination.

**Exception Number 8:** BrucePac excepts to the ALJ's evidentiary ruling at the hearing precluding it from examining Maciel regarding his major family problems and their effect on his work performance. BrucePac further excepts to the ALJ precluding this testimony and subsequently citing the alleged lack of explanation for Maciel's "upset" as an improper "veiled reference" to his union activities. BrucePac also excepts to the ALJ's finding that dissatisfaction with Maciel's attitude or performance did not contribute significantly to BrucePac's decision to lay him off.

The ALJ found that Martinez's "nonspecific reference to Mr. Maciel's 'upset' attitude is a veiled reference to his union activities" in the absence of a clear and credible explanation to the contrary. *See* Decision at 13:4-5. For a year or more, Martinez received reports and personally observed that Maciel was very upset at work. (Tr. at 384:21-385:23, 388:13-389:15). For example, long prior to the Union's organizing campaign, this angry attitude manifested itself in a January 2009 incident where Maciel violently pushed a table and injured a female co-worker. (R. Exh. 3). A witness to the incident described Maciel as looking angry. (R. Exh. 3 at pg. 2).

BrucePac attempted to offer an explanation for Maciel's upset demeanor, which predated the organizing campaign. As Esparza testified, Maciel's attitude problems were caused by his many family problems. (Tr. at 446:4-14). BrucePac sought to elicit detailed testimony from Maciel supporting this explanation. (Tr. at 148:12 – 149:10). After attempting to lay a foundation about Maciel's problems with his children, General Counsel objected to the questioning as being "entirely inappropriate." (Tr. at 148:2) The following offer of proof was made:

The offer of proof is that some of his children, specifically his son who was Abel Esparza's godchild, had had numerous problems that created conflict and problems for Mr. Maciel which affected his work performance and he, in essence, brought some of these problems to work, and they created attitude and other problems.

(Tr. at 148:21 – 149:2). The ALJ sustained the objection and rejected the offer of proof. (Tr. at 149:4-10). In missing the stated causal linkage, the ALJ stated, "If, in fact, there were problems

at work, you can go to the problems at work that occurred at work and deal with those, but we don't need to go into it from the backdoor, as it were, like asking questions about the problems with the children.” (Tr. at 149:5-9).

BrucePac should have been permitted to explore this line of questioning, which was intended to explain why Maciel was so upset at work. After improperly excluding this line of questioning, however, the ALJ cited the lack of specific explanation as supporting her conclusion that references to Maciel's “upset” attitude are a veiled reference to his union activities. *See* Decision at 13:1-7. Under these circumstances, the ALJ's conclusion should be rejected or, alternatively, the matter remanded so BrucePac can be permitted to present evidence on this subject. For the same reasons, the ALJ's conclusion should be rejected that dissatisfaction with Maciel's attitude and performance did not contribute significantly to BrucePac's decision to lay him off

**Exception Number 9:** BrucePac excepts to the ALJ's findings, conclusion and related procedural rulings that Maciel's February 2009 discipline was “reasonably comparable” to discipline issued to Agustin Carmona and Nicanor Luna.

The ALJ's conclusion that the Carmona/Luna and Maciel incidents were “reasonably comparable” is based upon several factual and procedural errors. *See* Decision at 13:32-33.

On January 13, 2009, a female co-worker, Marcelina Vargas, was pushing a table in the sanitation area of cook room 2 so it could be washed. (R. Exh. 3 at pg. 2). As the table was being pushed into the room, Maciel turned to his left and “shoved the table violently backward with his left hand.” (R. Exh. 3 at pg. 2). Two witnesses corroborated Vargas's account of the incident, including one (Rufino Gomez) who “added that Maciel looked angry.” (R. Exh. 3 at pg. 2). As a result of this incident, Vargas had to receive medical treatment at Salem Occupational Medicine for a groin injury. (R. Exh. 3 at pg. 2). The investigation concluded that

Vargas was injured as a direct result of Maciel's unsafe act of shoving the table violently. (R. Exh. 3 at pg. 2). By comparison, on February 19, 2009, Agustin Carmona and Nicanor Luna got into a "heated" argument involving no physical contact or physical harm. (GC Exh. 8 and 9(a)).

On Maciel's direct examination, General Counsel began asking questions related to the January 13, 2009 incident. (Tr. at 136:22-142:13). The ALJ, *sua sponte*, cut off the General Counsel's examination and stated that she did not intend to "look behind the facts" of this warning because she did not deem it relevant. (Tr. at 142:12-143:25). On de Soto's examination, BrucePac's counsel started asking questions about the same incident. (Tr. at 312:14-315:25). Following a preliminary question related to people who witnessed the incident, the following exchange occurred:

MS. BOTERO: I'm going to object. The document speaks for itself, Your Honor.

JUDGE PARKE: Moreover, **you appear to be doing just what I told General Counsel they could not, and that's questioning about the authenticity or accuracy or validity of the warning notice. Objection sustained. And please don't go into it any further.**

MR. O'CONNOR: Okay. Well, I would offer Respondent –

MS. BOTERO: **I would move to strike the testimony related to this warning other than anything that's on it.**

JUDGE PARKE: **Motion granted.**

(Tr. at 315:1-11) (emphasis supplied). After barring BrucePac (and the General Counsel) from asking any questions on the subject, the ALJ still concluded:

As to Mr. Maciel's January behavior, there is no suggestion he intended to injure anyone. Rather, the table-shoving appears to have been a physical manifestation of inappropriate anger, which incidentally resulted in an injury.

*See* Decision at 13:23-26. For the ALJ to make this finding, BrucePac should not have been prohibited from asking questions on the very same topic. While barring testimony on the

subject, the ALJ still concluded there was “no suggestion” Maciel intended to injure anyone, which was designed to minimize the seriousness of Maciel’s misconduct. The ALJ’s finding is still not supported by the record. BrucePac concluded that Maciel shoved back on the table “violently” at the same time Vargas was pushing it into the cleaning room. (R. Exh. 3). While there is no evidence he intended to specifically harm Vargas, Maciel’s violent behavior made injury very foreseeable under the circumstances.

The ALJ also erred in concluding there is no evidence that BrucePac deemed Maciel’s incident as more serious than the Carmona/Luna argument because “all three received the same discipline, i.e., written warnings.” *See* Decision at 13:26-29. This conclusion is factually incorrect. Both Carmona and Luna received written disciplinary warnings. (GC Exh. 8 and 9(a)). By comparison, however, Maciel received *two* warnings for the January 2009 incident - a written safety violation and a disciplinary written warning. (R. Exh. 3 at pg. 1; Tr. at 313:19 – 314:8). As de Soto testified, BrucePac normally fills out two separate forms – one safety and one disciplinary – for egregious incidents like the one involving Maciel. In this situation, however, de Soto simply added “+ written warning” to the corrective action section on the safety form to signify the additional disciplinary written warning. *Id.* As he testified without contradiction, de Soto was happy to present only one form for both write-ups because Maciel started “shouting” at him and stormed out of his office when he tried to present it to him. (Tr. at 314:6-14).

Finally, the ALJ erred in drawing an inference that BrucePac did not consider Maciel’s conduct to be more opprobrious than Carmona or Nicanor Luna’s. Specifically, while Martinez credibly recalled being told about the incident by Esparza, the ALJ concluded this inference is supported by Martinez’s alleged failure to clearly recall the incident’s disciplinary

documentation. This inference is misplaced for several reasons. First, Martinez created none of the documentation. De Soto issued the written discipline form to Maciel. (Tr. at 313:25-314:3; R. Exh. 3). Esparza issued the written disciplines to Carmona and Nicanor Luna. (GC Exh. 8 and 9(a)). All discipline forms are maintained in employees' personnel files, which were located in Human Resources. There is no evidence Martinez ever physically saw any of this disciplinary documentation. Indeed, as he testified, Martinez did not review personnel files in making his layoff selections. (Tr. at 405:20-23). Consequently, Martinez's alleged failure to clearly recall all disciplinary documentation does not support an inference that BrucePac considers these incidents reasonably comparable.

B. The Conclusion of the ALJ that BrucePac Failed to Rebut the General Counsel's *Prima Facie* Case Concerning Daniel Luna's Selection for Layoff Should Be Reversed

The ALJ found that BrucePac selected Daniel Luna for layoff because he demonstrated resentment of Foreman Briones' oversight. *See* Decision at 14:5-6. While finding Luna received an oral and written warning in October and November 2008, the ALJ concluded there is "no evidence Mr. Luna received any further discipline, and it is reasonable to infer that he corrected the problem to supervisory satisfaction." *Id.* at 14:6-10. The ALJ supports this conclusion by two adverse inferences, i.e., BrucePac's failure to call Foreman Briones to testify "or to adduce through Mr. Esparza that Mr. Luna's disrespectful behavior continued beyond his written warning." *Id.* at 14, ft. 25. The ALJ's conclusion and findings are marred by several factual and procedural errors.

**Exception Number 10:** BrucePac excepts to the ALJ's findings and conclusion that it failed to establish that it would have selected Daniel Luna for layoff even in the absence of union activities.

In concluding BrucePac failed to rebut the General Counsel's prima facie case, the ALJ found it "reasonable to infer" that he corrected his problems to supervisory satisfaction because "[t]here is no evidence Mr. Luna received any further discipline" and he "had apparently corrected a problem for which he was disciplined more than eight months earlier." *See* Decision at 14:8-12. Luna's November 2008 written warning states that, after he received his October 2009 verbal warning, he answered back with "foul language" every time he was given an order, he behaved in an intolerable manner, and he argues every time he is given an order. (Tr. at 319:5-17; R. Exh. 5).

While it is true Luna received no further *formal, written* discipline, the ALJ incorrectly assumes Luna corrected all of his performance problems. As the ALJ recognized with Rojas, BrucePac did not issue formal, written discipline every single time there was a performance problem. *See* Decision at 14:35-38. Like many employers, BrucePac can and does verbally counsel employees without creating a formal disciplinary paper trail each time. Indeed, BrucePac attempted to offer evidence that Luna continued to receive *verbal* counseling for his performance problems *after* his November 2008 written warning, but the ALJ improperly refused to allow such testimonial evidence. (Tr. at 440:11-24; Tr. at 443:20 – 444:8). Under these circumstances, the ALJ's inference should be set aside or, alternatively, BrucePac respectfully requests this issue should be remanded for further hearing.

**Exception Number 11:** BrucePac excepts to the ALJ's two adverse inferences concerning Daniel Luna's selection for layoff and related procedural rulings barring the introduction of relevant evidence concerning Daniel Luna's continuing performance problems up to his June 2009 layoff.

In support of the inference that Luna must have corrected his performance problems after November 2008, the ALJ drew two adverse inferences. Specifically, the ALJ found, "The Respondent's failure to call Foreman Briones to testify or to adduce through Mr. Esparza that

Mr. Luna's disrespectful behavior continued beyond his written warning gives rise to an adverse inference that either or both would have testified against the Respondent's interest." *See* Decision at 14, fn.25. Both adverse inferences are improper under the circumstances..

Concerning Foreman Briones not being called as a witness, the ALJ cites to *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, fn. 1 (1977) and *Flexsteel Industries*, 316 NLRB 745, 758 (1995). *See* Decision at 12, fn.21. Both decisions involve inferences being drawn against employers who failed to explain why "supervisors" or a "favorable witness" did not testify.<sup>13</sup> *Id.* In this matter, as the ALJ properly concluded, Foreman Briones was not a supervisor. *Id.* at 3:33-34. However, as Coria testified that Foreman Flores was his "supervisor" who had knowledge of his union organizing (Tr. at 53), BrucePac saw no strategic value in calling any foremen as witnesses and possibly opening the evidentiary door to a Section 2(11) finding. More fundamentally, the ALJ prohibited large portions of testimonial evidence concerning the work performance of the four alleged discriminatees. The ALJ's scope of relevancy was extremely limited to only reports actually made to Martinez. (Tr. at 440:11-24; Tr. at 443:20 – 444:8). Applying this procedural ruling, Foreman Briones's testimony was not relevant because, while the foremen did complain about Luna, Esparza actually received the complaints from foremen and conveyed them to Martinez. (Tr. at 386:6-11; Tr. at 441:12-22; *see* Tr. at 442:23 – Tr. at 443:9). Esparza testified that he reported these complaints to Martinez, who corroborated that he received them from Esparza.

In further support of the conclusion that Luna's performance problems were corrected after November 2008, the ALJ drew a second adverse inference that Esparza would have testified against BrucePac's interest because it failed "to adduce through Mr. Esparza that Mr.

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<sup>13</sup> While the ALJ infers Luna's job performance must have improved, the General Counsel offered no direct evidence to contradict any of the evidence concerning Luna's performance problems. The General Counsel did not call Luna to testify.

Luna's disrespectful behavior continued beyond his written warning." See Decision at 14, ft. 25. The ALJ's conclusion ignores Martinez's uncontroverted testimony that he continued to receive reports concerning Luna's poor performance for more than a year prior to the June 2009 layoffs. (Tr. at 394). Martinez's testimony was corroborated by Esparza. Moreover, the ALJ's finding is directly contrary to record evidence. During Esparza's direct examination, BrucePac attempted to elicit testimony from him at least *two times* concerning Luna's continuing performance problems, but the ALJ barred such testimony repeatedly on the grounds of relevance.

During Esparza's direct examination, the following exchange occurred on the record:

[By Mr. O'Connor] Did you have an opportunity to observe Daniel Luna's work performance at any time?

A. Yes.

**Q. Did you believe that there were any problems with Daniel Luna's work performance?**

MS. BOTERO: **Objection as relevant.** What's the relevance, Your Honor?

MR. O'CONNOR: I believe the testimony -- well --

JUDGE PARKE: **Yeah**, the relevance isn't what he knew, that is true -- so if you would go to that, please. His testimony is that he had nothing to do with the layoffs and with the selection. **What he knew about the conduct or job performance of the individuals who were selected is not relevant, but rather what he reported.**

(Tr. at 440:11-24)(emphasis supplied). Though the ALJ's scope of relevancy was extremely limited to only what Esparza reported to Martinez, BrucePac attempted to elicit the same testimony a second time later in Esparza's direct examination:

BY MR. O'CONNOR: Let me ask the question again. **Prior to June 29, 2009, did you ever talk with Daniel Luna about any of these performance problems?**

MS. BOTERO: **Objection, relevance.**

JUDGE PARKE: **Sustained.**

BY MR. O'CONNOR: Did you ever report to Osmin Martinez that you had talked to Daniel Luna about any of these performance problems?

A. Yes.

Q. **Did Mr. Daniel Luna's performance improve after you had these conversations with him?**

MS. BOTERO: **Objection, relevance again.**

JUDGE PARKE: **Sustained. It's report (sic) that we need to focus on.**

(Tr. at 443:20 – 444:8)(emphasis supplied).

As the foregoing exchanges reflect, BrucePac attempted *twice* to elicit testimony concerning Luna's performance and behavioral problems continuing after his November 2008 written disciplinary warning. After repeatedly barring this testimony from Esparza, the ALJ improperly cites the lack of testimonial evidence to draw an adverse inference against BrucePac that Esparza would have testified that Luna had corrected his problems.

No adverse inferences should be drawn under the foregoing circumstances. Further, as the ALJ correctly deemed relevant in her decision (but not during the hearing), BrucePac should have been permitted to offer this evidence in support of its rebuttal defense. By failing to allow such evidence, the Board should overrule these adverse inferences. Alternatively, BrucePac respectfully requests remand for further trial on this issue.

## V. **CONCLUSION**

Based upon the foregoing exceptions, BrucePac respectfully requests the Board to dismiss the Section 8(a)(3) violations involving Manuel Coria, Jose Carmen Maciel and Daniel Luna. Maciel was properly selected for layoff due, in relevant part, to his violent outburst in early 2009 resulting in a serious injury to a female co-worker and multiple forms of discipline.

Contrary to the ALJ's finding, this incident is not reasonably comparable – in either severity or BrucePac's response - to other formal discipline issued to others on the dayshift sanitation crew.

Similarly, Luna had serious performance problems resulting in two disciplinary write-ups in October and November 2008. While the ALJ's improperly barred specific testimonial evidence on the subject, these performance problems continued up to the point of his layoff. The ALJ's conclusion should be overturned or, alternatively, the issue remanded for further hearing so BrucePac can properly offer this evidence in support of its rebuttal defense. Finally, there is ample evidence supporting why Coria was properly selected for layoff. He had on-going problems with taking direction and guidance from foremen. While he was not formally disciplined in writing all the time, Coria was verbally counseled on multiple occasions in an effort to correct his behavior. His behavior would improve for a period of time before reverting back to his previous problems.

Finally, BrucePac respectfully requests the Board to dismiss the Section 8(a)(1) interrogation allegation. In reviewing the full context of their conversation, Esparza did not coerce or restrain Cortez. To the contrary, he affirmed that he was “with her” on unionization.

Dated this 27<sup>th</sup> day of May, 2010.

Respectfully submitted,

**JACKSON LEWIS LLP**

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Counsel for Bruce Packing Company, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on May 27, 2010, I electronically filed the Respondent's Brief in Support of Exceptions to the Decision and Order of the Administrative Law Judge using the NLRB E-file System. I hereby certify that I have served the following recipients via e-mail using the e-mail addresses indicated below:

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Dated this 27<sup>th</sup> day of May, 2010.

/s/ Lara Needham  
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