Pacific Coast M.S. Industries Co., Ltd. *and* General Teamsters, Local 439, International Brotherhood of Teamsters. Cases 32–CA–22748–1, 32–CA–22861–1, and 32–RC–5443

September 30, 2010

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

At issue in this case are various unfair labor practice allegations, ballot challenges, and election objections arising out of a 2006 representation campaign among the employees at the Respondent's facility.[1]

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below, and to adopt his recommended Order as modified and set forth in full below.[3]

A key question in this case is whether the Respondent's team leaders are statutory supervisors. As explained below, we find that the team leaders are not supervisors and accordingly direct that the challenged ballots, all of which were cast by team leaders, shall be opened and counted and that a revised tally of ballots shall be prepared. We also resolve the unfair labor practice allegations and order appropriate remedies.[4] However, as discussed below, we do not, at this time, resolve the election objections.

The Respondent, which is a subsidiary of two Japanese corporations, Maruyasu and Sekiso, manufactures automotive parts. Its primary client has been the General Motors/Toyota joint venture, New United Motor Manufacturing, Inc. (NUMMI). The highest ranking official at the Respondent's Tracy, California facility is the company's vice president; at the time of the events at issue, Richard Hendrick held that position.[5] Top management included Sekiso senior vice president (first name unknown) Yazawa and Maruyasu/Respondent President Singi Yamada, both of whom resided in Japan. Under Hendrick's supervision in the Tracy plant were various managers, including Assistant General Manager Ryan Sharffenberg, Production Manager Brian Juarez, and Human Resources Manager Dawn Tipton. Below the various managers are group leaders, who are undisputed supervisors. Below group leaders are team leaders (TLs), whose supervisory status is at issue. Below team leaders are team members, who are rank-and-file employees carrying out the facility's production work.

In late March 2006,[6] a union organizing campaign began among some of the plant's employees. The Respondent discovered that TL Felicia Montes was a union supporter in mid-April, after she spoke with two other TLs about the Union; Montes was unlawfully subsequently suspended and fired.[7] In the course of the Respondent's investigation of Montes' conduct, its managers unlawfully questioned her and other TLs about employees' union activities and prohibited them from engaging in union activities.[8] The Union filed a representation petition on June 20, and on June 29 the parties stipulated to the terms of an election to be held on July 28. Beginning just after the election date was set, group leader Jose

[1] On May 25, 2007, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union filed answering briefs to the Respondent's exceptions, and the Respondent filed a reply brief to each answering brief. The Union filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent further filed a motion to strike the Union's cross-exceptions and supporting brief; the Board denied this motion by Order dated September 17, 2007.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We will modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language, and in accordance with our decisions in *Ferguson Electric Co.*, 335 NLRB 142 (2001), and *Excel Container*, 325 NLRB 17 (1997). We will substitute a new notice to conform to the Order as modified.

[4] We are mindful that the Respondent may have closed its plant, possibly affecting the implementation of certain remedies ordered here. Absent a showing of the need for remedial modifications, however, we will order our standard remedies and leave any modifications to be resolved in compliance proceedings.

[5] At the time of the hearing in this case, Hendrick was a senior manager, overseeing human resources and other departments.

[6] All subsequent dates are in 2006, unless otherwise specified.

[7] We adopt the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by first suspending and then discharging Montes for speaking in favor of the Union to other employees. In exceptions, the Respondent defends its actions on the sole basis of its claim that Montes was a supervisor. As discussed herein, we agree with the judge that Montes and other TLs were not supervisors.

We reject the Union's contentions that the judge erred in failing to find additional, unalleged violations of Sec. 8(a)(1) related to Montes' conversations.

[8] The Respondent's only exceptions to the judge's findings that these actions violated Sec. 8(a)(1) turn on its nonmeritorious contention that TLs were supervisors. We note that the judge failed to make an express finding, which he clearly intended, that TL Montes was unlawfully interrogated about her own union activities.

Quiñones made various statements to employees that constituted unlawful threats, notwithstanding the Respondent's attempts to repudiate them.[9] Finally, on June 30, Hendrick unlawfully announced that employees would receive an across-the-board pay raise, effective July 1.[10]

When the election was held, TLs' ballots were challenged based on the parties' disagreement about the TLs' supervisory status. The vote tally reflected 33 votes in favor of the Union, 28 votes against, and 10 challenged ballots, of which 9 remain unresolved. All 9 remaining challenges turn on the supervisory status of the TLs who cast them, and the validity of TL Montes' ballot depends also on the lawfulness of her discharge. The Respondent filed objections based on the arrangement of the polling place, the number of union observers, alleged electioneering by a union observer, prounion conduct by certain TLs, and an apparent vandalism incident at a voter's home.[11] The Union filed conditional objections (in the event the challenged ballots' resolution were to reverse the election outcome) based on Quiñones' alleged threats and the wage increase.

1. Team leaders' alleged supervisory status

TLs in the Respondent's facility oversee certain aspects of the work of team members. The Respondent argues that TLs are statutory supervisors, while the Union and the General Counsel contend that TLs lack statutory indicia of supervisory authority.

Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer.[12] *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)). In contending that TLs are supervisors, the Respondent relies primarily on their asserted authority to assign, discipline, and effectively recommend hiring.[13]

[9] We agree with the judge that the Respondent did not effectively repudiate group leader Quiñones' threats of futility, plant closure, and job loss due to striker replacements if the employees unionized. (The Respondent does not except to the judge's findings that the initial threats were unlawful.) Subsequent statements made by the Respondent's officials did not admit wrongdoing, referred only to the plant closure threats, and failed to give adequate assurance to employees that the Respondent would not interfere with their Sec. 7 rights in the future. The Respondent therefore clearly failed to satisfy the standards for repudiation set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

[10] We agree with the judge's conclusion that the wage increase was granted for the purpose of influencing the employees' votes in the upcoming election. The Respondent's own documents demonstrate that the onset of union organizing was considered a significant justification for the raise. Moreover, Hendrick acknowledged that the union organizing was "certainly a reason" (although not the only reason, he said) for his decision to seek approval for the pay raise. We need not rely on the judge's finding that the decision to grant the pay raise was not finalized before the petition was filed on June 20. Hendrick's testimony suggests that the decision may have been made in early June, and the judge did not expressly discuss this evidence (though he may have implicitly discredited it).

We reject the Union's contention that, as a remedial matter, it should be entitled to request rescission of the wage increase. Rescission upon union request is a standard Board remedy in cases involving 8(a)(5) unilateral changes. In such cases, the right to seek rescission remedies the violation of a union's right, as the employees' representative, to bargain over the wage increase. Here, the wage increase interfered with employees' free choice in the election and thus violated Sec. 8(a)(1); it did not violate Sec. 8(a)(5) because the Union was not owed a bargaining duty at the time of the decision. Consequently, a rescission remedy is not appropriate in this case.

[11] We need not supplement the judge's description of the facts pertinent to the parties' objections at this time, other than explaining in section 2, below, why we are not resolving the objections in this decision.

[12] Sec. 2(11) provides that a supervisor is one who possesses "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."

[13] The Respondent cites several other bases for TLs' alleged supervisory authority, all of which we reject. The authority to evaluate employees' performance is not a Sec. 2(11) indicium; thus, as is the case here, "'when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor.'" *Williamette Industries*, 336 NLRB 743, 743 (2001) (quoting *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999)). Training team members is also not a supervisory indicium, and as the judge found, team members as well as TLs trained the Respondent's team members. Authority to grant or deny time off is a secondary indicium of supervisory status. *Sam's Club*, 349 NLRB 1007, 1014 (2007). Absent primary indicia of supervisory status, secondary indicia are not dispositive. *Training School at Vineland*, 332 NLRB 1412, 1412–1413 fn. 3 (2000). Moreover, we agree with the judge that TLs' role in processing time-off requests was limited to assessing staffing adequacy, a routine task that did not involve independent judgment. Pay differentials are likewise secondary indicia, and in any event, the only relevant evidence is the testimony of former TL Lue Vang, who appeared to be describing his pay at the time of the hearing, after his promotion to Group Leader. TLs' inclusion in training programs meant for supervisors shows, at most, the Respondent's belief that they were supervisors, but not their possession of supervisory authority. As for TLs' signing timesheets and timeclock corrections, the judge properly found these to be clerical functions that merely confirmed employees' presence at work at particular times and did not involve independent judgment.

The Respondent further contends in its reply brief that TLs responsibly direct their team members, though it does not except to the judge's failure to so find. We conclude that the Respondent did not properly raise this issue before the Board.

(a) Assignment of team members

The Respondent's policies provide that team members within each department must rotate among their department's various tasks or workstations. Assignments within the rotation, which last 60–90 minutes in some departments and a week in others, are set forth in a "rotation schedule" that informs team members what tasks or workstations they are assigned to, and during what period of time. The Respondent argues that TLs Pacheco, Vang, Orn, Martinez, and Quinto create these rotation schedules; that TLs Montes and Kang apply them daily; and that former TL Vang, on occasion, decided to modify them. In so doing, the Respondent contends, TLs are assigning employees using independent judgment and are thus Section 2(11) supervisors.

The judge summarily found that TLs' assignments of employees are "per a routine," and thus TLs do not assign in a manner that demonstrates supervisory authority. However, the judge failed to consider the question under the current standards set forth in *Oakwood Healthcare*, supra.[14] Applying *Oakwood*, we also conclude that the Respondent has not demonstrated supervisory status based on TLs' assignment of team members.[15]

First, the Respondent relies primarily on the testimony of Production Manager Juarez and former TL Vang; however, the judge reasonably discredited their testimony and instead credited the testimony of several other TLs about their own functions and authority.[16] As explained below, the TLs' testimony, other than Vang's discredited statements, supports a conclusion that TLs do not assign team members using independent judgment.

As described, the various tasks or workstations through which team members (and at least some TLs) rotate are predetermined, as are the employees' periodic assignments to work on each. Thus, assuming arguendo that assigning team members to workstations represents the assignment of "significant overall tasks," and therefore that TLs possess authority to assign within the meaning of Section 2(11),[17] they do not use independent judgment in exercising that authority because TLs do not take into account the relative skills of team members in making those assignments.[18] On the contrary, the rotation of team members through workstations or tasks according to a predetermined schedule exemplifies judgment that is not independent because it is "dictated or controlled by detailed instructions."[19]

Further, the Respondent did not prove that TLs create rotation schedules other than sporadically. Montes credibly testified that she merely continued to apply a rotation schedule established before she became a TL. Pacheco testified that she writes out the daily rotation at most a couple of times a month, when her group leader is absent; her regular responsibility is merely to review the schedule and apprise team members of its contents.[20] In any event, Pacheco and half her team start work each morning an hour later than the other half of the team. The early-arriving team members begin work without awaiting Pacheco's instructions, demonstrating that their daily assignments within the rotation are not dependent on any independent decision by Pacheco.

Vang testified that, as a TL, he could modify the rotation schedule when production goals were met early, to allow certain employees additional training on certain tasks. Even assuming that this testimony were credited and that modifying work assignments for training purposes may demonstrate Section 2(11) authority, the evidence fails to demonstrate the frequency of such modifications or their reliance on Vang's independent judgment.[21]

In sum, the Respondent has not shown that TLs exercise independent judgment in creating, applying, or modifying rotation schedules. See *Alstyle Apparel*, 351 NLRB 1287, 1287, 1303–1304 (2007) (finding no supervisory status where employer failed to show that shift leaders exercise independent judgment in assigning crew

[14] Although the Respondent contends that the case should be remanded to the judge for analysis under *Oakwood*, we find such a remand unnecessary. The parties fully presented their evidence related to TLs' alleged authority to assign team members using independent judgment, and the judge made the necessary factual and credibility determinations. The Board itself can apply the relevant law to the established facts, without the additional delay inherent in a remand.

[15] As the party alleging supervisory status, the Respondent bears the burden of proof, and any lack of evidence in the record is construed against it. *Oakwood*, 348 NLRB at 694.

[16] See fn. 2, above. Hendrick, rather than Juarez, was the Respondent's main witness regarding Montes' authority. The judge did not expressly credit or discredit Hendrick's testimony on this issue, but he expressly credited Montes with regard to her authority (or lack thereof). Thus, to the extent that Hendrick's testimony conflicts with Montes', we conclude that the judge discredited Hendrick. The Respondent also relies on the job description it circulated in seeking to replace Montes after her suspension. Hendrick's assertion that Montes performed all of the duties listed on the job description is contradicted by Montes' more specific testimony. In any event, employer-prepared job descriptions are not controlling on the issue of supervisory authority; instead, the Board looks to the authority actually possessed and the work actually performed by the alleged supervisor. *Oakwood*, 348 NLRB at 690 fn. 24.

[17] *Oakwood*, 348 NLRB at 689.

[18] Id. at 693.

[19] Id.

[20] The record does not support the Respondent's assertion that Pacheco admitted to using independent judgment in creating rotation schedules for her department.

[21] The Respondent's assertions that other TLs either assigned work based on a rotation schedule or created a rotation schedule rest entirely on Juarez' discredited testimony, as the TLs at issue did not testify.

members to machines for each shift). For these reasons, we conclude that TLs do not possess supervisory authority to assign.

(b) Discipline

The Respondent contends that TLs also have supervisory authority to discipline team members. We agree with the judge's rejection of this argument. As the judge found, TLs' involvement in the issuance of attendance-based warning forms was clerical and nondiscretionary. Thus, we address in detail only TLs' authority with regard to nonattendance discipline.

The Respondent documented employee conduct (both positive and negative) that was not related to attendance on "employee observation forms." TLs could initiate such forms, as could admitted supervisors and managers, but some evidence suggests that team members could do so as well, and certainly team members could (and did) initiate preparation of observation forms by informing a manager of conduct to be documented. TLs sometimes signed such forms, but only in conjunction with additional signatures by group leaders or managers.[22] TLs occasionally delivered the completed forms to team members, though group leaders often carried out this task. The Respondent asserts that, in presenting the forms to team members, TLs warned them that they could be subject to further discipline if they continued the conduct at issue.

The judge found that the observation forms were primarily "avuncular" counseling rather than discipline. We do not rely on this characterization. However, the Respondent has failed to show that that any observation form issued by a TL ever affected a team member's working conditions or job status or tenure. It has likewise failed to show that any observation form issued by a TL could be the basis for future disciplinary action if the observed conduct continued. Montes credibly testified that she was not empowered to tell team members that continuation of their documented conduct could subject them to further disciplinary action. We therefore conclude that TLs' involvement in the Respondent's system of issuing employee observation forms does not demonstrate supervisory authority to discipline.[23]

(c) Effective recommendation to hire

The Respondent alleges that TLs effectively recommend hiring, in that they evaluate temporary employees regarding their qualifications for hire as regular employees.[24] The record contains a 90-day review of temporary employee Romeo Panopio completed by TL Pacheco. The review form seeks information about Panopio's compliance with safety rules, quality and quantity of work, and teamwork, as well as general comments. In addition, the form includes a "final comments" section in which the reviewing individual is to "[m]ake notes [as] to why team member should or should not be hired in the future," and it gives the reviewer an opportunity to indicate, by circling "yes" or "no," whether the reviewed employee should be hired. On Panopio's form, "yes" is circled, and Pacheco notes that Panopio is better suited for hire in a position to which he was recently assigned. No other reviews of temporary employees are in the record. Montes acknowledged that she had evaluated temporary employees "to a point," but denied having recommended whether or not they should be hired.

The judge found that TLs review the work and skills of temporary employees, but that these reviews do not demonstrate supervisory authority because they merely provide factual information based on TLs' own observations. The judge further distinguished Pacheco from other TLs, finding that her opinion was understandably given more weight than those of other TLs because, unlike them, she had previously served as the Respondent's production manager.

We agree with the judge that the evidence does not show that TLs possess supervisory authority with regard to hiring, but we analyze the issue differently. In our view, the judge's credibility determinations resolve the matter. Montes, whose testimony was credited, stated that her reviews of temporary employees stopped short of recommending for or against their hire as regular employees. Thus, at least with regard to Montes, the credited evidence does not establish that she made hiring recommendations.

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[22] The record contains only one observation form signed by a TL. This form documents that team member Hector Ocequeda was seen driving his forklift too fast and not wearing his seatbelt. Montes signed this form, along with Ocequeda himself, group leader Aldo Montes, manager Brian Bellamy, and Human Resources Manager Dawn Tipton. For the reasons given by the judge, we agree that Montes did not initiate this form.

[23] See *Ken-Crest Services*, 335 NRLB 777, 777–778 (2001); *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1139 (1999). See generally *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007) (Under Board law, "the issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority. . . . [F]or the issuance of reprimands or warnings to constitute statutory supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors."). Member Hayes does not rely on the cited precedent to the extent it suggests that the issuance of oral warnings cannot itself be evidence of supervisory authority or that the mere fact of review by others negates that authority.

[24] All team members work as temporary employees for a period of time (though the record is not clear how long) before being considered for hire as regular employees.

Pacheco is the only TL who has been shown to have made a recommendation regarding hiring. The Respondent's only evidence that Pacheco's recommendation was "effective" is Juarez' testimony that Panopio was hired based on this recommendation. As previously stated, however, the judge generally discredited Juarez' testimony on supervisory authority. Pacheco testified at the hearing but was not asked about her recommendation regarding Panopio or more generally about the weight her recommendations on such forms were given.[25] The Respondent therefore has not shown that TLs possess the authority to effectively recommend hiring.[26]

In sum, based on the foregoing, we conclude that the Respondent has failed to meet its burden of proving that the TLs possessed any of the Section 2(11) indicia of supervisory authority. We therefore find they were statutory employees entitled to the full protection and rights guaranteed by Section 7 of the Act.

2. Election issues

The current tally of ballots shows 33 votes in favor of the Union, 28 votes against it, and 9 remaining challenged ballots, which are determinative. All challenged ballots were cast by TLs and turn on our decision regarding their supervisory status, with Montes' ballot additionally dependent on the lawfulness of her discharge. Pursuant to our findings, above, that TLs are statutory employees, not supervisors, and that Montes was discharged unlawfully for her union activity, we conclude that all 9 challenged voters were eligible to vote. Thus, we will direct the Regional Director to open and count these ballots and to prepare a revised tally of ballots.

Also pending before us are election objections by both the Respondent and the Union. In cases like this, administrative efficiency is often best served by resolving all pending issues together. Nevertheless, in some cases, we have departed from that procedure, finding it more efficient to resolve challenged ballots before addressing objections that may be mooted because the revised tally of ballots would show that the objecting party has won.[27] In this case, a puzzling factual finding regarding two of the Respondent's objections would require remand to the judge, as we explain below. If we did remand, and the Respondent's objections were subsequently mooted by the revised tally of ballots, the remand would have delayed resolution of the case needlessly. In these circumstances, we find that administrative efficiency calls for preparation of a revised tally of ballots before analysis of the objections.

In its Objections 6 and 8, the Respondent objects that the election was held with two observers representing the Union, but with only one observer representing the Respondent. The judge found that the parties discussed this imbalance at the morning preelection conference, and the Board agent offered the Respondent an opportunity to obtain a second observer. The judge found that, although the record did not reflect exactly when this offer was made, the Respondent was given an adequate opportunity to obtain a second observer, and thus its failure to do so constituted a waiver of its objection to the observer imbalance. In our view, however, the Respondent cannot have waived its right to an equal number of observers unless it was offered—and it refused—a *reasonable* opportunity to obtain a second observer, a determination that depends on when the offer was made.[28]

The Union's witnesses testified that the Respondent did not object to the observer imbalance during the preelection conference—testimony that the judge implicitly but unmistakably discredited in finding that the parties discussed the observer imbalance. In contrast, Hendrick and Vang testified for the Respondent that the Board agent's offer of a second Respondent observer was made only 5–10 minutes before the polls were to open, and that by then it was too late to find and train an additional observer. In light of the judge's discrediting of the Union's testimony, Hendrick's and Vang's testimony stands apparently unrebutted. Nonetheless, the judge expressly found that the record does not reflect when the Board agent made the offer of a second Respondent observer.

The judge may have intended to discredit Hendrick's and Vang's testimony on the timing of the Board agent's offer (despite having apparently credited their testimony on the fact that the offer was made). And Board law is clear that testimony need not be credited merely because

[25] In the absence of credible evidence that Pacheco's recommendation was given any weight, we need not rely on the judge's finding that her managerial experience gave her recommendation extra weight.

[26] We need not rely on the judge's conclusion that the reviews did not involve independent judgment because they were merely factual reporting of TLs' own impressions. We also do not rely on the judge's finding that Montes did not review temporary employees during her last year as a TL; although the record could be clearer, we read Montes' testimony that her group leader, not she, reviewed employees' work during that period as referring to already-hired team members' annual evaluations, rather than pre-hire reviews of temporary employees.

[27] See, e.g., *Columbia College*, 346 NLRB 726, 726 fn. 2, 730 (2006); *Laneco Construction Systems*, 339 NLRB 1048, 1051 (2003).

[28] Compare *Best Products Co.*, 269 NLRB 578 (1984) (overruling objection where employer declined opportunity, 15–30 minutes before polls opened, to provide a second observer where union had two), enfd. 765 F.2d 903 (9th Cir. 1985), with *Asplundh Tree Expert Co.*, 283 NLRB 1 (1987) (union representative was not offered option of obtaining additional observer to match employer's observers, only of objecting to unequal numbers after election).

it is unrebutted.[29] Given the state of the evidence, however, we cannot ascertain whether the judge implicitly discredited the unrebutted testimony or relied on some other rationale for his conclusion that the record did not reflect exactly when the offer was made. We thus are unable to resolve Respondent's Objections 6 and 8 in the absence of clarification by the judge as to at least approximately when the offer was made, and the judge's basis for that finding.

As explained above, however, we direct the Region to open and count the challenged ballots first, and to then address only the objections that remain relevant based on the revised tally of ballots. The Direction below specifically provides for the possible contingencies.

ORDER

The Respondent, Pacific Coast M.S. Industries Co., Ltd., Tracy, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities, sympathies and desires or the union activities, sympathies and desires of other employees.

(b) Telling employees they cannot talk about organizing a labor organization in circumstances in which doing so does not interfere with their work.

(c) Telling employees that it will close or move the plant to another state or country if the employees choose union representation; telling employees that unionization is a futile act; and telling employees that striking will result in their losing their jobs.

(d) Granting wage increases for the purpose of deterring employees from voting in favor of union representation in an NLRB election.

(e) Suspending, discharging, or otherwise disciplining employees because they engage in activity protected by Section 7 of the Act, including organizing on behalf of any labor union.

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

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

(a) Within 14 days from the date of this Order, offer Felicia Montes full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Felicia Montes whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

(c) Within 14 days from the date of this Order, remove from its files any reference to Montes' unlawful suspension or discharge, and within 3 days thereafter notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

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

(e) Within 14 days after service by the Region, post at its plant in Tracy, California, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent (in English and any other foreign language deemed appropriate by the Regional Director) and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.[31] 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 late April 2006.[32]

[29] See, e.g., *Cherry Hill Convalescent Center*, 309 NLRB 518, 518 fn. 2, 520–521 (1992) (adopting judge's discrediting of uncontradicted testimony, based on witness's evasive and obstructionist demeanor).

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

[31] We reject the Union's arguments for notice-posting terms that differ from standard terms under extant law. Regarding the Union's request that the Respondent should be required to post the notice on its intranet, Chairman Liebman adheres to her view that electronic posting need not be raised in the merits hearing. See *Wal-Mart Stores*, 348 NLRB 833, 833 fn. 3 (2006). She acknowledges, however, that extant law is to the contrary, and she concurs in applying that law for institutional reasons. Members Pearce and Hayes did not participate in the decision in *Wal-Mart Stores* and express no view at this time regarding the appropriateness of intranet posting of remedial notices.

[32] The judge's recommended Order contained a contingent notice-mailing date of May 3, 2006, apparently based on the date of Montes' suspension. It is apparent from the record that at least some of the interrogations occurring during the investigation of Montes preceded

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

IT IS FURTHER ORDERED that Case 32–RC–5443 be severed and, depending upon the outcome of the revised tally of ballots as described below, either transferred to the Board or remanded to Administrative Law Judge Jay R. Pollack for further action consistent with this Decision, Order, and Direction. If remanded to the judge, the judge shall prepare a supplemental decision limited to the issue of Respondent's Objections 6 and 8, specifically reconciling the testimony regarding the timing during the preelection conference of the parties' discussion about the unequal number of observers. Such supplemental decision shall set forth findings of fact and a recommendation to sustain or overrule the Respondent's Objections 6 and 8. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 32 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of Edwin Bagalso, Lue Vang, Angel Martinez, Oscar Sanchez, Keing Orn, Phanma Kang, Anna Pacheco, Israel Quinto, and Felicia Montes. The Regional Director shall then prepare and serve upon the parties a revised tally of ballots. If the revised tally of ballots shows that the Petitioner has received a majority of the valid ballots cast, the Petitioner's objections will be moot and Case 32–RC–5443 shall be remanded to the administrative law judge for the factual determinations described above regarding Respondent's Objections 6 and 8. If, however, the revised tally of ballots shows that the Petitioner has not received a majority of the ballots cast, then the Regional Director shall promptly transfer Case 32–RC–5443 back to the Board for further proceedings regarding the Petitioner's objections.

Dated, Washington, D.C. September 30, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

her suspension. While they cannot be dated with precision, the record establishes that these earliest unfair labor practices occurred in late April. We have modified the date accordingly. See *Excel Container*, 325 NLRB 17 (1997).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your own or other employees' union activities, sympathies and desires.

WE WILL NOT tell you that you cannot talk about organizing a labor organization in circumstances in which doing so does not interfere with your work.

WE WILL NOT tell you that the Company will close or move the plant to another state or country if you choose union representation; WE WILL NOT tell you that unionization is a futile act; and WE WILL NOT tell you that striking will result in your losing your job.

WE WILL NOT grant wage increases for the purpose of deterring you from voting in favor of representation by General Teamsters, Local 439, International Brotherhood of Teamsters, or any other union in an NLRB election.

WE WILL NOT suspend, discharge or otherwise discipline you because you engage in activity protected by Federal labor law, including organizing on behalf of any labor union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Federal law as listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Felicia Montes full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

WE WILL make Felicia Montes whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Felicia Montes' unlawful suspension or discharge, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

PACIFIC COAST M.S. INDUSTRIES CO.

Jennifer Benesis, for the General Counsel.
Thomas J. Dowdalls and *Harry M. DeCourcy (Littler Mendelson),* of Walnut Creek, California, and *Mr. Richard Hendrick of Pacific Coast M.S. Industries,* for the Respondent/Employer.
David A. Rosenfeld and *Caren P. Sencer (Weinberg, Roger & Rosenfeld),* of Alameda, California, for the Charging Party/Petitioner.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge I heard this consolidated case in trial at Oakland, California, on January 29, 30, 31, and February 1 and 2, 2007. On July 19 and September 26, 2006,[33] General Teamsters, Local 439, International Brotherhood of Teamsters (the Union or the Petitioner) filed the unfair labor practice charges alleging that Pacific Coast M.S. Industries Co., Ltd.[34] (Respondent or the Employer) committed certain violations of the National Labor Relations Act (the Act). On November 9, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a consolidated complaint alleging Respondent had violated Section 8(a)(1) and (3) of the Act.

In addition, on June 20 the Union filed a representation petition in Case 32–RC–5443 seeking to represent a unit of Respondent's production and maintenance employees at its plant in Tracy, California. An election was conducted on July 28, pursuant to a Stipulated Election Agreement approved by the Regional Director. The election remains unresolved due to challenged ballots and objections. On December 1, the Regional Director issued a Report on Challenged Ballots and Objections, ordering a hearing. By separate order, he consolidated those matters with the unfair labor practice proceeding.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following[35]

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent has been a California corporation with its principal office and place of business located in Tracy, California. It is a manufacturer of automotive parts. In the course and conduct of its business, during its fiscal year ending June 30, 2006, it purchased and received goods at its Tracy facility valued in excess of $50,000 directly from sources outside California. Accordingly, Respondent admits, and I find it to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In addition, Respondent admits the Union is a labor organization within the meaning of Section 2(5) of the Act and I so find.

Many of the issues raised in this case hinge upon whether Respondent's so-called "team leaders" are supervisors as defined in Section 2(11) of the Act. A determination of that ultimate fact will resolve certain threats alleged to have violated Section 8(a)(1), whether alleged discriminatee Felicia Montes is an employee protected by Section 7, and whether team leaders were eligible voters. Other issues include objections to the manner in which the election was conducted—were the laboratory conditions for a fair election somehow compromised, either by the voters, the Board agent conducting the election or even by some unknown third party?

II. RESPONDENT'S ORGANIZATION

A. Overview

As noted, Respondent is a California corporation. It is, however, the subsidiary of at least one and apparently two, Japanese corporations, Maruyasu Industries and Sekiso Corporation. The Tracy operation manufactures parts (mostly transmission, brake and fuel lines, and seal tubing) for Toyota automobiles and trucks. Much of its product is delivered to the New United Motor Manufacturing, Inc. (NUMMI) plant in Fremont, California, located about 50 miles west. NUMMI is a joint venture of Toyota and General Motors. Respondent has recently begun manufacturing parts for another Toyota line, Hino Trucks. It also sends its products to Toyota Canada and Toyota Mexico.

The Tracy operation consists of three plants, the serially named plants 1, 2, and 3. Plant 1 houses the truck department, the passenger department (including end forming), the Hino department, the quality assurance department, the shipping and receiving department, and the tool room. The Company's main office is also located in plant 1. The vice president and the human resources staff are officed there. The blow mill and

[33] All dates are 2006, unless otherwise noted.

[34] On the first day of hearing, Respondent's counsel requested their answer be amended to reflect the Respondent's correct name is Pacific Coast MS, Industries Company, Limited, that request was granted.

[35] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and unworthy of belief.

asphalt departments occupy plant 2, while plant 3 is for the stamping and heat shrink processes.

During the period in question, mid-2006, the executive in charge of the Tracy facility was Corporate Vice President Richard Hendrick. Hendrick was the individual who reported to the parent corporations in Japan. Respondent's corporate president was Singi Yamada, who also served as president of Maruyasu Industries. He is located in Okasaki, Japan. Reporting to Hendrick were Ryan Scharffenberg, the assistant general manager, and Dawn Tipton, the HR manager, as well as the managers for accounting, quality assurance, and the tool room.

Beneath the department managers on the organizational layout are the group leaders and beneath them are the team leaders. That structure holds true for most of the departments, although there are some which did not have a group leader. Both classifications comprise hourly, not salaried, employees. As far as this case is concerned, the team leaders' status plays in a number of directions. Each of the challenged ballots was cast by a team leader. Respondent seeks to deny them the right to vote, asserting they are statutory supervisors. One, Lue Vang, served as Respondent's observer during the election, despite the fact that supervisors are not supposed to perform that function—see both the Stipulated Election Agreement and Board law generally. Others are the alleged victims of otherwise unlawful threats under Section 8(a)(1) and one, Felicia Montes, is the alleged discriminatee whom Respondent essentially agrees was fired because of her perceived union activity. There is some conflicting evidence regarding the team leaders' powers and the significance of their authority. Much of this is the traditional divide between factory foremen and lead persons or straw bosses.

B. Team Leaders

First, it is entirely clear that none of the team leaders possesses any of the criteria of Section 2(11) of the Act defining a statutory supervisor, except possibly the last, to "effectively recommend" certain action. Section 2(11) states a supervisor must: "[have the] 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." None, by himself or herself, had the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign,[36] reward, adjust grievances, or even discipline team members. Indeed, that void alone may be construed as not supporting Respondent's contention. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536, fn. 8 (1999).

There is some conflicting evidence regarding the extent of their involvement in daily work assignments, attendance-related discipline and the effectiveness of recommendations in the nature of hiring or disciplining or their participation in that process.

Respondent utilizes two forms which play a role in the disciplinary process. One, despite its name, "warning," is the mechanical application of its attendance policy under which tardies and absences accumulate points leading to termination. This is nearly entirely administered by the human resources department. Neither the group leaders nor the team leaders have any discretionary role to play, although they may be called upon to deliver the warning notice to the offending employee. For the most part, the group leader, not the team leader, handles that chore. A team leader might be asked to perform that task in the group leader's absence or if there is no group leader for that component of the factory. Nevertheless, neither the team leaders nor the group leaders use any independent discretion in that process.

There are also time-punching questions which arise on a frequent basis. Respondent utilizes a computer check-in system which is administered by the HR department. If an employee fails to scan his or her card, the failure will trigger an inquiry the following day. The team leader may be asked to find out or confirm whether the employee's time record needs to be corrected. This duty is nothing more than assisting with the clerical record and does not involve the use of independent judgment. It is not helpful in determining the supervisory status of the employee. The same is true for punching errors caught on the day of the mistake.

Although out of logical order because it is a secondary, not statutory, indicium of supervisory status, a similar observation can be made about the training or mentoring a team leader may provide to team members or prospective team members. For example, Respondent usually hires employees from a temp agency (Adecco, according to R. Exh. 70) which has sent the prospective employee to Respondent for work. The training required of a new employee or an in-house transfer is subject to the same analysis as timekeeping. Showing a fellow employee how to do a particular job or run a specific machine is not evidence of supervisory power. Indeed, it is common, according to one of the team members, for team members to serve as trainers. See the testimony of Lorenzo Castro.[37] Likewise, the temps come with their own timesheet from the temp agency and someone needs to verify that they worked the hours claimed. That is commonly done by a responsible employee approving the temp agency's timecard. Again, this is nothing more than the clerical function of timekeeping performed by that trusted employee and is not evidence of supervisory status.

The second form utilized in the disciplinary system is called an "Employee Observation Sheet." This is a more open-ended form, for it requires factual explication. It is used in both the discipline and reward tracks. There is testimony that anyone may fill out such a sheet memorializing whatever they observed about another person, good or bad. One observation sheet re-

[36] "Assign" as used in the statute does not refer to daily work assignments, but to job placement. Daily assignments are more closely akin to the "responsibly direct" [employees] portion of the statute. Even so, where the assignments are per a routine, as seen here, it is not evidence of 2(11) supervisory status. *Sears, Roebuck & Co*., 292 NLRB 753, 754 (1989).

[37] Castro testified at two points during the hearing. In his second appearance, found in the fifth volume, the transcript misidentifies him as Lorenzo Cortero. The transcript is hereby corrected to reflect his correct name.

ceived in evidence was written by Production Manager Brian Juarez but initiated by team members who had complained about Group Leader Jose Quinones. They had told Juarez that Quinones had failed to provide team members a lunchbreak after 10 hours' work. Juarez recorded on the sheet that he told Quinones that state law required such breaks and gave additional advice regarding the need and frequency of breaks. Another concerned Quinones' negative approach to Team Leader (and former manager) Anna Pacheco and admonished him to work positively with her.

More frequently, however, the observation sheets are filled out by someone in the chain of command targeting a team member for some shortcoming. Usually they do not end up as traditional discipline. As with the two directed to Quinones, they are more often used to induce improvement. As such, they are generally more avuncular than emphatic. This is more in the nature of counseling than discipline. Counseling is, of course, not evidence of 2(11) authority. *Ken-Crest Services*, 335 NLRB 777 (2001).

There is only one observation sheet in the record which was disciplinary and served as an official warning. Even so, it was offered only in support of the contention that Felicia Montes, the alleged discriminatee, was a statutory supervisor. It was directed to team member Hector Ocequeda for neglecting to wear his seat belt while driving a forklift. Its application to Montes is discussed later in the decision.

Given the paucity of evidence supporting Respondent's contention that the power to fill out observation sheets is evidence of supervisory authority, I am unable to accept Respondent's argument on the issue. It is true that the sheets may be used for disciplinary purposes, but it seems that any employee may trigger one, whether they physically write it or not. Witness the employees' complaint about breaks that Juarez picked up and followed. Furthermore, there is no observation sheet in the record signed by a team leader. Indeed, Montes testified that as a team leader if she wrote an observation sheet on a team member she was not empowered to tell the employee he would be subject to further discipline.

There is some testimony that team leaders are involved in the evaluation of temps as they are being considered for hire as permanent employees. For example, Montes testified that while serving as a team leader she has evaluated the temps on a 60- or 90-day basis. At the same time, however, she said she did not make any recommendation concerning their hire. As for the relevant timeframe, she testified she did no evaluations of temps between May 2005 and May 2006. During that timeframe the duty was performed by her group leader, Aldo Montes.

Production Manager Brian Juarez also gave some testimony about the manner in which temps became full-time employees. He asserted that team leaders regularly made recommendations concerning hiring the temps as they completed their 60- or 90-day reviews. He pointed to Respondent's Exhibit 72, a 90-day review form for a temp named Romeo Panopio dated June 9, 2006. The form asks the trainer to comment on four areas for evaluation: safety, quality of work, quantity of work, and teamwork. There are also spaces for both general comments and a final comment. At the form's end, the evaluator is asked to circle "yes" or "no" as a recommendation for hire. In this case, Team Leader Anna Pacheco followed all those instructions and gave a neutrally-worded evaluation, finding Panopio's performance to be acceptable in three of the categories and needing improvement in the fourth. She concluded with the remark that the position the applicant had been assigned to since June (a matter of only 9 days) is better suited to him. She circled the "yes" choice on the hire recommendation. Juarez says Panopio was hired based on this evaluation. Respondent cites that recommendation as evidence of the evaluator's supervisory authority.

It should be noted, however, that Pacheco's assessment differs in quality from the other team leaders. She is a former production manager for plant 2 who had been demoted. Certainly her experience (14 years with the Company) and probably her managerial skills in evaluating prospective employees exceed those of other team leaders who do not have her background. No doubt Anna Pacheco's assessment carries greater weight than that of a lesser-experienced team leader who is just beginning to rise in the Company.

Pacheco had been called by the General Counsel earlier in the hearing and was not asked about either this recommendation or the weight such evaluations normally have.

While Respondent sees an inconsistency here between Pacheco and Felicia Montes's testimony, I do not. All Felicia Montes is really saying is that she was the person closest to the prospective hire and was in a position to provide factual information to the hiring authorities who actually made the decision. Indeed, that is a normal duty of a lead person and is exactly what Pacheco did in Panopio's case. Lead employees in most circumstances are trusted employees. Their observations are valued. Even so, their observations do not amount to "effectively recommending" the hire of anyone. They simply provide information which is taken into account by the hiring authority. Indeed, under Respondent's hierarchical system, it is doubtful that group leaders have much discretionary input on such decisions, either. Respondent, by utilizing a temp agency to find qualified applicants has delegated the initial contact to an independent company. That agency is the one which does the background check and the suitability analysis. That leaves only simple observation to the team leaders and group leaders. Productivity can be measured objectively from that point. The recommendation choices at the bottom of the evaluation form are little more than the tail on the dog. While they are the opinions of the evaluator, they do not constitute the independent judgment or the "effective" recommendation the statute contemplates for 2(11) supervisor status. I conclude, therefore, that the team leaders have no role involving independent judgment in the hire of employees nor are their recommendations "effective" as used in the statute. Their opinions are based on factual observation, not on whether it is in the employer's interest to actually hire (or not hire) the employee. *Williamette Industries*, 336 NLRB 743 (2001).[38]

[38] See also the so-called "reportorial" cases discussing the fact that an employee is not rendered a supervisor by the fact that he makes reports about others. E.g., *Vencor Hospital-Los Angeles*, 328 NLRB 1136 (1999) (ability to issue oral warnings in itself does not demon-

Another area alleged to be proof of supervisory status is the testimony that team leaders have the authority to grant or deny time off requests. In this regard, there is a variety of reasons for an employee to seek time off. The obvious one is the paid vacation. In addition, there is so-called "convenience time," which is unpaid and, of course, emergency time off, also unpaid.

Respondent utilizes a request form to be filled out and signed and dated by the employee. It contains two approval signature lines to be signed and dated by a "supervisor," one of whom is to check the "approved" or "denied" blanks. And, it is certainly accurate to observe that team leaders have routinely signed the forms, together with the group leader. Still, after the slips are signed, the form is submitted to the HR department for review and final approval. The record shows that the group or team leaders first check to see what impact the employee's absence will have on the staffing level. That result is more important with regard to convenience time, because those requests occur on short notice and cannot be planned for as easily as vacation time. Both the group and team leader are familiar with the number of staff members required for particular stations and can easily see whether the employee's absence can be covered. Curiously, the only slips which Respondent offered in evidence show that the request was always approved whether the employee sought convenience time or vacation time. No denials have been shown. Discretionary judgment here has not been shown.

Sick time and emergency time are handled differently, directly through the HR department which reviews the requests afterwards. Yet even the request forms covering convenience and vacation times are reviewed by HR. For example, if the employee has requested vacation time when his or her vacation account is insufficient to cover it, HR will deny the request.

Whatever the power the team leaders have here, it is limited. It is limited by the fact that the group leader and the department manager have review authority over it in the first instance. In addition, the HR department has final authority over the entire process. It is clear that the team leaders are merely the persons making a tentative decision with respect to such leave requests. Employees' paid vacations are nearly a matter of right. The right to other kinds of absences is governed by a bureaucratic procedure in which the team leader plays only a limited role, one which the record shows is often bypassed in favor of the group leader.

Considering the evidence on this issue as a whole, I find without exception that the job classification of team leader does not meet the definition of supervisor as defined by Section 2(11) of the Act. The true first line supervisor is the group leader. I reach this conclusion primarily upon the testimony of Montes, Pacheco, Bagalso, and some of Vang's testimony. I found that Vang's testimony that was favorable to Respondent was colored by his recent promotion. For example, Vang's testimony that since his promotion he reports daily to Juarez, but never did so when he was a team leader, is compelling because Respondent's current argument seems to argue that there is hardly any difference between the team leaders and the acknowledged group leaders' supervisory authority. The same can be said for Vang's testimony that his former group leader Frank Cordero never turned down any leave requests, suggesting strongly that even group leaders follow routines designed to get the decision before someone with actual authority. Furthermore, I specifically discount the testimony of manager Brian Juarez who was transparently promoting the team leaders to powers greater than they possess.

See, for example, Juarez' testimony concerning the people who reported to him as production manager. It is entirely contrary to what Vang said.

> Q. [BY MR. DOWDALLS]: Still talking about this time period between April and July 2006, were there PCI employees who reported directly to you?
>
> A. [WITNESS JUAREZ]: Yes, there was.
>
> Q. And are you able to give me those individuals and their job titles?
>
> A. Yes, I can. Okay. I have a group leader, Frank Cordero, Lue Vang is the team leader. And Keing Orn, team leader. Jesse Ocequeda, group leader. Jose Quinones, group leader. Anna Pacheco team leader, and Vernon Kiawe, team leader.
>
> Q. So, these are the seven employees at PCI who reported directly to you?
>
> A. Yes.

Vang had no reason to understand that the reporting line of authority would have any bearing on supervisory status. He accurately testified that he did not begin reporting to Juarez until he became a group leader. Juarez, who understands the issue, clearly colored the situation to fit with Respondent's current argument. Juarez' testimony on supervisory authority cannot be relied upon.

I have also carefully gone through the secondary indicia of supervisory authority supposedly granted each of these team leaders. I found it telling that none of their supposedly discretionary powers really exist. Moreover, Respondent pointed to no structural differences, such as wage differentials or managerial privileges. Indeed, there is no evidence that team leaders have ever been told that they have supervisory authority. That absence of notification is certainly evidence that they have no such authority. *Volair Contractors*, 341 NLRB 673, 675 (2004). It is true that on occasion some have been asked to travel for training or to work with NUMMI, but this says nothing about their daily duties, which are entirely routine in nature. Even where a team leader is the only person with any authority, such as Keing Orn during that time frame (team leader on the night shift) and leading a group of 8–10 team members, there is

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strate supervisory authority); *VIP Health Services v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (mere reporting is insufficient to establish that nurses effectively recommend discharge or discipline); *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 817 fn. 20 (2d Cir. 1980) (authority to do no more than orally counsel and reprimand employees is not supervisory). Accord: *Waverly-Cedar Falls Health Care,* 297 NLRB 390, 392 (1989), enfd. 933 F.2d 626 (8th Cir. 1991); and *Ohio Masonic Home*, 295 NLRB 390, 393–394 (1989). See also *Lynwood Health Care Center*, *Minnesota v. NLRB*, 148 F.3d 1042, 1046 (8th Cir. 1998) (mere authority to effectively recommend warnings that "have no tangible effect on [an employee's] job status . . . is not sufficient for supervisory status").

no reason to think his authority became greater simply because he was "in charge." The factory operates in a repetitive manner. No discretionary decisions need to be made until a consultation with the group leader could be had during their shift overlap. Even Juarez' testimony makes it clear that nothing non-routine was expected to occur at night: The team leader (Orn) was "responsible to make sure production was completed each day. He was responsible for overseeing quality and make sure shipments were done, as well as training and other various items." These duties were not inconsistent with being a nonsupervisory lead person.

Another night-shift team leader, Vernon Kaiawe, who appears to have only one subordinate, Veronica Arce, said this of his night-time duties:

> Q. [BY MS. BENESIS]: What are your job duties as a team leader in the passenger department?
>
> A. [WITNESS KAIAWE]: Informing, and I basically tell Veronica or whoever works there at night what to do, and I also once in a while fix machines.

As can be seen, Kaiawe's duties, in addition to the production work he does, are minimal. It hardly sounds in supervision. His assignment of work to the team member is dependent on production needs. He also passes on to Arce the qality Assurance dpartment's daily assessment of her work from the night before. Her success as an employee does not reflect on his success as a team leader. He gets no reward for her excellence; neither does he get down graded because of any of her negative performance.

The absence of anyone with 2(11) supervisory authority from these shifts is essentially meaningless to Respondent's operation. Night-hift team leaders have no more authority than do day-hift team leaders. All of them perform their duties under routines which limit them from performing work involving independent judgment. *Sears, Roebuck & Co*., 304 NLRB 193 (1991).

Therefore, I have no hesitancy in finding that team leaders are employees entitled to the protection of Section 7 of the Act.

III. INTERFERENCE, RESTRAINT,AND COERCION

A. The Wage Increase

On June 29, the Regional Director approved the election stipulation, setting the representation election in Case 32–RC–5443 for July 28. Both Respondent's counsel and the Union's counsel had signed the agreement the day before on June 28. On June 30, in a series of meetings with the employees, Vice President Hendrick announced an across-the-board wage increase of 26 cents per hour. At the same time he announced a new safety program and a contest for a cash bonus. Insofar as the wage increase was concerned, Hendrick followed a script which had been prepared for him by a labor consultant. The script is set forth in Respondent's Exhibit 55. It is not necessary to describe it in detail. The employees had not had a wage increase since January 2003, although there had been grants of small yearend bonuses.

Hendrick told the employees that in December 2005, he had told them that raises would come when the Company was profitable, and that toward the end of the company fiscal year (June 30), he would be able to determine profitability. If the Company was profitable, he would seek a wage increase from headquarters in Japan. He then told them that the Company had, indeed, become profitable and that he had persuaded the Japanese managers to grant the 26-cent increase.

At the hearing Hendrick testified that the plant had shown profits in January, February, March, April, and May. As a result, he had proposed the wage increase on June 5 with President Yamada. At the same time, he acknowledged that the fiscal year numbers would not become finalized until a month or so after June 30, because the accounting staff needed several weeks to gather and check the outstanding figures. Nevertheless, he explained, he had a good idea how things were going due to the monthly "first look" meetings he held with the managerial staff. Those took place on the second or third workday of each month. From those, he said he was confident of a fiscal year's profitability, so he made the June 5 recommendation. On April 21, however, Hendrick had become aware of the union organizing and on May 3 had suspended Felicia Montes for union organizing. The very next day a Sekiso corporate senior vice president, Yazawa, arrived in Tracy for a 2-day visit. Hendrick told him about Montes's union activity and the action Respondent was taking concerning it.

Hendrick began preparing his recommendation sometime in mid-May, although one draft bears a May 30 date. The proposal itself cites the employees' morale as an issue. "Although employee morale has been OK, PCI has learned that some employees have discussed the possibility of union representation." This language understates the situation, for he well knew that the employees had proceeded past the "discussion" point.

In any event, he recommended a two-phase wage increase. The first would be a 30-cent increase beginning July 1. The second phase would be 22 cents, beginning January 1, 2007. He estimated the first phase would cost $4800 per month. The second addition would result in a monthly payroll increase in January 2007 to $8320 over the rate as it stood in June. Eventually, the Company granted only the 26-cent raise noted above. That amounted to a monthly payroll bump of $4457, $343 less per month than Hendrick proposed.

From this, it can readily be seen that Respondent had made no decision whatsoever concerning either the raise itself or the amount of the raise at the time the petition was filed. And, of course, it had not made that decision prior to the employees' commencement of their union activity. In fact, as it acknowledges, the decision to grant the increase was a direct response to the union organizing. Beyond that, the timing occurs in tandem with the setting of the day for the election.

With respect to the grant of benefits while a representation election is concerned, in *Lampi, L.L.C*., 322 NLRB 502 (1996), the Board reiterated the rule of law to be applied in timing cases. There, the Board, quoting itself, said:

> It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405

> (1964). As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. *R. Dalkin*, supra, quoting *Red Express*, 268 NLRB 1154, 1155 (1984). In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits. *Uarco Inc.*, 216 NLRB 1, 2 (1974). See, e.g., *Singer Co.*, 199 NLRB 1195 (1972).

And, in *Waste Management of Palm Beach*, 329 NLRB 198 (1999), the Board cited the controlling law relating to the timing of the grant. It said:

> The Board has held that benefits granted during an election campaign are not unlawful if the employer shows that its action was governed by factors other than the pending election. The employer can meet its burden by showing the benefits granted were part of an already established company policy and the employer did not deviate from that policy upon the advent of the union. *American Sunroof Corp.*, 248 NLRB 748, 748–749 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981). But, an employer cannot time the announcement of increased benefits to employees in order to dissuade their union support. *Reno Hilton*, 319 NLRB 1154, 1154–1155 (1995); *Capitol EMI Music*, 311 NLRB 997, 1012 (1993), enfd. 23 F.3d 399 (4th Cir. 1994).
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> . . . .
>
> On this record, we conclude, in agreement with the judge, that the Respondent accelerated the announcement in order to discourage union support. Therefore, we find that the announcement violated Section 8(a)(1) of the Act. *Brooks Bros.*, 261 NLRB 876, 883 (1982), enfd. 714 F.2d 111 (2d Cir.); *H-P Stores, Inc.*, 197 NLRB 361 (1972).

The rule is the same whether the Board is scrutinizing the grant as an election objection (*Lampi, L.L.C.*, supra), or an unfair labor practice (*Waste Management of Palm Beach*, supra; also *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th Cir. 1994);[39] and *Speco Corp.*, 298 NLRB 439, fn. 2 (1990). Therefore, for Respondent to defend the complaint allegation that the grant here interfered with the employees' Section 7 rights, it must rebut the inference that it was granted to influence the election. I find that it has failed to do so. Hendrick's memo to headquarters recommending a raise specifically references the union organizing. Furthermore, Respondent's own evidence shows that no raise had been contemplated (aside from an inchoate hope uttered during the 2005 Christmas season) before Hendrick's memo of May 30. Respondent waited until the signing of the Stipulated Election Agreement to announce it. And finally, its evidence concerning profitability and a raise connected to profitability does not meet the test. That was not a decision. It was merely Hendrick's supposedly fulfilling a promise to seek a raise in the event a year's profit was reached. Therefore, Respondent has failed to demonstrate that it had crystallized its wage increase decision before it learned of the union activity or that the grant would have occurred if the Union had not been on the scene. I find, therefore, that the 26-cent-wage increase granted during the runup to the election violated Section 8(a)(1) of the Act as the complaint alleges.

[39] Case heard by the Supreme Court on other issues. 517 U.S. 392 (1996).

B. Threats; Attempted Repudiation

About a week after the representation petition was filed on June 20, Production Manager Brian Juarez went around the plant and handed a memo to each employee advising them of the filing. Lorenzo Castro, Glen Garcia, and Gilbert Pimental were among the employees to whom he delivered a copy. As they read it, Group Leader Jose Quinones joined them to see what was happening. Juarez gave him a copy and then left, apparently to deliver copies elsewhere. Quinones read it and then turned to the three and spoke. Castro:

> Q. (BY MS. BENESIS): Did Mr. Quinones say anything about the handout?
>
> A. (WITNESS CASTRO): Not as soon as we received it. We all pretty much stopped what we were doing to read the handout.
>
> Q. And after he read the handout, did he say anything?
>
> A. Yeah, we pretty much stopped what we were doing, stood around, read the handout, and I remember myself, Glen and Gilbert were discussing what we thought about it. And I remember the group leader saying it will never happen. That the Japanese wouldn't allow it.
>
> Q. Did he say what would never happen?
>
> A. The—us becoming union.
>
> Q. Did he say anything else about what would happen if the union came in?
>
> A. Yeah, he said that, you know, before they would allow a union to come in, that they would either shut down the plant and move it to one of our—to another location, either Mexico or Texas.
>
> Q. Did you ask him any questions?
>
> A. I asked him what he meant by that, and he goes like, well, they had said from the get-go that they would—they would never allow us to have a union there. And that's all I remember him saying.

Some time later, about a month before the election, Quinones spoke to Veronica Arce, a graveyard shift worker in the passenger department. The end of her shift overlapped slightly with the beginning of his. She remembers the conversation because it was the first she was aware that the Union was seeking representation. She also recalls the second because of its nature. Arce's English requires some editing for clarity; my edits are shown. She testified:

> Q. BY MS. BENESIS: When did you hear about the union?
>
> A. When Jose [Quinones] told me.
>
> Q. What did Jose tell you?
>
> A. He told me, Veronica, do you know they're going to try to put the union inside? I say, yeah. Who? I go, who? And I don't remember he told me the name. But I ask

him, what do you think? And he told me I think they [the employees] stupid because they [the Company] don't have money to ask . . .

. . . .

Q. When did Jose tell you this?

A. Maybe like three weeks before the start—the elections. Like three or four, yeah.

Q. Where did that conversation happen?

. . . .

A. Cell 5, passengers.

Q. Is that a work station?

A. Yes, my work station.

. . . .

Q. BY MS. BENESIS: After Mr. Quinones asked you if you knew about the union, do you remember if he said anything to you about the union another time?

A. After that, Yes.

Q. When did he next say something to you about the union?

A. I don't remember how many days after, but he told me when I working on 81/82's, he tell me that the company already say if the union come in, they going to close down because they don't have the money.

Q. Do you remember who started that conversation?

A. I don't remember, but I think I asked most of the people because I'm concerned. Because I don't know if I'm going to vote Yes or No. So I want to know. I asking the people, and they almost—most of the people they ask me, they told me some things about the union.

Q. Do you remember if you asked Mr. Quinones how you should vote?

A. If I ask him how you going to vote?

Q. How you should vote?

A. No.

Q. And when you talked with other people about the union, did you start by asking them how you should vote?

A. I asked them how they think. If the union is good or bad, but I never ask if I vote Yes or No.

Q. Is the 81/82 is a work station?

A. Yes.

Q. Were you working when Jose told you that the company already decided they will close if the union came in? Were you working when Jose talked to you?

A. Yes, I was talking [sic] [working].

Q. After that conversation with Jose, was there any other time that he talked to you about the union?

A. Yes. After—after—before I left, he told me if the company—if the company get the union, if they going to strike, well, it's not any problem because they're going to bring people from Japan to cover the people here. They going—wait. [Witness pauses] If they bring the people. So I asked him what going to happen with the people who is going to strike, and he said they going to lose their jobs because they have people to cover the people that wants out.

Q. Did he say how long people from Japan would work there?

A. He don't tell me that.

Q. Are you friends with Anna Pacheco?

A. Not really.

Q. Have you ever worked with Anna?

A. Yes.

Q. When did you work with her?

A. I working in truck side, but I don't like the way how she works. So I move into passengers, but still has her eyes on me every time. If I go bathroom. If I do this. Or if I—anything I do, everything is bad for her. No matter what. I always try to do all my job good, but still—

Q. Did you ask to be transferred so you wouldn't have to work with her?

A. Yes.

Q. Who did you ask to be transferred?

A. [HR manager] Dawn [Tipton].

. . . .

. . . . Now when they had the opening to night shift, that's when I moved to night shift because same thing. If I move to truck side, if I move passengers, they're the same thing. She always has the eyes on me.

Q. Did Jose Quinones tell you that Anna was involved in the union campaign?

A. Yes.

Q. What did he say about Anna and the union?

A. He told me if the union wins, Anna is going to be one of the people who's going to [be] in charge for the union. And so that made me scared because I don't want to have nothing with Anna.

Q. He said she was one of the people who was going to be in charge?

A. Yeah. It's like elected for the union to be one of the—I don't know how say it.

Q. Have you ever told Jose that you don't get along with Anna?

A. He knows a lot of times.

Q. How does he know?

A. Because I tell him. And he see it. And I'm not the only one. People who has problems.

Q. Okay. When did Jose tell you that Anna would be in charge if the union came in?

A. Is when I work in 81/82's. The same day when she—he told me about the union going to be shut down if the union's come in.

Arce testified that Quinones issued three threats. The first was that the employees' union organizing was futile because Respondent did not have enough money to pay for the wage demands the Union would be making. The second, connected to the first, was that Respondent would have to close if the Union came in because it didn't have enough money. That threat occurred in both conversations. The third was Quinones' statement that the employees would have to strike and that they would lose their jobs since the strike would not succeed because Respondent would bring workers from Japan to do the strikers' work. Finally, aware of Arce's antipathy toward Anna Pacheco, he told her that Pacheco would be elected one of the union leaders. While not exactly a threat, he knew she would

be opposed to that eventuality. He was seeking to influence her vote.

So far as I can tell each of the things Quinones told Arce was false. Nevertheless, there was no way for Arce to be able to evaluate their trustworthiness. Respondent does not contest Arce's credibility. Indeed, it acknowledges that Quinones made the remarks. It concedes the point because a few days later, when its labor consultant spoke to the employees to advise them what could and could not be said during the preelection period, Arce's team leader, Vern Kiawe told the consultants that Quinones had just made threat to the effect that the Company would close or move if the Union came in. Quinones, in the meantime, had gone on vacation.

Upon hearing this, Respondent began some damage control. At a later meeting that day, the consultant told employees that one of the supervisors may have said the plant would close, asserting that the statement, if made, was absolutely not true. On July 17, Hendrick distributed a memo (dated 3 days before) to all the team members in an effort to disavow the unidentified supervisor's threat, "if it was made." The letter in its entirety:

> Recently I learned that some employees may have been told by a supervisor that if the union wins the election on July 28, 2006, the company will close the plant.
>
> This statement, if it was made, is absolutely not true. If the union wins the election we will have an obligation to bargain in good faith with the union, and we would bargain in good faith.
>
> We do not want a union here for many reasons, which we have shared with you, but we will not close this plant because the union wins the election. I have taken steps to ensure that this type of statement is not repeated in the future. Such a statement is a violation of our policy and will not be tolerated. Please feel free to tell me or any other management member if you hear any such statement in the future.

It should first be noted that the memo does not acknowledge that the threat was made nor does it admit any wrongdoing. It specifically hedges as it references whatever the supervisor may have said, using "may have" and "if it was made" expressions—a clear limitation on actual acknowledgment.

Respondent did write an "employee observation sheet" directed to Quinones on July 17 when he came in to get his paycheck. Both he and Juarez signed it that day, but they never sat together until he returned to work a week or so later. The sheet warned him that he could be terminated if he repeated the transgression. Even so, the admonition to Quinones remained private and was never announced to the staff.

Respondent argues that it self-remedied the violation. The General Counsel disagrees. For a respondent to successfully claim that it has self-remedied a violation of the Act it must meet the test set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). There, the Board said that for a repudiation of an unfair labor practice to be effective, it must be timely, unambiguous and to specifically refer to the unlawful conduct. Moreover, the repudiation must be broadly published and no further violations must have occurred. In *Holly Farms*, 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th Cir. 1994),[40] the Board said the employer must admit wrongdoing.

I find that Respondent has not met the requirements of *Passavant*. While reasonably timely, this repudiation was certainly not unambiguous; neither did it specifically refer to the unlawful conduct. Nor did it address at all Quinones' statement that unionization was a futile act, that the plant could be moved to another State or country or his raising the specter of a strike and loss of jobs to Japanese employees imported as strike replacements. Clearly, it did not cover all of the unfair conduct. Accordingly, I find that the General Counsel has proven, and Respondent has not rebutted, these allegations of the complaint.

IV. INTERROGATION; THE DISCHARGE OF FELICIA MONTES

As discussed above, Felicia Montes was a team leader. She was a 16-year employee who, before her discharge, had served for about 4 years as the day-shift team leader in the production control department, performing shipping and receiving. I have already found that team leaders are not statutory supervisors, but employees protected by Section 7 of the Act. Respondent strongly urges as one of its defenses that she was a supervisor and is unprotected by the Act. One of Respondent's arguments is that Montes' signature appears on a disciplinary sheet for Hector Ocequeda when he was warned for not wearing a seat belt while driving a lift truck. Ocequeda wrote on the back of the sheet (R. Exh. 68), complaining a "her" didn't understand the facts. Respondent argued that the "her" was Montes, who had initiated the observation sheet warning. Ocequeda, however, testified that the "her" was Dawn Tipton, the HR manager who had ordered him to put the belt on. He said that group leader Aldo Montes actually handed him the form. Respondent's argument is severely undermined by Ocequeda's testimony. The discipline levied upon Ocequeda has nothing to do with Montes, who seems only to have been a witness to the warning.

Accordingly, I remain undeterred in my conclusion. Montes' main duties were exactly the same as her fellow team members. She noted that there were four basic jobs in her shipping and receiving section, each performed by one of the four employees. They rotated jobs weekly on a schedule put in place years before she became the lead. One employee did plant 1's passenger division; another worked on plant 1's truck division; a third did plant 2; and the fourth, plant 4. Montes described her job as unpacking material for distribution to the production process, including unloading the trucks. Indeed, she first unloaded and later loaded three trucks per day. As team leader, she was responsible for the shipping paperwork of the group and did review paperwork prepared by the other three. The General Counsel correctly observes that Respondent had not held Montes accountable for the work performance of the others, either their paperwork or the manner in which they performed their jobs. Respondent's argument that she was a statutory supervisor is not supported by the evidence.

Respondent proffers one other defense, that Montes violated the company no-solicitation policy. As will be shown, Respon-

[40] Case heard by the Supreme Court on other issues. 517 U.S. 392 (1996).

dent's approach to this defense required it to interrogate other employees about her union activities and that interrogation was, I find, coercive and a separate unfair labor practice.

The facts are relatively straightforward. In early April, Montes in the dock area had a brief conversation with fellow Team Leader Edwin Bagalso. Bagalso is uncertain whether he was on a break. On cross, he said he was "on the clock," but the matter was not pursued enough to know whether he we was working or on a paid break, which might still have meant to him that he was "on the clock." He did not know whether Montes was working or not, since their breaktimes differed. In any event, the conversation was so brief it could not have interfered with work any more than any nonwork-related brief comment would have. Bagalso described it:

> [T]he only time a person asked me [about a union] was—was Felicia Montes. When she asked me have you heard about the union. Then she said—then I said, what about the union? And then she goes, oh, nothing. Just forget it. And then I said, and then she said, forget it. And I said, why, what about the union? And she walked away. That was it.

Bagalso was not asked if Montes asked him to sign a union authorization card. And several weeks later, he told HR Manager Dawn Tipton who was investigating what Montes had done, that she had not asked him to sign a card. In between, Bagalso had gone to the Philippines to get married.

Either on the day of his encounter with Montes, or the next day, Bagalso mentioned this snippet to his group leader, Alice Silva. He initiated the conversation by asking if Silva knew anything about the Union. When she said she did not, he mentioned Montes' question to him. Eventually Bagalso's remark came to Group Leader Quinones and on to Production Manager Juarez.

About the same time, Montes had a similar exchange with Lue Vang, then a team leader and Montes' peer. In December, little more than a month before he testified, Vang had become a group leader. According to Vang, their conversation occurred between 8 and 9 a.m. one morning. He said she asked him how he would feel if unions represented the employees. He replied he'd have to think about it. Vang gave an abbreviated version of what followed: [WITNESS VANG]: She went into a conversation of how they could improve the plans, stuff like that[.] [Q.] So, a discussion about protection? A. Correct.

Montes acknowledges going somewhat further, saying that she observed to Vang that the employees had not had a raise in 4 years and had no job protection. According to Montes, Vang was more sympathetic to her concern than his simple "I'll think about it" response.

Later that day, Vang reported the conversation to Manager Juarez. Vang says he simply recited the conversation to him. Again, there is nothing to suggest that Montes had asked Vang to sign an authorization card.

Juarez says Vang had told him that Montes had asked him to sign an authorization card and he reported that "fact" to Hendrick as well as the Bagalso second-hand information. Based on the testimony given by both Bagalso and Vang, it seems strange that anyone would have concluded that Montes was seeking to get cards signed.

Nevertheless, Hendrick transmitted that information to HR Manager Dawn Tipton, directing her to conduct an investigation to see if Montes had breached the no-solicitation rule found in the company handbook.

Tipton was not called as a witness, and there is no dispute about what she did. On April 24, she took a statement from Juarez; later she asked Vang if Montes had talked to him about a union. She also asked team leader Anna Pacheco the same thing. She asked Pacheco if Montes had asked her to sign a union card; Pacheco said Montes had not. Tipton also told Pacheco that she had heard Pacheco's name had been brought up in some undetermined conversation, connected it to the union and then told Pacheco, "That is a no-no." While not asserted directly, Pacheco reasonably concluded that Tipton was telling her union organizing was not to be carried out. Tipton told her that there would be "further investigation."

Tipton continued on, but could not speak to Bagalso because he was gone. Even so, she sent him a note directing him to meet with her on his first day back.

On May 3, Tipton and Assistant General Manager Ryan Scharffenberg met with Montes in the company conference room. Scharffenberg testified Tipton asked Montes if she was aware of the no-solicitation rule. When she said she was not, Tipton asked if she had been asking employees to sign cards. Montes answered that she knew nothing about union cards.

She asked if Montes had spoken to Vang and Bagalso, about the Union. Montes denied that she had. Tipton did not accept Montes' answers and informed her that she had been named a "union ringleader," who was trying to organize the Company. At that point, Tipton informed Montes that she was suspended without pay while the investigation continued. Scharffenberg did not quote Tipton as mention that Montes was being disciplined for conduct inappropriate for a supervisor.

When Montes got home, she realized she had been given no documentation about the suspension. She called the Company and asked Scharffenberg to send something. Tipton responded with a letter on May 5 saying that Montes had been suspended "without pay indefinitely, while an investigation is being conducted and a decision made regarding your recent workplace conversations." Like the interview, it was silent about Montes' supposed supervisory status.

On Monday, May 15, Bagalso returned and was immediately summoned to Tipton's office. His testimony:

> Q. [BY MS. BENESIS]: What did Ms. Tipton say to you during that meeting?
>
> A. She said that—she said that she had some questions for me.
>
> Q. Did she ask you questions then?
>
> A. Yes, she was asking me questions.
>
> Q. What question did she ask you?
>
> A. If Felicia Montes ever contacted me.
>
> Q. Did she ask you if Felicia had asked you to sign anything?
>
> A. Oh, Yes, that's one of the questions she asked me. And she—
>
> Q. And what question was that?
>
> A. If she had asked me to sign for the union.

Q. What did you tell her?

A. Then I told her No.

Q. Did she ask you any more questions about what Felicia said?

A. No, but—Yes, she did, but it happened a long time ago. But the only thing that I told her—remember telling her is we passed by the aisle way and Felicia had asked me if you [sic] [I] heard about the union. And I said, No. And then when I went back to talk to talk—to ask her [Montes] what about the union, and she said nothing. I don't know what happened, but she didn't tell me. I didn't get to talk to her that day.

Q. Did Ms. Tipton try to find out any more details?

A. She had other questions, but I don't remember most of them.

Q. Did Ms. Tipton ask you about your involvement with the union?

A. No, she didn't ask.

Hendrick said that Montes was suspended because he feared she would somehow interfere with the investigation. He believed, despite her 16 years of service, that she would "intimidate" other employees from being forthcoming to the investigation.[41] He was also the individual who decided to fire Montes. He testified he fired her because she had violated both the no-solicitation policy and the Company's union-free policy. As before, there is no direct mention of Montes' supposed status as a statutory supervisor.

I think it is reasonable to find, even without the evidence affirmatively demonstrating that the team leaders are not supervisors, that Respondent's current argument is an after-the-fact attempt at obfuscation. There is no evidence that supervisory status played an actual role in Respondent's decisionmaking here.

The foregoing facts constitute a confession that Respondent suspended and discharged Montes because of her union activity. In addition, they demonstrate that Respondent's Tipton coercively interrogated at least one other team leader, Bagalso, about Montes' union activity. The same can be said for her questioning of Vang, even though he had first volunteered the information to Juarez. That an employee is willing to provide information about another employee's Section 7 activity is not a license to interrogate him about it. It is coercive both as to him and as to the individual being investigated. The same is true of the interrogation of Pacheco. So these are all unlawful interrogations under Section 8(a)(1).

In addition, Respondent has essentially fabricated the claim that Montes ever solicited an employee to sign a union authorization card. There is no evidence from anyone, including Vang, to suggest that Respondent had a good-faith belief that Montes had been soliciting cards from any employee whatsoever, much less that it occurred during worktime.

Indeed the Board has recently reiterated that talking itself is not solicitation within the meaning of a no-solicitation rule. *Wal-Mart Stores,* 340 NLRB 637, 638–639 (2003) (Member Battista dissenting). There it said:

> In the context of a union campaign, "'[s]olicitation' for a union usually means asking someone to join the union by signing his name to an authorization card." *W. W. Grainger, Inc.*, [supra]. However, an integral part of the solicitation process is the actual presentation of an authorization card to an employee for signature at that time. As defined, solicitation activity prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if the individuals involved are supposed to be working. Solicitation is therefore subject to rules limiting it to nonworking time and, in the special circumstances of retail stores, to nonselling areas.
>
> . . . .
>
> Once again, our analysis turns on the distinction between union solicitation and other employee activity in support of union organizing. "'[S]olicitation' for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad." In recognition of this distinction, the Board found that an employee did not engage in conduct lawfully proscribed by no-solicitation rules when she merely asked a coworker if she had a union authorization card. In another instance, the Board held that an employee's act of introducing a union representative to a coworker, and her subsequent statement that the coworker would go along with the union, did not constitute solicitation for which the employee could be disciplined under the employer's no-solicitation rule. [Footnotes omitted.]

Also see *International Signal & Control Corp.*, 226 NLRB 661, 665 (1976).

What Respondent was really doing here was imposing a no-union-talk barrier. Given the fact that Respondent had no rule against employees talking to one another about any subject, it cannot bar their discussions about the union so long as work is not being neglected.

The Supreme Court has said, "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees." *NLRB v. Magnavox Co. of Tennessee,* 415 U.S. 322, 325 (1974). That observation, of course, is tempered with the requirement that employees are expected to be performing their work during their worktime and should not be distracted from working by matters unrelated to work. Every employer knows that workers talk about all sorts of things while they work. They also know that talking can be distracting, but that it often is not. If a distraction of that nature occurs, it is easily correctible. But, prohibiting discussion of certain subject matters while allowing others is problematical. Thus, a rule which bars talking about any subject at all might theoretically pass muster under the Act. But, such a rule would make for a very unpleasant place to work and could not be easily enforced. For that reason, such rules are never seen. Recognizing that reality, the Board has held company rules which prohibit talking about matters protected by Section 7 during work while permitting

[41] I find Hendrick's reasoning to be disingenuous. He and Tipton clearly believed Montes was a union organizer. They suspended her to prevent her from further contact with her fellow employees, thereby interdicting her organizing efforts.

talk about any other subjects violate Section 8(a)(1) of the Act.[42] *Opryland Hotel,* 323 NLRB 723 (1997), citing *Teksid Aluminum Foundry,* 311 NLRB 711, 713–714 (1993); *Meijer, Inc.*, 318 NLRB 50, 57 (1995); *Jennie-O Foods*, 301 NLRB 305, 316 (1991); *T & T Machine Co.,* 278 NLRB 970 (1986); *Orval Kent Food Co.*, 278 NLRB 402 (1986); *Cerock Wire & Cable Group,* 274 NLRB 888, 897 (1985). Also *Saginaw Control & Engineering*, 339 NLRB 541 (2003). Such a rule does not prevent an employer from telling employees who have stopped work to talk to get back to work.

Whatever Montes was doing, it did not breach any rule against solicitation. At most she was trying to generate a brief conversation with a fellow employee, a peer team leader, about their feelings toward union representation. That is far from solicitation. Talk itself cannot be solicitation. She was doing what *Magnavox* expressly permits. Respondent did not tell her to go back to work; it hunted her down and fired her for engaging in protected activity in support of union representation. That is a clear violation of Section 8(a)(3) and (1) of the Act. Moreover, Tipton's imposition of such a bar on Pacheco during the hunt for Montes ("That is a no-no."), violates Section 8(a)(1) as well.

V. ELECTION ISSUES—CASE 32–RC–5443

A. The Postures of the Parties

As the election closed on July 28, the Union was leading 33 to 28, a margin of just 5 votes. There were 10 challenged ballots which are determinative of the final outcome. Most of those voters are, or were, team leaders, including discriminatee Felicia Montes. The Board affirmed the Regional Director's sustaining the challenge to 1 of the 10, leaving 9 for resolution, still a determinative number.

In addition, the Union/Petitioner filed five objections which, in the event the final tally does not support its bid for certification, would if sustained, require a second election. The first three objections tend to track the unfair labor practice complaint, but are not congruent with it. The last two assert that the Employer allowed supervisors in the voting area, particularly in assigning a supervisor (Lue Vang, then a team leader) to be an election observer.

The Employer filed 11 objections. The Board has adopted the Regional Director's rejection of Employer Objection 10. The Board ordered the Regional Director to include four of the Employer's objections to be heard with the five the Regional Director had already ordered to hearing. Thus, the Employer's nine remaining objections will be decided here.

Those may be grouped discretely. The first group (Objections 1, 2, 3, and 9) deals with the polling place layout, where it asserts that during the early morning session, the Union's observers were sitting too closely to the voters as they cast their ballots. This, it asserts, allowed for the impression that voters' selections were under surveillance and made it appear as if the balloting was not secret. It also asserts that the Board agent was complicit in this conduct because she did not take steps to rearrange the layout to prevent the conduct.

The second group (Objections 6 and 8) deals with the number of observers the Union placed at the polls. It also alleges that the Board agent was complicit and contributed to the problem by not taking appropriate steps to deny the Union the additional observer.

Objection 5 asserts that one of the Union's observers engaged in electioneering at the polls.

The foregoing objections are all aimed at the conduct of the election itself. The remaining objections are directed to conduct which occurred in the days before the election. Objection 4 asserts that Montes and Pacheco solicited employee support and authorization cards during worktime.

Objection 7 asserts that the Union is responsible for the intimidation of an employee at her home by vandalizing a streetside mailbox and leaving a dead rat and a car with union stickers in the driveway. Objection 11 asserts that even if the Union cannot be shown to be responsible for the incident, the election should nevertheless be overturned because it interfered with the laboratory conditions the Board requires for its elections.

As with the Union's concerns, the Employer seeks a new election in the event that in the final tally the Union obtains a majority of the votes. Therefore, the objections must be resolved before the challenged ballots can be resolved and opened. The Union's objections will be analyzed first.

In general, the Board will not entertain objections to an election which occur prior to the commencement of the preelection critical period. *Ideal Electric & Mfg. Co.,* 134 NLRB 1275 (1961). *Ideal Electric* establishes the preelection critical period to be the timeframe between the filing of the election petition and the conclusion of the polling. Therefore, incidents occurring prior to June 20 or after the July 28 poll closing will not be considered as affecting the election outcome. They may nevertheless be unfair labor practices reachable under Section 10 of the Act.

B. The Petitioner's Objections

Clearly the 8(a)(1) threats to close and/or move the plant uttered by Group Leader Quinones a week after the petition fall within the critical period. This conduct is encompassed by Petitioner's Objection 1 (Pet. Obj 1). Nor, as I have found, was the conduct properly repudiated. To the extent that the Petitioner's Objection 1 alleges that the Employer would carry out postelection reprisals different beyond closing or moving, no evidence has been presented. Similarly, Petitioner's Objection 2 asserts that the wage increase announced on June 30 was an attempt to discourage employees from voting in favor of union representation. I have previously found that wage increase to be an unfair labor practice within the meaning of Section 8(a)(1).

In Petitioner's Objection 3, the Union contends that the Employer threatened to decrease wages or take other action against the employees if they voted for the Union. Here, I do not find any evidence of a threatened wage decrease, but I have found that Quinones unlawfully created the impression that union

[42] Sec. 7 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except[ions not relevant here].

representation would be futile and, in addition, that in the event of a strike, the striking employees would be replaced by workers coming from Japan. I think Petitioner's Objection 3 fairly encompasses such a threat.

As for Petitioner's Objections 4 and 5, these are directed at the Employer's use of Lue Vang as an observer. I have found above that team leaders are not supervisors as defined by Section 2(11) of the Act. Vang, accordingly, was a 2(3) employee. The Employer's selection of Vang did not interfere with the conduct of the election.

The Board has consistently held since *Dal-Tex Optical Co.,* 137 NLRB 1782 (1962), that conduct violative of the Act is a fortiori conduct which interferes with the exercise of a free and untrammeled choice in an election. Accordingly, following the law set forth in *Dal-Tex*, I find that unfair labor practices occurring during the preelection critical period are grounds for setting aside the election and ordering a rerun since they match Petitioner's Objections 1, 2, and 3. Therefore, in the event the final tally does not demonstrate a majority in favor of the Union, I will recommend that the election be set aside and a new election conducted.

C. The Employer's Objections

As noted above, the first group of employer objections, Objections 1, 2, 3, and 9 (E. Objs. 1, 2, 3, and 9) targets the polling layout that the Employer asserts was misconduct or the appearance of misconduct.

The facts are not in dispute and Respondent's Exhibits 64–67 are four photographs of the polling place taken after the morning session. (At the Employer's request the tables were moved further apart for the afternoon session.) The polling place was Respondent's conference room. It is not a large room, but adequately houses one 6- or 8-person conference table, a smaller table and a telephone table, as well as several chairs, enough for each table and apparently some along the wall. The tables were arranged in a T, with the small table across the top of the large table. Two NLRB blue corrugated cardboard voting partitions or booths were set atop the small table about a foot apart. They are designed for tabletop use. I have administratively determined that this official agency equipment is 16 inches high, 24 inches wide, and 19 inches deep. Within the booth's confines, the voter places the ballot on the table top, 16 inches below the top of the booth. There is even a 2-inch brace flap across the top of the booth which serves as an additional blind to shield the voter's marks. This system is similar to some curtainless public election partitions, although in public elections the observers are much further away than here and the partition's size is often more shallow than the Board's. In that latter respect, the Board's partitions are superior to those used in public elections, for they are more private.

Lue Vang provided the Employer's testimony. He was the only one of three observers who testified. As mentioned, he was a team leader who later became a group leader. It was his tipoff to the Employer's attorney during the break between the two election sessions that caused the photographs to be taken.

Vang testified that the two union observers were Stephanie Martinez and Felicia Montes. He said that that the company representatives during the preelection conference made two objections to the union observers. First, that the Board agent permitted the Union to have two observers while the Employer only had one. Second, that the Board agent permitted Montes to serve as an observer even though she had been discharged.

Vang agreed that the Board agent gave the Employer the opportunity to obtain a second observer and that it declined, saying that there was insufficient time. The Employer did not add a second observer for the second session, either, though there clearly was sufficient time at that stage.

The Board agent and the observers took their places at the long table. Although there was room for three chairs on each side, the photo shows only two were used. The Board agent sat in the middle chair on the left side of the long table. Stephanie Martinez sat to the Board agent's left and next to the smaller table supporting the voting partitions. She sat with her back to booths and Vang says Martinez never looked at the voters as they cast their ballots behind her. Montes sat opposite Martinez, on the large table's right side. Vang agrees that Montes also sat with her back to the voting partitions and he never saw her look at the voters casting their ballots. Vang sat in the middle chair next to Montes and opposite the Board agent. The Board agent was in a swivel chair and with the help of the observers could watch the voters enter the room from the door behind her. No one sat in the other two chairs.

Once the voters identified themselves to the Board agent, she gave them a ballot. They would then walk past Martinez, round the edge of the small table and stand behind one of the two booths. They cast their ballot, returned the way they came in, and as they exited, placed their ballot in the ballot box which, during the first session, sat on the telephone table next to the door. Vang did not testify that the secrecy of any voter's ballot was compromised by this arrangement. He was concerned, however, by the close proximity of the two union observers to the voting partitions. Had they made the effort to do so, he thought that they could have risen from their seats and looked inside. He agrees they never did. Moreover, the photos show that the eye level of each (photographic stand-in) observer was about even with the top of the partitions. I find that, despite their proximity to the partitions, no observer could have looked over the 16-inch booth front without standing and making an obvious effort to do so. There is no evidence that voters made any complaint about ballot secrecy even though the observers were sitting right in front of them. I find that ballot secrecy was not compromised. Instead, all three observers focused on identifying the voters as they came through the door. Indeed, voter identification is their primary duty. A person desiring to look into the booth would have had to make a great and obvious effort to do so. As a result, I find, secrecy of voting was in fact accorded to each voter. Furthermore, I find that this arrangement did not even create the appearance that ballot secrecy was being compromised.

Therefore, Respondent's objections cannot be sustained and must be overruled. It is certainly well settled that the Board must maintain and protect the integrity and neutrality of its election procedures. Integrity of the process is a hallmark of Board election procedures.

There are some similarities here with *Avante At Boca Raton, Inc.,* 323 NLRB 555 (1997), at least in the sense that the objec-

tion there also raised concerns about the arrangement of voting equipment in the polling place. There, the objection complained that the ballot box was too close to the observers. Yet, as here there was no evidence that ballot secrecy was somehow compromised. "The Employer did not present any voters to testify about witnessing any of the observers, the translator or the Board agent handling or tampering with their ballot once marked, nor to testify about the fact that their election choice was witnessed or that they had the impression that it was witnessed by one of those individuals as they approached the ballot box." Id at 558.

The Board adopted the hearing officer's recommendation that the objection be overruled. Clearly, a mere assertion that secrecy was compromised is insufficient to warrant setting an election aside. That is all we have here, a mere assertion. Indeed, Vang's testimony demonstrates that the evidence is to the contrary. No observer made any effort to look into the voting booths and they could not have seen into them without making an obvious effort to do so. I shall recommend that Employer's Objections 1, 2, 3, and 9 be overruled as not supported by any evidence.

Employer's Objections 6 and 8 assert that the Union's insistence on having two observers while the Employer could only provide one breached the election agreement and is ground for setting the election aside. Again, the facts are undisputed. The fifth paragraph of the Stipulated Election Agreement states: "OBSERVERS. Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling place to assist in the election, to challenge the eligibility of voters, and to verify the tally."

The Board has certainly said that the provision in the election agreement is a "material" provision, at least to the extent that it establishes for each party a bargained-for "right" to have observers. *Breman Steel Co.*, 115 NLRB 247, 249 (1956) (employer denied any observer); *Browning-Ferris Industries of California,* 327 NLRB 704 (1999) (union denied any observer). In both cited cases, the Board set the election aside and ordered a second election.

In *Best Products Co*., 269 NLRB 578 (1984), affd. 765 F.2d 903 (9th Cir. 1985), during the preelection conference before the first voting session, the petitioner requested that the number of observers be increased to two per party on the grounds that an additional observer was necessary to enable the petitioner to identify all the voters. The Board agent granted the request, and requested the employer to provide *an equal* number of observers. The employer declined for several reasons. The Board thereupon overruled the objection which followed and issued the appropriate certification. However, the Board has held that where a union did not learn until the preelection conference that the employer was selecting two observers for each station at a multisite election and could not reasonably have obtained additional observers, the election must be set aside. *Asplundh Tree Expert Co.,* 283 NLRB 1 (1987).

In *Inland Waters Pollution Control, Inc*., 306 NLRB 342, 342–343 (1992) (Member Raudabaugh dissenting), the Board observed that even though the clause in the stipulated agreement established a "right" and was a "material" clause, it was not an absolute right. As the Board noted, it does not logically follow:

> [T]hat "because the Board agent refused to seat [the late-arriving observer], the denial was a material breach of the agreement. The right to an observer, while material, is not absolute. It is an implicit condition of an election agreement that the observer to which a party is entitled will show up in time to carry out his or her functions without risking disruption of the election. If, as here, a party's observer arrives when the election is well underway and the Board agent makes a reasonable judgment that instructing and installing the observer at that point would disrupt the election, and if, as here, the party has failed to take reasonable steps to make up for the late arrival—such as appointing an alternate available to serve in the designated observer's place—then the party's own conduct has prevented it from securing its 'right' to an observer."

Accordingly, the Board overruled the objection.

Here, Company Vice President Hendrick testified that the Union, at the time of the preelection conference, advised that it intended to have two observers. Stephanie Martinez was one and she was present for the meeting. The other, though identified early on, discriminatee Felicia Montes, did not arrive until toward the end of the conference. Hendrick initially objected to Montes as an observer since she was no longer employed. That was resolved after a short discussion. Respondent's counsel then objected that the number of observers was now unequal. The Board agent proposed that the Employer get another observer. Hendrick testified that the attorney responded that there was not enough time, that the election was to start at 5:30 a.m., and the Company did not have time to pull somebody off the floor and explain their duties to them. The record does not show the time of day when he made his observation. As a result, the election was conducted with the Union having two observers and the Employer having one. In addition, even though the Employer could have found a second observer for the afternoon session, it chose not to do so.

On these facts, I do not find any breach of the Stipulated Election Agreement whatsoever. First, the language of the Stipulated Election Agreement itself uses the word "may," rendering the provision permissible: "Each party *may* station an equal number. . . ." Furthermore, circumstances did not arise which barred the objecting party from having any observer at all. The Employer did have an observer, Vang, who seems to have carried out the Employer's concerns, particularly with respect to the election arrangements discussed above.

I am also persuaded by the logic of *Inland Waters Pollution Control*, supra. The clause in question is a "material one," of course. But, the breach was not material, if it may even be called a breach. It appears to me that the Employer has failed to demonstrate that the Board agent denied it the opportunity to obtain a second observer. Even if time had been short, the Board agent could probably have instructed any newly arriving observer concerning his/her duties. The decision to go forward with one observer was made by Respondent. It simply did not exercise its permissive right to find a second observer. I shall recommend that these objections be overruled.

Employer's Objection 5 asserts that one of the Union's observers, Stephanie Martinez, engaged in electioneering within the meaning of the Board's *Milchem*[43] rule. This rule prohibits prolonged conversations between persons connected to a party, including election observers, with prospective voters waiting to vote. Such conversations, without regard to their content, will be sufficient to set aside an election as improper electioneering near the polls. It does not apply where the voter initiates the conversation or consists of ordinary pleasantries or chance remarks. In those types of case, the objection will not be sustained as they do not constitute electioneering.

In support of this objection, the employer offered the testimony of its observer Lue Vang. He testified that union observer Stephanie Martinez was sitting in the chair to the left of the Board agent with her back to the voting partitions. In that position, she could easily see the Board agent, the door and the ballot box behind the agent's swivel chair and, of course, voters who entered the room to vote. Indeed, all three observers had approximately the same aspect of the room as they faced the doorway.

Vang testified that at one point during the morning session Angel Martinez, a team leader from plant 2, came into the room.[44] Stephanie Martinez asked him, "Was that all your people?" Angel Martinez simply replied, "Yes." There is no evidence that anything further was said by either. Indeed, Vang was not asked if Stephanie Martinez made the remark before or after Angel voted. Furthermore, he did not offer evidence concerning whether any other voters were in the room at that moment.

The Employer urges that I find the comment made by Stephanie Martinez to be a statement of employee solidarity and therefore impermissible electioneering. I cannot concur.

First, this is not a *Milchem* type of conversation. It was extremely brief, not prolonged in any way. Indeed, Stephanie's words were a question seeking a one-word answer, apparently an inquiry about whether all the people from Angel's work area had now voted. It is certainly not electioneering on its face. Nor would it have been even if Angel's answer had been "No." Had he given a negative answer, she might have asked him to urge the remaining employees to come vote. This, of course, is rank speculation, but it would not have constituted electioneering if that had been the direction her question led, for urging fellows to vote, without a partisan message, is only asking them to exercise their right under the law. Only by innuendo could one reach the conclusion suggested by the Employer. Yet, given the lack of evidence about other voters being in the area, that conclusion would only be speculation, too. I find that Employer's Objection 5 should be overruled.

Employer's Objection 4 asserts that Team Leaders Felicia Montes and Anna Pacheco interfered with the election in the days and weeks before by soliciting union authorization cards during worktime and in violation of the Employer's no-solicitation rule. This can have merit only if the two were statutory supervisors. I have earlier found that they were not. But even if they were supervisors, no showing has been made demonstrating the extent of their involvement. Moreover, it is manifest at this stage that Montes never solicited cards at all, nor did the Employer have any realistic basis to believe that she had.

Laborer Sylvia Gonzalez said that Pacheco had asked her to sign a union card on April 29, but there is no evidence that Pacheco presented one for Gonzalez' signature. In fact, the conversation initially was an inquiry by another employee about whether Gonzalez was going to attend an immigration march on May 1.

> Q. [BY MR. DOWDALLS]: Okay. Now, when this conversation between you and Anna Pacheco was taking place, who did it start, how did it come up?
>
> A. [WITNESS SYLVIA GONZALES]: I was working on clamp set, on 21, 22, was [sic] [with] Gilbert Pimentel, and he, she asked me if I come to this Monday the May 1st.
>
> Q. Come to what?
>
> A. To work. It's the immigrants march, something like that.
>
> Q. So, that was the day of the big immigrants march?
>
> A. On Monday.
>
> Q. That was Monday?
>
> A. Monday.
>
> Q. Was that May 1st?
>
> A. May 1st.
>
> Q. Okay.
>
> A. And we was working was Saturday April 29th.
>
> Q. Okay.
>
> A. And I say, I don't know, you come? And she [Anna Pacheco] told me, no, oh, maybe I'm not. And she start to tell me if I know about the union and that thing. And I say, I don't know. And she asked me if I—oh—after that she told Hebe (phonetic) if he come this Monday to work. And Hebe say, no. And she told her, aye, it's your people, come on, it's your people. And loud she asked me about if I want to sign a card, and I say I don't know, let me think.
>
> Q. Did she say what the card was for?
>
> A. No. But she, before she told me about that union and that thing.
>
> Q. Okay. So, she was talking to you about the union, telling you about the union?
>
> A. Yes.
>
> Q. And then she asked you if you would sign a card?
>
> A. Yes.
>
> Q. Okay. All right. Well, let me ask you then, what did you say?
>
> A. Oh, I say I don't know, let me think.

The import of this testimony's is very elusive. Gonzalez seems to believe the card was for the Union, but never quite says so. In fact, she's not certain that Pacheco even had a card at all. Gonzalez says Pacheco had a paper in her hand, but she never saw what it was. Her uncertainty prompted some questions from me.[45]

[43] 170 NLRB 362 (1968). Misprinted "Michem" in the title line.

[44] As a team leader, Angel Martinez cast a challenged ballot.

[45] Questions from Judge Pollack:

In any event, it seems to me that the Employer is challenging the Union's showing of interest, claiming it was undermined by supervisory solicitation committed by Montes and Pacheco. This is an effort, by indirect means, to challenge the sufficiency of the Union's initial showing of interest. The Board will not permit litigation of such an issue. *O. D. Jennings & Co.*, 68 NLRB 516 (1946). Regional Directors will examine such matters administratively, but the claim needs to be supported by evidence. Moreover, a collateral attack on the sufficiency of the showing of interest will not be permitted. *International General Electric, S. A., Inc.,* 117 NLRB 1571 (1957). Similarly, the Board will not look behind the showing of interest made by the Regional Director if the issue is brought up in a postelection circumstance. *Goldblatt Bros., Inc.*, 118 NLRB 643 (1957); *Gaylord Bag Co.*, 313 NLRB 306, 307 (1993).

Also see *Glomac Plastics*, 194 NLRB 406 (1971), which outlines the level of supervisory infection necessary to declare those cards invalid. That case arose in a demand for recognition framework, not in an election objections context, as here. I, however, will not concern myself with it, particularly since the argument has no merit once the nonsupervisory status of the solicitors has been established.

Finally, it is clear that the conduct occurred before the petition was filed on June 20. Montes had been suspended as of May 3 and hadn't been at the facility for over 6 weeks before the critical period even commenced. Pacheco's single solicitation of Gonzalez, if it can be so termed, occurred on April 29, some 7 weeks before the petition was filed.

It may be argued that even though the solicitation occurred before the critical period began, an exception should be made. *Lyon's Restaurant*, 234 NLRB 178 (1978), does seem to provide for an exception to the *Ideal Electric* preelection critical period limitation on objections. Even so, I find it to be distinguishable, for the exception deals with an entirely different type of complaint, dues waivers/vote purchasing under the *Savair* doctrine.[46] This exception simply has no application to an isolated solicitation of an authorization card intended to demonstrate an adequate showing of interest. Employer's Objection 4 will be overruled.

The final objection, Employer's Objection 7 asserts that the election should be set aside due to someone's having vandalized the streetside mailbox of a voter, leaving a dead rat in her driveway. It also references a car in the voter's driveway having prounion stickers, but no evidence on this claim was adduced.

The only testimony in support of this objection was by Alma Baca, who is a 14-1/2-year employee who works the day shift in the plant 1 truck department. She testified that 9 or 10 days before the election she had a conversation with her son, Matthew, about the Union. Matthew is a plant 2 employee who still lives at home with his parents. She initiated the conversation, asking him if anybody had approached him about the Union. He replied that someone had, asking him if "he was still with us?" He told his mother he had said he was, and then said the person had asked about her. She testified he told her that he had responded, "I don't know if she is, but I can get her to change her mind."

Two days later, now a week before the election, she rose at her normal time, 4:15 or 4:30 a.m. to get ready for her 6 a.m. workday. The Bacas' house is about 1-1/2 miles from the plant. As she arose, she heard a loud bang in front of the house and the sound of a car driving away. She says both she and her husband opined that it sounded as if something had happened to the mailbox, located on a post on the street. They did not investigate.

Later, when she exited the house to go to work, about 5:45 a.m., she saw a dead rat in front of her car in the driveway. Then, as she drove away from the house, she saw the family mailbox had been knocked off its post. She reported the incident to her supervisor, Group Leader Frank Cordero.

The Employer has offered no evidence demonstrating why the incident should be attributed to anyone connected to the election, yet asserting that the conversation she had with her son somehow implicates the Union. First, the evidence is rank hearsay; but second, there is nothing in the remark which would tie the Union to incident. If the Union is counting probable votes in advance of the election, as Matthew's conversation suggests, it does not follow that the Union would resort to intimidation as a means of obtaining her vote.

Recognizing the weakness of its argument, the Employer alternatively asserts that unknown third parties may have vandalized the mailbox and thrown the dead rat in the driveway. It correctly invokes the Board's long-held the laboratory conditions requirement, asserting that it does not really matter who is culpable for misconduct, but if the misconduct created an atmosphere which interferes with the employees' free and untrammeled right to choose a bargaining representative, the election should be set aside. See, e.g., *Al Long, Inc.*, 173 NLRB 447 (1969).

Here, however, there is no other conduct available which can be used as a ground for finding the atmosphere had become so infected the ability to run a fair election had been destroyed. The vandalized mailbox and dead rat cannot even be said to have been connected to the election at all. That being the case, the incident cannot have affected the atmosphere surrounding the election in the first place.

Even so, if the incident could somehow be connected to the election, it was isolated, occurring a week beforehand. It was insufficiently widespread to have contaminated the preelection atmosphere. I will recommend that this objection be overruled, as well.

D. Challenged Ballots

Having found that the persons holding the job classification of team leader are all statutory employees, it follows that all of them were entitled to cast a ballot in the representation election

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ADMINISTRATIVE LAW JUDGE POLLACK: She had something in her hand?

THE WITNESS: —something in her hands.

ADMINISTRATIVE LAW JUDGE POLLACK: But, you didn't get to see what it was in her hand?

THE WITNESS: No, no, that's why I told you I can't tell you it's that card or not, because I'm not sure.

[46] *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

conducted July 28. Those individuals are: *Edwin Bagalso, Lue Vang, Angel Martinez, Oscar Sanchez, Keing Orn, Phanna Kang, Anna Pacheco,* and *Israel Quinto*. The ninth remaining challenge is *Felicia Montes*. Montes, of course, is also a team leader. In addition, I have found that Montes was unlawfully suspended and later discharged in violation of Section 8(a)(3) and (1) of the Act as detailed above. Under the Act, she is entitled to a remedy which includes reinstatement to her job. She, too, is entitled to cast a ballot in this election.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. General Teamsters Local No. 439, affiliated with International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. On the dates shown in the decision, Respondent violated Section 8(a)(1) when its Human Resources Manager Dawn Tipton coercively interrogated employees about their union activities, sympathies, and desires and about the union activities, sympathies, and desires of other employees.

4. In May and June, Respondent acting through Tipton violated Section 8(a)(1) by telling employees they could not talk about organizing a labor organization in circumstances which did not interfere with their work.

5. On the dates shown in the decision, Respondent, acting through a statutory supervisor, Group Leader Jose Quinones, violated Section 8(a)(1) by telling employees Respondent would close or move the plant to another State or country if the employees chose union representation, by telling employees that unionization was a futile act, and by telling employees that striking would result in their losing their jobs.

6. On June 30, Respondent violated Section 8(a)(1) by granting a wage increase for the purpose of deterring employees from voting in favor of union representation in an NLRB election.

7. On May 3, Respondent violated Section 8(a)(3) and (1) of the Act when it suspended its employee Felicia Montes because of her union activity; thereafter, on May 25 it violated Section 8(a)(3) and (1) when it discharged Montes because of her union activity.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. And, as Respondent discriminatorily suspended and then discharged its employee Felicia Montes, it will be ordered to offer her immediate reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of her discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Furthermore, it shall be required to expunge from Montes' personnel file any reference to her illegal discharge. *Sterling Sugars*, 261 NLRB 472 (1982). Finally, it shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

The Respondent, Pacific Coast M.S. Industries Co., Ltd., Tracy, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities, sympathies, and desires and the union activities, sympathies, and desires of other employees.

(b) Telling employees they cannot talk about organizing a labor organization in circumstances which do not interfere with their work.

(c) Telling employees that it will close or move the plant to another state or country if the employees choose union representation; telling employees that unionization was a futile act; and telling employees that striking will result in their losing their jobs.

(d) Granting wage increases for the purpose of deterring employees from voting in favor of union representation in an NLRB election.

(e) Suspending, discharging, or otherwise disciplining employees because they engage in activity protected by Section 7 of the Act, including organizing on behalf of any labor union.

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

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

(a) Within 14 days from the date of this Order, offer Felicia Montes full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Felicia Montes whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

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

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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

(e) Within 14 days after service by the Region, post at its plant in Tracy, California, copies of the attached notice marked "Appendix."[48] Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by Respondent's authorized representative, shall be posted (in English and any other foreign language deemed appropriate by the Regional Director) by 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 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, Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 3, 2006.

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

Recommendation Concerning Objections to the Election;
Case 32–RC–5443

Based on the foregoing findings concerning the objections to the election filed by each party, I recommend that the Board overrule all of the Employer's objections. I further recommend sustaining the objections filed by the Petitioner-Union. Additionally, I recommend that the challenged ballots be opened and counted and a revised tally of votes be issued. I further recommend that in the event that the revised tally does not result in a majority cast in favor of representation by the Union-Petitioner, that the July 28, 2006 election be set aside and an second election be held at a time to be determined by the Regional Director. Finally, in the event that a majority of votes is cast for the Petitioner-Union, I recommend that a certificate of representative be issued in its favor.

Dated, Washington, D.C. May 25, 2007

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT coercively interrogate you about your union activities, sympathies, and desires or the union activities, sympathies, and desires of other employees.

WE WILL NOT tell you that you cannot talk about organizing a labor organization in circumstances which do not interfere with your work.

WE WILL NOT tell you that the Company will close or move the plant to another State or country if you choose union representation; WE WILL NOT tell you that unionization is a futile act; and WE WILL NOT tell you that striking will result in your losing your job.

WE WILL NOT grant wage increases for the purpose of deterring you from voting in favor of representation by General Teamsters, Local 439, International Brotherhood of Teamsters in an NLRB election.

WE WILL NOT suspend, discharge, or otherwise discipline you because you engage in activity protected by Federal law, including organizing on behalf of any labor union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Federal law as listed above.

WE WILL within 14 days from the date of Board's Order, offer Felicia Montes full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

WE WILL make Felicia Montes whole for any loss of earnings and other benefits suffered as a result of our discrimination against her.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to Felicia Montes' unlawful discharge, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

PACIFIC COAST M.S. INDUSTRIES CO., LTD.

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