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**Goya Foods, Inc. and Dewys Taveras.** Case 29–CA–29945

January 5, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER  
AND PEARCE

On June 15, 2010, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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,<sup>1</sup> and conclusions as modified below, to modify his remedy,<sup>2</sup> and to adopt his recommended Order as modified and set forth in full below.<sup>3</sup>

The issues in this case are (1) whether the Respondent violated Section 8(a)(1) of the Act by directing employee Dewys Taveras to leave a union meeting he was participating in and ordering him off the premises, and (2) whether the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Taveras for defying these or-

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<sup>1</sup> Although the judge did not make specific credibility findings, he implicitly credited the testimony of employees Dewys Taveras and Juan Vargas regarding Taveras' comportment during the union meeting at issue here. The Respondent has excepted to the judge's failure to find, based on the Respondent's witnesses' characterization of Taveras' conduct, that Taveras was interrupting the meeting and, in doing so, was "out of control." 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In any event, even the witnesses on whom the Respondent relies did not describe Taveras as "out of control."

<sup>2</sup> In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. We also modify the remedy to include an expunction remedy.

<sup>3</sup> We shall modify the judge's recommended Order to more closely conform to the violations found and to the Board's standard remedial language, and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). We shall substitute a new notice to conform to the modified order and to our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enf. 354 F.3d 534 (6th Cir. 2004).

ders. As explained below, we agree with the judge that the Respondent committed both violations.

The Respondent operates a warehouse in Bethpage, New York, where about 45 employees are represented by Local 888, United Food and Commercial Workers International Union. Taveras, a former member of the bargaining unit and Local 888, had been promoted to a non-unit position before the events in question took place.<sup>4</sup>

In late 2009, Local 888 was negotiating a new contract with the Respondent as well as campaigning against a decertification petition filed by employee Juan Vargas. As a result, Local 888 was holding frequent meetings with employees on the Respondent's premises, consistent with a visitation clause in the collective-bargaining agreement.

On November 29, Taveras arrived at the warehouse before his shift began and, as was customary for workers arriving early, sat in the cafeteria with 12–15 coworkers. Shortly thereafter, representatives from Local 888, led by Ricky Guzman, entered the cafeteria to meet with unit members to discuss the decertification petition. Vargas, who was also in the cafeteria, became involved in an argument with Guzman. Overhearing them, Taveras raised his hand and asked if he could offer his opinion on why some employees were dissatisfied with Local 888. Guzman consented, and Taveras explained that he had heard from other employees that they were frustrated with some of Local 888's bargaining positions, as well as past failures to defend disciplined employees. When Guzman disputed Taveras' assertions, Taveras loudly defended his position and gestured to other employees for emphasis.

During Taveras' exchange with Guzman, Night Warehouse Supervisor Stanley Cucalon entered the cafeteria to get coffee. Hearing the argument, he twice told Taveras not to get involved because Taveras was not a union member; Taveras twice responded that he was on his own time and had a right to stay. At that point, Night-Shift Manager Edwin Solorzano entered the cafeteria, the loud voices and Taveras' gestures having caught his attention. Solorzano called across the room to Taveras and told him to leave the cafeteria. Taveras refused. Solorzano then loudly repeated his instruction that Taveras leave the area, to which Taveras loudly replied, from 40 feet away, "Ven sacame" (a Spanish phrase translated as "come and take me out").<sup>5</sup> Solorzano responded by di-

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<sup>4</sup> Although he was no longer a member of the bargaining unit after his promotion, the Respondent does not contend that Taveras was a supervisor within the meaning of Sec. 2(11) of the Act, or that Taveras was not an employee within the meaning of Sec. 2(3) of the Act.

<sup>5</sup> Taveras and a significant number of the Respondent's other employees primarily or exclusively speak Spanish. Taveras, Vargas,

recting Taveras to punch out and go home. Taveras initially either sat down or said he would sit down, but after a moment he complied with Solorzano's order. Solorzano reported the incident to the warehouse general manager, who recommended that Taveras be discharged, but the Respondent's director of human resources instead suspended Taveras for 5 days.<sup>6</sup>

#### I. THE RESPONDENT'S ORDER TO LEAVE THE MEETING

The judge found, and we agree, that the Respondent violated Section 8(a)(1) by directing Taveras to leave the meeting and ordering him off the premises. Taveras' activity—participating in a union meeting at which he discussed the benefits and drawbacks of union representation with his coworkers—was protected by Section 7 of the Act. Furthermore, we are not persuaded by the Respondent's argument that the Respondent was justified in ordering him to leave the meeting because his conduct was disruptive and therefore lost the protection of the Act.<sup>7</sup> The record plainly establishes that Taveras had not interrupted the meeting, but was participating with union representative Guzman's permission. Moreover, the Respondent's agents did not order Taveras not to shout, not to interrupt, or in any other way not to disrupt the meeting. Rather, they both ordered him not to participate in the meeting.

Further, we agree with the judge that the Respondent's assertion that employers have a "prerogative" and "independent right" to decide who can attend union meetings held on the employer's premises pursuant to a collective-bargaining agreement's visitation clause is without merit. In *Marco Polo Resort Motel*, 257 NLRB 1293 (1981), enf. mem. 709 F.2d 715 (11th Cir. 1983), an employer permitted a union to hold a meeting on the employer's premises. The employer later interrupted the meeting, however, to order the nonunion bargaining-unit employees in attendance to leave. In finding that the employer's actions violated Section 8(a)(1), the Board reasoned that an employer's decision to permit a union meeting on its premises does not include the right "to police" the meet-

ing, absent a legitimate business justification. *Id.* at 1293.

Here, the sole justification offered by the Respondent is that the collective-bargaining agreement's visitation clause obliged it to prevent interruptions of the Union's meetings. The fact that Taveras was participating in the meeting with the Union's permission completely undercuts this justification. Accordingly, we affirm the judge's findings that Taveras was protected by Section 7 while participating in the meeting and that the instructions to Taveras to stop participating in the meeting and to leave the area violated Section 8(a)(1).

#### II. TAVERAS' SUSPENSION

The judge found that the Respondent violated Section 8(a)(3) and (1) by suspending Taveras for his actions on November 29. The judge found that, under *Atlantic Steel Co.*, 245 NLRB 814 (1979), Taveras' conduct on November 29 was not so opprobrious as to warrant the loss of the Act's protection. We agree with the judge that *Atlantic Steel* is the proper framework for analyzing this violation and that, applying it, Taveras did not lose the protection of the Act.<sup>8</sup>

Under *Atlantic Steel*, the Board considers four factors to determine whether an employee's conduct is so egregious as to lose the Act's protection: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's conduct; and (4) whether the conduct was provoked by the employer's unfair labor practices. *Id.* at 816.

##### A. The Place of the Discussion

The first factor, the place of the discussion, favors protection in the circumstances of this case. While Taveras' intemperate "ven sacame" remark was overheard by more than 10 other employees, and thus could conceivably affect workplace discipline, that consideration is outweighed by the fact that Taveras' conduct did not occur in a work area or during worktime. See *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007) (al-

Cucalon, and Solorzano all testified at the hearing through an interpreter.

<sup>6</sup> The judge incorrectly found that Cucalon instructed Taveras to stop participating in the meeting only once and that Solorzano ordered Taveras to leave the area twice. As set forth above, the record establishes that Cucalon gave Taveras two instructions, and that Solorzano gave him at least three orders, the last being to punch out and go home. For the reasons explained below, this factual error by the judge does not affect our conclusion that Taveras did not lose the protection of the Act.

<sup>7</sup> For the reasons set forth in the judge's decision, we find that the Respondent's attempt to rely on *Eagle-Picher Industries*, 331 NLRB 169 (2000), and *Carrier Corp.*, 331 NLRB 126 (2000), as support for the assertion that Taveras lost the protection of the Act is unavailing.

<sup>8</sup> The Respondent argues that Taveras was disciplined, not for participating in the union meeting, but for his "insubordination" towards Cucalon and Solorzano in refusing to follow their instructions. We reject this distinction. As we explained above, the initial orders Taveras allegedly refused to obey were to cease engaging in protected activity. It is well established that if an employee is disciplined "for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act." *Consumers Power Co.*, 282 NLRB 130, 132 (1986) (footnote omitted). Where, as here, the conduct at issue arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline. See *Tampa Tribune*, 351 NLRB 1324, 1326 fn. 14 (2007), enf. denied on other grounds sub nom. *Media General Operations, Inc. v. NLRB*, 560 F.3d 181 (4th Cir. 2009).

though employee's brief outburst occurred in the presence of other employees, the location in a breakroom favored protection because it would not disrupt the employer's work process). Indeed, it took place at a location and during a time period which the Respondent has approved for union meetings, even meetings taking place during the often contentious preelection period. Further, as discussed below, the fact there was any incident at all in the cafeteria is attributable to Cucalon's and Solorzano's unlawful decisions to confront Taveras and attempt to eject him from the Union's meeting. We thus conclude that the first factor favors protecting Taveras' conduct.<sup>9</sup>

#### B. The Subject Matter of the Discussion

The second factor, the subject matter of the discussion, strongly favors protection. At the meeting, Taveras was criticizing the Union's bargaining positions and tactics, and thus was plainly engaged in protected conduct. See *Tampa Tribune*, supra at 1326 (finding criticism of employer tactics and positions protected). Taveras' subsequent exchanges with Cucalon and Solorzano consisted almost entirely of Taveras defending his right to be present and speak at the meeting. Because defending protected activity is itself protected, see *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1429 (2007), and because asserting fundamental rights under the Act strongly favors protection, see *Stanford Hotel*, 344 NLRB 558, 559 (2005), this factor weighs heavily in favor of protection.

#### C. The Nature of the Conduct

The third factor, the nature of the conduct, also favors protection. Taveras' course of conduct, culminating in his remark to Solorzano, was entirely spontaneous and free of profanity, considerations that favor protection. See *Noble Metal Processing*, 346 NLRB 795, 800 (2006) (affirming finding that lack of profanity favors protection); *Trus Joist MacMillan*, 341 NLRB 369, 370–371 (2004) (finding premeditated outburst disfavors protection). That Taveras was speaking loudly does not, by itself, result in a loss of protection. See *Postal Service*, 251 NLRB 252, 258 (1980), enfd. 652 F.2d 409 (5th Cir. 1981). And even though the dispute went on longer than the judge's decision indicates (see fn. 6, above), it was

<sup>9</sup> Certainly, we do not suggest that breakrooms and other nonworking areas are safe harbors for unrestrained employee conduct. See, e.g., *Alcoa Co. of America*, 338 NLRB 20, 22 (2002) (although occurring in a breakroom, employee's "repeated, sustained, ad hominem profanity" in reference to supervisors could be overheard by coworkers and would reasonably undermine the authority of the supervisors subject to his "vituperative attacks").

no longer and no more contentious than other exchanges the Board has found remained protected. See, e.g., *Datwyler Rubber & Plastics, Inc.*, supra at 669 (2007) (employee taunted general manager with a series of pointed questions and remarks in front of other employees); *Noble Metal*, supra at 800–801 (affirming finding that employee's defiance of repeated orders to sit down during 2-minute period did not lose protection).

The Respondent's main contentions, however, are that Taveras' conduct lost the Act's protection because (1) it was "insubordinate" and (2) the words "come and take me out" constituted a challenge to Solorzano to engage in a fight. We reject both contentions.

Although insubordinate conduct weighs against protection, the Board distinguishes between true insubordination and behavior that is only "disrespectful, rude, and defiant." *Severance Tool Industries*, 301 NLRB 1166, 1170 (1990), enfd. mem. 953 F.2d 1384 (6th Cir. 1992). Taveras' conduct falls into the latter category. Although Taveras initially refused Cucalon's instruction to not get involved and Solorzano's instruction to leave the meeting and then to leave the cafeteria, in the end he complied. The Board has previously found that similar conduct did not lose the protection of the Act. See *Noble Metal*, supra at 798, 800–801.

Although we do not condone Taveras' "come and take me out" statement, called across the cafeteria in response to Solorzano's remarks, we agree with the judge that, viewed in context, this statement was not a threat or challenge to fight. Threatening statements doubtlessly weigh against protection, but the Board requires such statements to be objectively threatening. See *Plaza Auto Center, Inc.*, 355 NLRB No. 85, slip op. at 3–4 (2010) (alleged threat unaccompanied by physical movement or aggression); *Kiewit Power*, 355 NLRB No. 150, slip op. at 3 (2010) (purported threat must be unambiguous). In context, Taveras' statement, "Come and take me out," did not rise to that level.<sup>10</sup> Taveras was standing 40 feet from Solorzano, and made no threatening gestures or movements. Moreover, Taveras accompanied the statement by sitting down (or stating that he would), and moments later he complied with Solorzano's instruction to punch out and go home. Cf. *Plaza Auto*, supra at 2 (no threat where employee stood up and pushed a chair aside while telling employer he would regret firing another employee).

As Taveras' outburst was spontaneous, free of profanity, no longer than other protected outbursts, did not con-

<sup>10</sup> At the hearing, Solorzano himself indicated that the meaning of "come and take me out" is context-dependent, thereby admitting its ambiguity.

stitute a threat or physical challenge, and did not ultimately result in a refusal to comply with the orders, the nature of the outburst favors protection.

*D. Provocation by the Respondent*

The final factor, provocation by the employer's unfair labor practices, similarly favors protection. Taveras' remarks, and indeed the entire incident, were triggered by Cucalon and Solorzano's unlawful instructions that Taveras stop participating in the meeting and leave the area. Without this unfair labor practice, there would have been no reply by Taveras or further interaction; as such, this factor favors protection. See *Stanford Hotel*, 344 NLRB at 558.

In summary, all four *Atlantic Steel* factors weigh in favor of Taveras' retaining the protection of Section 7. Because Taveras' activity remained protected, his suspension violated Section 8(a)(3) and (1).

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by discriminatorily suspending Dewys Taveras, we shall order the Respondent to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also be required to remove from its files all references to the unlawful suspension of Taveras and notify him in writing in English and in Spanish that this has been done and that the suspension will not be used against him.

ORDER

The Respondent, Goya Foods, Inc., Bethpage, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing employees not to participate in union meetings or ejecting employees from its premises for attending union meetings.

(b) Suspending or otherwise discriminating against employees for participating in union meetings.

(c) 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) Make Dewys Taveras whole for any loss of earnings and other benefits suffered as a result of the unlawful suspension, plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), in the manner set forth in the amended remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension, and, within 3 days thereafter, notify Taveras in writing in English and in Spanish that this has been done and that the suspension will not be used against him in any way.

(c) Within 14 days after service by the Region, post at its Bethpage, New York facility copies of the attached notice, in English and in Spanish, marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 November 29, 2009.

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

Dated, Washington, D.C. January 5, 2011

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Wilma B. Liebman, Chairman

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Craig Becker, Member

<sup>11</sup> 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 and Order of the National Labor Relations Board."

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Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 direct our employees not to participate in union meetings or eject them from our premises because they attend union meetings.

WE WILL NOT suspend employees because they participate in union meetings.

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

WE WILL make Dewys Taveras whole for any loss of earnings and other benefits he has suffered as a result of the discrimination against him, with interest.

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

GOYA FOODS, INC.

*Ashok C. Bodke, Esq.*, for the General Counsel.

*Michael R. Cooper, Esq.* and *Carlos G. Ortiz, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York, on April 27, 2010. The charge and the amended charge were filed on December 7, 2009, and January 27, 2010. The complaint that was issued on February 23, 2010, alleged as follows:

1. That on or about November 29, 2009, the Respondent (a) directed Taveras to cease participating in a meeting of Local 888, United Food and Commercial Workers International Union and (b) ejected him from its Bethpage facility because he participated in that meeting.

2. That on or about December 11, 2009, the Respondent suspended Taveras for one week because he participated in the above described meeting.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Employer is engaged in the manufacture of foods and it operates a warehouse facility in Bethpage, New York. This facility has two shifts and the employees have been represented by Local 888, United Food and Commercial Workers International Union. At the time of these events, its contract with that union expired on October 31, 2009.

The Charging Party, Dewys Taveras, who used to be a member of the bargaining unit, was no longer in the unit because of a promotion he received to a nonbargaining unit position. Although classified by the employer as a night shift assistant foreman, the Employer does not contend that Taveras was a supervisor as defined by Section 2(11) of the Act. During the course of his employment, Taveras had accumulated 10 warnings from February 6, 2004, to September 20, 2008. The last indicated that it was a final warning and that similar violations could lead to disciplinary action up to termination.

The contract described above has a visitation clause which permits union representatives, on notice to the employer, to visit the facility and talk to employees. The bargaining unit consists of about 45 warehouse employees. Meetings are generally held in the Company's cafeteria.

On November 2, 2009, an employee named Juan Vargas filed a decertification petition in Case 29-RD-1138 seeking to oust Local 888 as the bargaining representative. Thereafter, on December 8, 2009, another union filed a petition in Case 29-RC-11863, seeking to represent the employees. (At that point the decertification petition was withdrawn). In any event, by late November 2009, there was a good deal of discussion about this situation within the shop and Local 888 was visiting the shop on a daily basis to promote its candidacy to be the bargaining representative.

Taveras arrived at the facility on November 29, 2009, before his starting time (6 p.m.) and went to the cafeteria. At some point union representatives including Ricky Guzman, came into the cafeteria to talk to and hand out leaflets to the warehouse workers who were sitting around at the various tables. There

then ensued an argument between Guzman and Juan Vargas, (the person who filed the decertification petition) about the value of Local 888's representation. At this point, Taveras raised his hand and asked if he could give his opinion. Although the shop steward, Hemildo Bonilla, opined that Taveras should not talk because he was not in the bargaining unit, Guzman said that he could. Taveras then proceeded to tell Guzman why some employees were upset with Local 888 and he seems to have made his point with enthusiasm and hand gesturing. In any event, there is no evidence that Guzman objected to Taveras' actions or statements or that he asked Taveras to leave the meeting.

During this transaction, foreman Stanley Cucalon entered the cafeteria to get some coffee. He noticed the interaction between Guzman and Taveras and told Taveras that he should not get involved because he did not belong in the Union. Taveras said that he was on his own time and that he had every right to stay.

Shortly thereafter, Edwin Salazano, the night-shift manager walked by the cafeteria and testified that he saw Taveras gesticulating toward Guzman and speaking loudly, albeit he couldn't hear what was said because the door was closed. Salazano testified that he entered the room and because he was fairly far away from the others, he called out to Taveras that he should leave the cafeteria. Taveras refused and when Salazano again told him to go outside Taveras replied: "come and take me out." Both Salazano and Taveras were talking loudly because they were about 40 feet away from each other.

This transaction was reported to John Quinones, the general manager and after investigating the matter, he recommended to the Company's human resources department that Taveras be fired because of his actions in the cafeteria, which he considered to constitute insubordination and because of Taveras' past disciplinary record. Notwithstanding this recommendation, Tony Rico, the director for human resources decided that the people got carried away by their emotions and that Taveras should not be fired. Instead, Taveras was given a 5-day suspension.

#### Analysis

Taveras was not in the bargaining unit and therefore was not represented by the Union. Nevertheless, Taveras sought to express his opinion at a union meeting held on November 29, 2009, regarding a pending decertification petition that was being held in the Employer's cafeteria pursuant to company's approval. This meeting was held on nonwork time and Taveras happened to be in the cafeteria before his shift was to start. Although the union representative addressing this meeting might have had his own reason to ask Taveras, a nonmember, to either leave or abstain from participating in the meeting, he did not do so. Instead, the evidence indicates that Ricky Guzman specifically agreed to listen to Taveras' comments and opinions regarding why some employees were dissatisfied with their union representation. In any event, Guzman did not ask Taveras to leave and did not ask anyone from the Company to direct Guzman to leave. In my opinion, it was not within the Company's prerogative to decide who could or could not attend a union meeting that was legitimately being conducted, pursuant to the collective-bargaining agreement's visitation clause,

on the Company's premises during nonworking time. I therefore conclude that the Respondent violated Section 8(a)(1) of the Act by directing him to leave the union meeting and ordering him off the premises.

Because Taveras was participating in a union meeting and was involved in discussing, with other employees, the merits or demerits of union representation, it is my opinion that he was engaged in union and concerted activity as defined in Section 7 of the Act. The fact that he was not in the bargaining unit, has no relevance.

In my opinion, since Taveras was engaging in union and concerted activity when he was expressing his opinion at a union meeting, the Employer had no independent right to order him to leave the Union's meeting unless it can demonstrate that his conduct was sufficiently egregious to remove his actions from the protection of Section 7 of the Act.

In *Atlantic Steel*, 245 NLRB 814 (1979), the Board established standards by which to decide whether concerted activity would be protected or unprotected, depending on the manner and means by which the conduct was carried out. The Board required the balancing of four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an Employer's unfair labor practice.

In substance, the Respondent's evidence is that two supervisors who passed by the cafeteria and who saw parts of the meeting, noticed Taveras speaking in an excited manner to Union Representative Guzman in the presence of other employees. They admit that they could not hear what was said and that they were not asked by Guzman to have Taveras removed from the meeting. When Salazano told Taveras to go outside Taveras replied: "come and take me out." At that time, both Salazano and Taveras were talking fairly loudly because they were about 40 feet away from each other. To the extent that the Respondent claims that this statement by Taveras should be construed as a challenge to fight, I think that this is a stretch and I do not agree with that conclusion based on the words used or the context of the event.

In my opinion the Respondent's reliance on cases such as *Eagle-Picher Industries*, 331 NLRB 169, (2000), and *Carrier Corp.*, 331 NLRB 126 (2000), is inapposite. In *Eagle-Picher*, the Employer held a series of captive audience speeches before an election and asked that all questions be held to the end. Notwithstanding that instruction, an employee continually interrupted the employer's presentation and refused to sit down and be quiet. When the speaker continued, the employee opined, in effect, that the presentation was "garbage."

Although the Respondent asserts that the factual situation in *Eagle-Picher* is analytically identical to the facts in the present case, I do not agree. In *Eagle-Picher*, the employees were not really engaged in concerted activity when they were compelled to attend a meeting and listen to the employer's speech as to why they would be better off without union representation. The function of that meeting was not to have employees engage in concerted activity for their mutual aid and protection; the function was to have them be an audience to the employer's position on union representation. In *Eagle-Picher* one can say that since an employer, during an election campaign, has a right

under Section 8(c) of the Act to express his opinion about union representation, he also has the right to discipline employees who actively, aggressively and by their conduct preclude or significantly interfere with that right.<sup>1</sup>

In the present case, the evidence simply does not show that Taveras, by his conduct during the November 29 union meeting, was engaged in conduct that interfered with the Union's right to present its opinion about union representation to the assembled employees. Union Representative Guzman did not object to Taveras' presence or conduct. And at no time did union representatives assert or indicate that Taveras should have left the meeting or otherwise have ceased his conduct during the meeting.

In my opinion, Taveras' conduct during the November 29 meeting did not, under the criteria of *Atlantic Steel*, lose the protection of Section 7 of the Act. See *The Tampa Tribune*, 351 NLRB 1324, 1335–1326 (2007); *Noble Metal Processing, Inc.*, 346 NLRB 795 (2006); *Aluminum Co. of America*, 338 NLRB 21 (2002). Cf. *Starbucks Corp.*, 354 NLRB 877 fn. 5 (2009). In my opinion, his conduct was protected and therefore the Employer's decision to suspend him for that conduct violated Section 8(a)(1) and (3) of the Act.

#### CONCLUSION OF LAW

By suspending Dewys Taveras because he participated in a meeting with Local 888, United Food and Commercial Workers International Union, the Respondent has violated Section 8(a)(1) & (3) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In view of the above, I shall recommend that the Respondent, having discriminatorily suspended an employee, it must make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates of 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 (2987).

On these findings of fact and conclusions of law and on the

<sup>1</sup> In my opinion, *Carrier* is factually distinguishable as well. In that case, the alleged discriminatee, along with another employee essentially barged into a business meeting being conducted by a manager and insisted on raising a completely separate issue than what was being discussed in the meeting. The manager asked the two employees to leave and one left to return to work while the alleged discriminatee stayed on to argue his point in what the ALJ concluded was a threatening manner. At fn. 1, the Board stated: "we find it unnecessary to rely on the judge's finding that Gresham's conduct on April 3, 1996 was not concerted activity. Instead we rely solely on the judge's findings that the Respondent lawfully disciplined Gresham based on his interruption of a meeting conducted by Manager Kathy Holen with other employees; Gresham's insistence on discussing immediately a subject unrelated to the meeting and his failure and refusal to acquiesce in Holen's repeated directions to him that his concerns could be discussed later that day at a more appropriate time."

entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, Goya Foods, Inc., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Directing employees not to participate in union meetings or ejecting them from its premises because they attend union meetings.

(b) Suspending employees because they participate in union meetings.

(c) 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) Make whole, with interest in the manner described in the remedy section of this Decision, Dewys Taveras for any loss of income he may have suffered by reason of his discriminatory suspension.

(b) Within 14 days after service by the Region, post at its facilities in Bethpage, New York, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved, 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 Respondents at any time since November 29, 2009.

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

Dated, Washington, D.C. June 15, 2010

#### APPENDIX

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

<sup>2</sup> 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.

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The 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 direct our employees not to participate in union meetings or eject them from our premises because they attend union meetings.

WE WILL NOT suspend employees because they participate in union meetings.

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

WE WILL make whole, with interest, Dewys Taveras for any loss of earnings that he may have suffered as a result of the discrimination against him.

GOYA FOODS, INC.