

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

ALONSO & CARUS IRON WORKS, INC.,
Respondent,

Case 24-CA-11558

and

UNITED STEEL WORKERS, AFL-CIO,
LOCAL 6873,

Charging Party,

Jose L. Ortiz, Esq., for the General Counsel.

Luis M. Ferrer Medina and Fernando A. Baerga Ibanez,
Esqs. (Baerga & Quintana), of San Juan, Puerto Rico,
for the Respondent.

Ruben Cosme Ayala, of Bayamon, Puerto Rico, for the
Charging Party.

DECISION

Statement of the Case

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in San Juan, Puerto Rico, on December 14, 2010.¹ The charge was filed June 24, the amended charge was filed September 8, the second amended charge was filed November 30, and the complaint issued September 30. The complaint alleges that Alonso & Carus Iron Works, Inc. (the Company or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denying Carlos Camacho and Hector Rivera the right to exercise their *Weingarten* rights prior to discharging them, and threatening to discharge *Weingarten* representatives. Additionally, over objection, the General Counsel's trial motion to amend the complaint was granted as follows: (1) subparagraph 1(c) is added to the complaint to refer to the second amended charge; (2) subparagraph 7(a) is added to allege that a company supervisor, Jose Hernandez, on or about February 19, threatened to discharge an employee if he attempted to represent an employee in an interview; and (3) subparagraph 7(b) is added to allege that Rule 46 of the Company's employee rule book, which prohibits union-related meetings or activities during worktime and without prior notification to management, was overly broad and unlawful. The Company denied the material allegations of the complaint. With respect to Rule 46, the Company contends that the rule, when considered in context with the collective-bargaining agreement between the parties, does not restrain the right of employees to meet over union matters.²

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

¹ All dates are in 2010 unless otherwise indicated.

² Tr. 7-11.

Findings of Fact

I. Jurisdiction

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The Company, a corporation, manufactures and produces iron and steel products at its facility in Cataño, Puerto Rico, where it annually purchases and receives goods valued in excess of \$50,000 directly from points outside the Commonwealth of Puerto Rico. The Company admits, and I find that, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the United Steel Workers, AFL-CIO, Local 6873 (Union or Local 6873), is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

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A. *The Parties*

The Company's managers and supervisors involved in the controversy include: Jose Soto, the vice-president for production; Eileen Lugo, the human resources director; Jose Hernandez, production shop manager; and Ana Luisa Osorio and Hector Negron, supervisors.³ The two employees who complained that their *Weingarten* rights were denied, Carlos Camacho and Hector Rivera, are members of Local 6873. Camacho was employed as a sandblaster and painter; Rivera was employed for 31 years as a fabricator and beam cutter.

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The Company's Employee Manual includes rules regulating employees terms and conditions of employment. The provision at issue in this case, Rule 46, prohibits employees from "[holding] meetings and/or activities related to the Union during working hours and without prior notification to management." The discipline for employees who violate that rule is progressively tiered: a written warning for the first violation; a 1-week suspension for the second violation; and discharge for the third violation.⁴

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³ The Company admitted that Hernandez and Osorio were supervisors as defined by Section 2(11) of the Act. Negron was not alleged as a supervisor within the meaning of the Act, but Hernandez testified that Negron holds the same position and same degree of responsibility as Osorio (Tr. 116-117).

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⁴ Exh. B to the Company's position statement, dated December 3, 2010, and received as GC Exh. 2, is the original Spanish language copy of Rule 46. On January 14, 2011, the General Counsel filed a motion submitting the translation of Rule 46. I have designated it as ALJ Exh. 1. The proposed translation was agreed to by the parties, except as to the translation for "horas laborales." The General Counsel contends that the proper translation is "work hours," while the Company asserts that it should be "work time." In its reply, filed in the e-room on January 19, 2011, as attachment 1 to the Company's brief, the Company submitted a certified translation of the term by U.S. Court Certified Interpreter Aida Torres. I have redesignated that document as ALJ Exh. 2. She provided a detailed and credible explanation as to why the correct term should be "working hours," a term not previously used by either party. I do not, however, give weight to Ms. Torres' assertion, as well as those of counsel, that "as used in Puerto Rico the term refers only to hours spent by an employee working, excluding time that the employee is not working." Such an assertion should have been raised at trial and subjected to cross-examination. Accordingly, the General Counsel's motion is granted, except to the extent that the term "work hours" in the proposed translation shall be deemed changed to "working hours." The motion and reply are received in evidence as ALJ Exh. 1-2.

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The Company contends that the legality of Rule 46 must be considered in context with the current collective-bargaining agreement (CBA) between the parties, which is effective from May 1, 2010, to April 30, 2014.⁵ The Company and the Union were previously bound by a CBA that was in effect from May 1, 2006, to April 30, 2010.⁶ The current CBA provides, in pertinent part, at Article XIV:

The Union shall have the right to celebrate meetings at a convenient site within the premises of the plant in the Company's property. Due to the distance in which the employees live from the worksite, it is agreed that the Company will give the employees one (1) hour monthly, if necessary, to conduct their meetings. The Union agrees to use the last hour in the regular work shift, that is, 2:30 p.m. The Company will pay these at the regular rate of pay to employees who attend the meetings. This hour will be considered as time worked to any employee who attends. The Union will notify the Company with sufficient time before the celebration of any Union meeting.

The Company will provide for Union use and its employees, a convenient room which will serve as lunchroom and meeting room.

The Company accepts to compensate with money, exclusively its union employees, the monthly hour not used during the year for Union meetings and the Union agrees not arrange for any other meetings outside from the agreed upon hours. This time will be paid during the month of December, before Christmas.

All employees will punch its time card at the assistance clock before leaving the unit.

Field employees will be notified with sufficient time so that they may attend these meetings.⁷

B. Carlos Camacho

1. Prior discipline

Carlos Camacho is a member of the bargaining unit. On March 30, 2009, he was involved in a workplace altercation with coworker Juan Ramos. After an investigation, the Company determined that Camacho provoked Ramos to physically assault him. The Company further concluded that Camacho's conduct constituted grounds for a discharge. However, after negotiations with Eric Maldonado, Local 6873's president at the time, the Company agreed to reduce the discipline to a 1-month suspension without pay. On June 4, 2009, Camacho and Maldonado signed a "last chance" agreement acknowledging Camacho's culpability for the incident and the consequences of any further transgression. The agreement stated, in pertinent part:

We advise you that in the moment that you commit any violation (serious or minor), you will be immediately discharged without the opportunity for the union to represent you once again. This includes, but is not limited to, your agreement to perform the tasks

⁵ The Company belatedly raises Rule 25 in its brief as proof that it does not maintain a ban on other nonwork related matters. (Attachment 2 to R. Brief.) As the document was not offered into evidence at trial, I have not given it any weight.

⁶ Stipulations of Fact 1-2.

⁷ R. Exh. 5.

designated by your supervisors, without objecting to the same and that you will maintain a harmonious relationship with the rest of your coworkers.⁸

2. The February 18, 2010 incident

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On February 18, 2010, Camacho was preparing to operate a crane when Osorio approached him. Osorio explained that she needed the crane to clear the platform. She further directed Camacho to help Juan Ramos and Jose DeJesus, the employees who were going to perform the work. Camacho refused, threw the crane control over the platform, turned his back to Osorio, and started walking away. Osorio insisted that Camacho return and comply with her instruction, but he ignored her request and commented that he would not help those “dogs” because nobody helped him. He also alluded to past problems with Ramos. Osorio told Camacho to go to the shop office to meet with Hernandez. Camacho washed his hands and went to the shop office.⁹

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Camacho and Osorio met with Hernandez at the shop office for approximately 30 minutes. Camacho began the meeting by telling Camacho that he could not stand anymore instructions by Osorio, he was constantly changed from one job to another, and he previously told Hernandez that he did not want to work with Ramos because he felt in danger.¹⁰

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Hernandez told Camacho that the job was not dangerous and he should follow Osorio’s orders, but Camacho responded that he did not want to follow her instructions any longer, was tired of Osorio, and noted that Hernandez knew that he did not like to receive orders from women.

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Osorio then explained her version of the incident, which Camacho conceded. Hernandez then told Camacho that he had already been given several chances for outbursts against Osorio and other coworkers. Camacho began crying and begged Hernandez not to take this incident to the next level because he knew he would lose his job. Hernandez told Camacho to go home, and informed him that the incident would be reported to the human resources office and he would be notified the next day as to the Company’s decision.

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During this meeting, Camacho did not request union representation or the presence of a coworker.¹¹

⁸ The terms of the letter, dated April 6, 2009, and signed by Jorge Ramos, the Company’s president, was signed by Camacho and Maldonado nearly 2 months after the parties negotiated a reduced penalty to suspension. (Jt. Exh. 1.)

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⁹ In this sequence of events, I found Osorio more credible than Camacho. (Tr. 72–73.) Camacho was somewhat evasive on cross-examination when asked to concede that he refused to follow Osorio’s instructions. After being instructed to respond to the question, he conceded refusing her instructions. He did not, however, deny Osorio’s contention that he turned his back on her and walked away, and that he frequently spoke negatively about coworkers. (Tr. 17–19, 29–30.)

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¹⁰ Camacho insisted that Osorio knew he had problems working with Ramos, but conceded that there had been no reported incidents since Camacho signed the last chance agreement in April 2009. (Tr. 26, 31–32.)

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¹¹ I based my findings as to the discussions during this initial meeting on the testimony of Hernandez and Osorio. (Tr. 73–75, 91–93, 108.) Camacho testified that he immediately requested the presence of a union representative during his initial meeting with Hernandez and Osorio, but Hernandez rejected that request and showed him a copy of the last chance agreement. (Tr. 19–20, 32.) In contrast to the consistent and credible testimony of Hernandez and Osorio denying that he made such a request, Camacho’s testimony was beset by numerous inconsistencies. He was confronted twice on cross-examination with his prior statement that Rivera did, in fact, arrive at the workshop office for that initial meeting.

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5 Shortly after meeting with Camacho, Hernandez and Osorio reported the incident to Lugo by telephone. After detailing Camacho's insubordinate conduct, they agreed with Lugo's position that Camacho should be terminated the following day pursuant to the terms of the last chance agreement.¹²

3. The February 19 meeting

10 Camacho reported to work on February 19. At approximately 8:30 a.m., Negrón told him to report to Hernandez' office. On the way to Hernandez' office, Camacho stopped by Rivera's work area. Camacho asked Rivera to represent him in a meeting in Hernandez's office. Rivera agreed, but needed to wash up first and inform his supervisor, Negrón, as to what he would be doing. However, when Rivera informed Negrón that he would represent Camacho in a meeting with management, Negrón denied the request. He told Rivera that
15 Camacho "waived his rights to the union." Negrón also warned Rivera that he would be discharged if he accompanied Camacho to the meeting. Rivera returned to his work area.¹³

20 When Camacho arrived, Hernandez told him to sit down and said he would return shortly. Over an hour later, Hernandez returned and directed Camacho to accompany him to Lugo's office. As Rivera had not yet shown up, Camacho stated that he wanted union representation at the meeting. Hernandez rejected the request on the grounds that Camacho no longer had a right to union representation and the meeting was to "inform" Camacho.¹⁴

25 Lugo, Hernandez, Osorio, and Camacho were present at the meeting. Lugo started by asking Osorio and Hernandez questions regarding Camacho's conduct on February 18. Osorio said that Camacho offended and disrespected her, and did not comply with her directive that he work with Ramos. Hernandez confirmed Osorio's version. Lugo then asked Camacho for his version of the incident. Camacho told her that he needed union
30 representation by either Rivera or Adolfo Ayala from the grievance committee. Hernandez responded that if either of the two came up, they would be discharged. Lugo then read the last chance agreement and informed Camacho that he was terminated. Camacho pleaded for another chance. Lugo said Camacho had already been given enough chances and he left shortly thereafter.¹⁵

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Twice, Camacho responded that he did not recall if that was the case; a third time, he responded, "[b]ut I believe that he didn't." He denied lying in his affidavit and suggested that his statement merely meant that he "informed Mr. Rivera that I had been summoned to Mr. Hernandez' office." (Tr. 33-38.)

40 ¹² It is not disputed that the Company decided on February 18 to discharge Camacho on February 19. (Tr. 108-118, 131-149; R. Exh. 1.)

¹³ This finding is based on the credible and unrefuted testimony of Camacho and Rivera. (Tr. 21-22, 52-54.)

45 ¹⁴ As to the issue regarding representation requests, I found Camacho more credible. (Tr. 22-24.) Hernandez denied twice that Camacho made such a request. However, he then conceded, and the Company's position statement confirmed, that Camacho gestured to Rivera as they walked to Lugo's office and, after ascertaining that Camacho wanted someone to accompany him, told him that he did not need anyone. (Tr. 111-113; GC Exh. 4, p.2.)

50 ¹⁵ Again, I found Camacho more credible on the issue of representation requests. Lugo, Hernandez, and Osorio all denied that Camacho requested representation at the February 19 meeting. Camacho provided a detailed version of the meeting. (Tr. 24-26.) Lugo, Hernandez,

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Having already prepared an Employee Admonition form prior to the meeting, Lugo had Osorio sign it as soon as Camacho left the meeting. Following the meeting, Lugo wrote a summary of the events leading to Camacho's discharge. Referring to the last
 5 chance agreement, she concluded that Camacho "has an attitude problem and is insubordinate. The Company has given him several opportunities and even so the employee continues with his pattern of conduct, therefore, Management's decision was to enforce what was previously stipulated. We proceeded to discharge Mr. Camacho."¹⁶

10 After the meeting, Camacho picked up his belongings, went to Rivera's working area, and informed him that he had been discharged. Rivera asked him for the discharge letter, but Camacho explained that he was not provided with a copy of one. Rivera urged him to return to get one. Negron, apparently hearing the conversation, chimed in that a verbal discharge was in order and that Camacho did not need anything in writing. Rivera
 15 disagreed and urged Camacho to return to get a copy. Camacho agreed and returned to Lugo's office, where she provided him with one.¹⁷

C. Hector Rivera

20 Hector Rivera is a member of the bargaining unit and has served as president of Local 6873 since February 2010. On Friday, May 7, Rivera got into a heated argument with coworker

and Osorio, on the other hand, provided inconsistent versions. They each conveyed the sense of a relatively quick meeting. Osorio testified that Lugo did not ask questions, simply read the
 25 last chance letter to Camacho and told him he was discharged. (Tr. 77-78.) Hernandez testified that Lugo asked Camacho why, having agreed to a last chance agreement, he continued "behaving the same way." A follow-up leading question sidestepped Camacho's potential response and went directly to Lugo informing Camacho that he was terminated. (Tr. 95-96.) He was also confused as to whether it was Osorio or Lugo who showed Camacho the last chance
 30 agreement on February 19. Finally, Lugo, having sat through all of the prior testimony, including that provided by Hernandez and Osorio, also attempted to convey the notion that she conducted a quick meeting at which she simply read the contents of the last chance agreement and then informed Camacho that he was discharged. (Tr. 135-136.) To the contrary, her summary written right after the meeting stated that "the incidents which occurred on 2/18/10 were discussed with
 35 Mr. Camacho." (Jt. Exh. 3.)

¹⁶ The circumstances regarding Osorio's signature or nonsignature were confusing and somewhat suspicious. There were two completed Employee Admonishment forms, both appearing to contain Osorio's signature. However, after contending that both forms were the same and that "[s]ome days I change my handwriting," she conceded that she signed only one
 40 of the forms. Osorio could not explain who signed her name on the other. (Jt. Exh. 2(a); GC Exh. 3; Tr. 84-89.) Lugo, addressing both documents, only added to the confusion. She identified Jt. Exh. 2 as the form that was in Camacho's file and maintained that GC Exh. 3 was a copy of it. It is not, as the signatures are clearly different. (Tr. 137-138). As Lugo generated the form and maintained it in her files, it is evident that she signed Osorio's name to GC
 45 Exh. 3. Why she would have done that is not clear, but illustrates her control over the disciplinary process that unfolded. In any event, the whole episode further diminished the credibility of Lugo, as well as Osorio.

¹⁷ On cross-examination, Camacho was confronted with his written statement to the Board that did not mention that he went to look for Rivera. However, there is minimal significance
 50 to such an omission, since any subsequent discussions with Rivera had no bearing on what had already transpired in Lugo's office. (Tr. 38-41.)

Edgar Santiago. The argument was observed by Soto as he passed through their work area. Rivera and Santiago ceased arguing when they saw Soto, but continued arguing after he left the area. However, Hernandez also heard the commotion. The lunch bell rang and they separated. Hernandez approached them and asked each one for his version. After listening to their explanations, Hernandez told Rivera and Santiago to come to his office after lunch. Hernandez also called Soto, as his supervisor, and asked him to attend the meeting.¹⁸

Hernandez and Soto were in the workshop office when Rivera and Santiago arrived at 1:30 p.m. With Soto present, Rivera asked why they were being called into the office. Hernandez explained that he heard screaming and asked them what happened. Rivera initially denied that anything significant occurred, but then admitted that the argument ensued because Santiago was informing management about union organizing activity. Santiago responded by urging Rivera to repeat what he said on the floor. Another argument ensued and, during the exchange, Rivera hurled obscenities at Santiago. Hernandez interjected that Rivera, having denied insulting Santiago, proceeded to do just that in their presence. After some further arguing between Rivera and Santiago, Hernandez told Rivera that he would inform the human resources department of his conduct. Rivera and Santiago were then directed to return to work. At no time before or during the meeting in the shop office did either Rivera or Santiago request the presence of another employee or union representative.¹⁹

As promised, Hernandez called Lugo and reported the incident. At Lugo's request, Hernandez wrote a report of the incident and emailed it to her.²⁰ Lugo then scheduled a meeting for 3:30 p.m. to inform Rivera of the discharge. Hernandez asked Rivera to attend the meeting, but Rivera responded that he was being picked up for an appointment and did not have alternate transportation available. Hernandez excused Rivera from attending the meeting.²¹

The afternoon meeting was attended by Lugo, Santiago, Soto, and Hernandez. After Santiago provided his version of the incident and left, Lugo, Soto, and Hernandez decided that Rivera should be discharged because it was his third incident of misconduct within the past year. Realizing, however, the significance of discharging Local 6873's president, Lugo called Union Representative Ruben Cosme and informed him of Rivera's impending discharge. She did not, however, inform Cosme that she would be meeting with Rivera on May 10, much less offer him an opportunity to attend.²²

¹⁸ Rivera did not dispute the testimony of Hernandez and Soto that the argument occurred and they witnessed it. (Tr. 56-57, 97-100, 120-122.)

¹⁹ I relied on the testimony of Hernandez and Soto as to what transpired during the afternoon meeting on May 7. Rivera's version, combining a sense of defiance with ignorance as to why he was there, indicates that he was poised for yet another tussle. He knew from his earlier conversation with Hernandez that it was about his earlier argument with Santiago. In any event, Rivera did not testify that he requested union or other representation on May 7, 2011. (Tr. 55-57, 113-114, 108-118, 120-122).

²⁰ Jt. Exh. 4.

²¹ Rivera's testimony that Hernandez excused his attendance at the meeting later that afternoon was not disputed. (Tr. 57-58.)

²² Further diminishing her credibility with respect to the accuracy of her documentation, Lugo's subsequent memorandum omitted any reference to her meeting with Hernandez, Soto, and Santiago on May 7. (Jt. Exh. 6.) Nevertheless, Cosme, who attended the trial on behalf of the Charging Party, did not testify and there is no dispute as to what transpired at the afternoon meeting. (Tr. 101-104, 116, 120-130, 141-144; R. Exh. 4.) However, Lugo, Hernandez, and

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About an hour after Rivera arrived at work during the morning of May 10, Hernandez told him to report to Lugo's office. Rivera inquired as to the purpose of the meeting. Hernandez responded that it was about his May 7 argument with Santiago. Rivera said he needed either a union representative or one of the grievance committee members, and had been unable to contact Cosme. Hernandez responded that Rivera would not need a representative to attend, as the meeting would be very quick.²³

Prior to the May 10 meeting, Lugo prepared an Employee Admonishment form detailing Rivera's discharge and basing it on violent or threatening behavior and disrespectful behavior toward a coworker, "insulting him and inclusively threatening him in the presence of two Supervisors, utilizing offensive and threatening language." She added that the Company "cannot tolerate this type of conduct and more so when it is not the first time that you have this type of behavior."²⁴

Upon his arrival at her office, Lugo told Rivera to sit down. Soto, Santiago, and Hernandez were also present. Even though the decision had already been made to discharge Rivera, Lugo wanted Santiago there because she anticipated that Rivera would deny the allegations. Lugo explained that she was investigating the incident involving Santiago. She then asked Rivera what happened. Rivera professed a lack of recollection as to what happened that day. Lugo told Rivera that Hernandez sent her an email stating what had happened at the office, and that Soto and Hernandez heard him insult Santiago. Rivera insisted that he did not recall the incident, at which point Santiago refreshed his recollection about cursing his mother. Rivera responded angrily and called Santiago a snitch. Santiago replied that he simply wanted an apology. Rivera apologized. At Lugo's direction, Santiago left. Lugo noted to Rivera that he engaged in the same aggressive conduct in front of her. She explained that Rivera's conduct was unacceptable and violated the Company's disciplinary regulations. Lugo also informed Rivera that she reported the incident to Cosme and that he would be discharged. Rivera became angry, pointed a finger at her, and accused her of having an attitude problem and an agenda to discharge workers. Lugo told Rivera that it was his third infraction within the past year and dismissal was warranted. She proceeded to read from an Employee Admonishment form and asked Rivera to sign it. Rivera refused. Hernandez, Soto, and Lugo all proceeded to sign the termination form and Rivera was provided with a copy.²⁵

Soto only testified that she informed Cosme that Rivera would be discharged as a result of his latest conduct. As such, there is no indication that she informed Cosme that she planned to meet with Rivera on May 10. (Tr. 103, 125-126, 143-144.)

²³ I credited Rivera's detailed version regarding this interaction over the terse denial provided by Hernandez. (Tr. 58-59, 104.) As emphasized during his cross-examination, Rivera was a long-time official of the Union, was well aware of his rights, and had a long history of asserting the rights of employees to have a union delegate present during certain meetings with the Company. As such, his credibility on this issue was bolstered by his past practice in such situations. (Tr. 55, 63-64.) See FRE Rule 406. Moreover, having found Hernandez less than credible regarding Camacho's representation request, I have little reason to credit his testimony in this instance. See fn. 14, supra.

²⁴ Rivera confirmed the testimony of Lugo and Hernandez that the Employee Admonishment form was prepared prior to, and presented to him during, the meeting. (Tr. 61, 107-108, 144; Jt. Exh. 5.)

²⁵ Rivera testified that he responded to Lugo's inquiry by explaining his version of the argument with Santiago. (Tr. 59-61.) Lugo, Hernandez, and Soto, on the other hand, all testified

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III. Legal Analysis

5 The Supreme Court has long held that an employee has a right to have union representation at an investigatory interview that the employee reasonably believes may result in disciplinary action. *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 262 (1975). The test for determining whether an employee reasonably believes that the interview might result in disciplinary action is considered from an objective perspective under all the circumstances of the case rather than by the employee's subjective motivation. *Weingarten*, supra at 257; 10 *Lennox Industries*, 244 NLRB 607, 614-615 (1979), enf'd. 637 F.2d 340, 344 (5th Cir. 1981), cert. denied 452 U.S. 963 (1981); (*United Telephone Co. of Florida*, 251 NLRB 510, 513 (1980).

15 The General Counsel contends that Camacho and Rivera had a reasonable basis to believe that they would be subjected to investigatory interviews, then requested union representation and were denied.²⁶ The Company contends that neither Camacho nor Rivera requested union representation. Assuming, arguendo, that they did, the Company further asserts that their *Weingarten* rights were not triggered because they were 20 subjected to meetings convened solely for the purpose of informing them of their discharges. In addition, the Company contends that Camacho previously waived his *Weingarten* rights in a last chance agreement signed in 2009.²⁷

Weingarten provides the right to representation during an employer's interview that may reasonably lead to discipline. However, this right does not apply where the adverse 25 action has been decided and the employee is only being informed. *LIR-USA Mfg. Co.*, 306 NLRB 298, 305 (1992). On the other hand, when an employer informs an employee of a disciplinary action and then seeks facts or evidence in support of that action, or to attempt to have the employee admits his alleged wrongdoing, or to sign a statement to that effect, . . . the employee's right to union representation would attach. *Baton Rouge Water Works* 30 *Co.*, 246 NLRB 995, 997 (1979). See, also *Electric Co.*, 355 NLRB No. 71 (2010), citing *Titanium Metals Corp.*, 340 NLRB 766 (2003).

A. Camacho Representation Requests

35 Camacho did not request representation on February 18. To the contrary, the credible facts indicate that he attempted to contain the controversy to the shop office and pleaded with Hernandez to sidestep protocol and not report it to Lugo. Camacho did, however, request representation as he went with Hernandez to the February 19 meeting. Hernandez, alluding to the last chance agreement, told Camacho that he waived his 40 *Weingarten* rights and denied the request. He also told Camacho that he would not need

that Rivera insisted that he could not recall what transpired on May 7 before being prodded by Santiago. Significantly, Rivera did not refute the testimony of the Company's witnesses that he did not request representation during the May 10 meeting. (Tr. 105-108, 126-130, 144-146; Jt. 45 Exh. 5.) Notwithstanding credibility problems that I had with Hernandez and Lugo, including the fact that Lugo was able to listen to preceding testimony of Hernandez and Soto, I found the versions given by the Company's witnesses more credible. An important consideration in my determination was Rivera's testimony that he apologized to Santiago, but never conceded his abusive behavior toward Santiago. (Tr. 60.)

50 ²⁶ GC Brief at 12-16.

²⁷ R. Brief at 19-21.

representation, as the meeting would be informative only and Camacho had waived his *Weingarten* rights anyway.²⁸ Notwithstanding that assurance, however, Lugo proceeded to ask Osorio, Hernandez, and Camacho for each of their versions of the incident. She also asked Camacho if he recalled signing the last chance agreement and why he misbehaved in light of the agreement. Lugo concluded by reciting the contents of the last chance agreement and informing Camacho that he was terminated.

Camacho had a reasonable basis to believe he would be subjected to an investigatory interview when he requested representation prior to the February 19 meeting. *Consolidated Edison*, 323 NLRB 910 (1997); see also *Quality Mfg. Co.*, 195 NLRB 197, 198 fn. 3 (1972). Camacho was being called into the human resources director's office for a meeting after disrespecting and disobeying Osorio's directive. Moreover, his supervisor told him that the meeting would consider the consequences of this latest incident in relation to his previous disciplinary disposition. See e.g., *Circuit Wise, Inc.*, 308 NLRB 1091, 1109 (1992)

The facts and circumstances also reveal that he reasonably believed he was in an investigatory meeting when he requested representation in Lugo's office. It is also evident that Lugo and Hernandez decided to discharge Camacho prior to the meeting and that Lugo had already prepared a termination letter. However, the 20-minute long meeting involved more than just informing Camacho that he was discharged. I agree with the General Counsel, citing *El Paso Electric Co.*, supra, that, although the Company had already made the decision to discharge Camacho, it "sought to obtain more information from Camacho in order to substantiate or bolster its decision to fire him."²⁹ Accordingly, the Company, by denying Camacho's request for representation prior to and during an investigatory meeting, violated his *Weingarten* rights.

B. Rivera's Representation Requests

On May 7, Hernandez told Rivera that he would inform the human resources office about the incident that occurred that day. Hernandez reported the incident to Lugo and they met later that day with Soto and Santiago. Since Rivera was not present, Lugo cut Santiago's explanation short and excused him from the meeting. She then proceeded to discuss and decide on Rivera's termination with Hernandez and Soto. Realizing the significance of discharging Local 6873's president, Lugo called Cosme to inform him of Rivera's discharge. She also prepared Rivera's discharge form.

²⁸ The last chance letter was a clear and unmistakable waiver of Camacho's *Weingarten* rights. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The letter was received in evidence (Jt. Exh. 1) and the Company referred to it in its position statement as a justification for denying Camacho's *Weingarten* rights. (GC Exh. 4.) The Company essentially relied on the last chance letter as a waiver of Camacho's *Weingarten* rights. It did not, however, plead a waiver based on the last chance letter as an affirmative defense in its answer to the complaint. (GC Exh.1.) Nor was such an affirmative defense mentioned in its post-hearing brief. Proof of a waiver is an affirmative defense and must be pled. See *Allied Signal Aerospace*, 330 NLRB 1216, 1228 (2000), review denied, 253 F.3d 125 (2001). *General Electric*, 296 NLRB 844, 857 (1989), enfd. mem. 915 F.2d 738 (D.C. Cir. 1990). If not, it is waived. *Harco Trucking, LLC*, 344, 478, 479 (2005). Moreover in the absence of a motion, it is beyond my purview to amend the answer. See *GPS Terminal Services*, 333 NLRB 968, 968-969 (2001).

²⁹ GC Brief at 15.

5 Shortly after arriving at work on May 10, Hernandez directed Rivera to report to Lugo's office. He also informed Rivera that the purpose of the meeting related to Rivera's argument with Santiago. Rivera requested union representation. Hernandez denied the request and told Rivera that he would not need a representative to attend because the meeting would be merely informative. From an objective standpoint, Rivera would not have any reason to doubt Hernandez's representation that the meeting would be merely informative. On the other hand, Hernandez actually knew that Santiago would be present at that meeting to provide his version of events. As such, Hernandez was keenly aware of the likelihood that Rivera would be subjected to an investigative interview in Lugo's office.

10 *Consolidated Edison Co.*, supra.

15 After reporting to Lugo's office, Rivera encountered Soto, Santiago, and Hernandez. Although the decision had already been made to discharge Rivera, Lugo wanted Santiago present because she anticipated that Rivera would deny the allegations. Lugo explained that she was investigating Rivera's argument with Santiago, and then asked Rivera what happened. Rivera and Lugo proceeded to discuss the information she received from Hernandez and Soto. Santiago interjected his version of the incident and an ensuing argument culminated with Rivera apologizing to Santiago. After Lugo noted that Rivera's latest display essentially corroborated the allegations, she informed Rivera that he was being discharged because it was his third infraction within the past year. After a nearly 1-hour long meeting,³⁰ Lugo proceeded to read from the discharge form, but Rivera refused her request to sign it. Hernandez, Soto, and Lugo all proceeded to sign the termination form and Rivera was provided with a copy. As in Camacho's case, it is evident that, although the decision to terminate Rivera had been made prior to the meeting, Lugo did more than just notify Rivera of that fact at the meeting. She used the meeting to obtain more evidence from Rivera in order to substantiate the Company's decision. *Baton Rouge Water Works Co.*, supra. Therefore, Respondent's refusal to provide Rivera with union representation violated Section 8(a)(1) of the Act.

30 C. Supervisors' Threats

35 The General Counsel also contends that the two aforementioned *Weingarten* violations were accompanied by unlawful supervisory threats. The first occurred on February 19 when Negrón warned Rivera that he would be discharged if he accompanied Camacho to the meeting in Lugo's office. The allegation of that threat, however, was not inserted in the initial complaint; nor was it included in the General Counsel's trial amendment, which alluded to Hernandez's threats.

40 The General Counsel, citing *Redd-I, Inc.*, 290 NLRB 1115 (1988), seeks to further amend paragraph 7 of the complaint to allege a separate 8(a)(1) violation based on Negrón's threat. Rivera did testify about Negrón's threat. However, the General Counsel never moved to amend the pleadings at trial and Negrón was not called as a witness. The first mention that Negrón's conduct constituted a violation surfaced in the General Counsel's brief and is not addressed by the Company in its brief. Contrary to the General Counsel's contention, the principles of *Redd-I, Inc.*, would not be served here and its belated motion to amend the complaint to allege the additional threat is denied.

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50 The complaint was, however, timely amended to include Hernandez's threat. As previously discussed, Camacho attempted to exercise his *Weingarten* rights, but was rebuffed.

³⁰ Rivera's estimate of the meeting was not disputed. (Tr. 59.)

Under the circumstances, Hernandez violated Section 8(a)(1) of the Act when he informed Camacho that any employee seeking to represent him would be discharged. See *Consolidated Edison Co. of New York, Inc.*, supra; *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977); *Good Hope Refineries*, 245 NLRB 380, 384 (1979), enf. 620 F.2d 57, 59 (5th Cir. 1980).

5

D. Rule 46

The General Counsel contends that Company Rule 46 unlawfully restrains protected concerted activity because it is ambiguous and overly broad in several respects: it prohibits all unauthorized meetings and/or union related activities during “working hours,” which would even include lunch and break periods; it could be interpreted as banning such activity in working and nonworking areas; it requires prior permission from management in order to engage in union activity; and there is no evidence that the Company similarly prohibits other nonwork-related matters. The Company concedes that the literal translation for “horas laborales” is “working hours,” but contends that such an extremely narrow interpretation misconstrues the real meaning of the term. Instead, the Company contends that, based on common usage and local laws, “horas laborales” really means “work time.” The Company also maintains that Rule 46 must be read in conjunction with CBA Article XIV, which provides for compensated union meetings or activities.

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An employer may lawfully impose some restrictions on employees' statutory rights to engage in union solicitation and distribution. Such restrictions, however, must be clearly limited in scope so as not to interfere with employees' rights to solicit coworkers on their own time or to distribute literature on their own time in non-work areas. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc.* 268 NLRB 394 (1983). Therefore, an employer's maintenance of a work rule that could be reasonably construed to restrict the exercise of Section 7 rights would be deemed in violation of Section 8(a)(1). *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004).

25

The Board has long viewed rules prohibiting union solicitation or activities during “working hours” as overly broad and presumptively invalid because they could reasonably be construed as prohibiting solicitation at any time, including an employee's break times or other nonwork periods. *Our Way, Inc.*, 268 NLRB 394 (1983); *Krystal Enterprises Inc.*, 345 NLRB No. 15, slip op. at 37 (2005); *A.P. Painting & Improvements, Inc.*, 339 NLRB 1206, 1207 (2003); *K.B. Specialty Foods Co.*, 339 NLRB 740, 742 (2003); *Becker Group, Inc.*, 329 NLRB 103, 109 (1999); *Carry Companies Of Illinois, Inc.*, 311 NLRB 1058, 1070 (1993). An employer may nevertheless overcome such a presumption by showing that the rule was communicated to employees in such a way as to convey clearly an intention to permit solicitation during times when and places where employees are not actually working. *Our Way*, supra.

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The Company relies on Article XIV of the CBA, which specifies the rights of union members to meet one hour each per month to attend union meetings.³¹ While Article XIV

³¹ I sustained an objection on the basis of relevance to the Company's attempt to submit testimony as to “how does the company actually police that the union meetings are held as agreed upon.” (Tr. 148-149.) The Company indicated that it relied on the CBA as its evidence that the Rule 46 did not preclude protected concerted activity by employees during when they were not actually working. (Tr. 8-10.) However, there is no contention by the General Counsel or the Union that the CBA was honored by the Company. As such, the sole determination as to the legality of Rule 46 must be considered in context with Article XIV of the CBA.

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affords employees the opportunity to attend union meetings for one hour per month, it hardly covers every potential situation in which an employee may seek to engage in protected concerted conduct during his nonworking hours and in nonworking areas.

5 Applying that standard here, I find the Company's no-solicitation rule unlawful because employees would reasonably construe its prohibition of "meetings and/or activities related to the Union during working hours and without prior notification to management" to fall during working hours, which includes breaks or other nonwork periods. See *Moeller Aerospace Technology, Inc.*, 347 NLRB No. 76, slip op at 8-9 (2006). In addition, the Company's no-solicitation rule is also unlawful because employees reasonably would construe its prohibition in all areas, which includes non-working areas. See *Satellite Services, Inc.*, 356 NLRB No. 17, slip op at 11 (2010).

Under the circumstances, the Company's promulgation and maintenance of Rule 46 violated Section 8(a)(1) of the Act.

15 Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

20 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct the Company committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act.

25 (a) refusing to honor the requests of Carlos Camacho and Hector Rivera for *Weingarten* representation at investigatory meetings;

(b) threatening to discharge employees that serve as *Weingarten* representatives; and

30 (c) maintaining an overly broad and ambiguous no-solicitation rule.

4. The above-described labor practices affect commerce with the contemplation of Section 2(6) and (7) of the Act.

35 REMEDY

Having found that the Company 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.

40 Having found that the Company maintained an overly broad rule prohibiting employees from "[holding] meetings and/or activities related to the Union during working hours and without prior notification to management," we shall order the Company to rescind the rule and notify its employees in writing that the rule is no longer in force.

45

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³²

50 ³² 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.

Continued

ORDER

5 The Company, Alonso & Carus Iron Works, Inc., of Cataño, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

10 (a) denying employees' requests to be represented by a shop steward or union official at interviews when they reasonably believe that the interview might result in disciplinary action against them.

15 (b) threatening with discharge any shop steward or union officials that accompany employees during interviews or meetings where such employees have a reasonable belief that the interview might result in disciplinary action against them.

20 (c) maintaining in its employee handbook and enforcing the following rule regarding solicitation: Rule 46: "[holding] meetings and/or activities related to the Union during working hours and without prior notification to management."

(d) 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.

25 (a) Rescind in its employee handbook Rule 46, which prohibits employees from "[holding] meetings and/or activities related to the Union during working hours and without prior notification to management," and notify employees that this action has been taken and that they do not have to request permission to engage in solicitation on employees' own time in a nonwork area.

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35 (b) Within 14 days after service by the Region, post at its Cataño, Puerto Rico facility copies of the attached notice marked "Appendix." 16 Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Company's authorized representative, shall be posted by the Company 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 Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company 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 Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since February 18, 2010.

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 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(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 Company has taken to comply.

5 Dated, Washington, D.C. March 10, 2011

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Michael A. Rosas
Administrative Law Judge

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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 deny your requests to be represented by a shop steward or union official at an interview when you reasonably believe that the interview might result in disciplinary action against you.

WE WILL NOT threaten with discharge any shop steward or union official that accompanies an employee during an interview or meeting where that employee has reasonable belief that the interview might result in disciplinary action against him/her.

WE WILL NOT maintain a rule prohibiting any of you from engaging in union or other protected solicitation/distribution during nonwork time and in nonwork areas.

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

WE WILL rescind any rule prohibiting any of you from engaging in union or other protected solicitation/distribution during nonwork time and in nonwork areas, and we will inform you in writing that this has been done.

WE WILL permit you to be represented by a union official or shop steward at an interview or meeting which you reasonably believe might result in disciplinary action taken against you.

ALONSO & CARUS IRON WORKS, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

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

JD-
San Juan, PR

525 F. D. Roosevelt Avenue, La Torre de Plaza, Suite 1002
San Juan, Puerto Rico 00918-1002
Hours: 8:30 a.m. to 5 p.m.
787-766-5347

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

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