

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

ALONSO & CARUS IRON WORKS, INC.

Respondent

and

UNITED STEELWORKERS AFL-CIO
LOCAL 6873

Charging Party

Case 24-CA-11558

**GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

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Comes now Counsel for the Acting General Counsel and respectfully submits to the Board this Answering Brief to Respondents' Exceptions to the Administrative Law Judge's Decision whereby it requests that Respondent's exceptions be dismissed in their entirety and the Administrative Law Judge's decision in this case be affirmed. In support of this position, Counsel for the Acting General Counsel (CAGC) offers the following:

I. PROCEDURAL STATEMENT

The Regional Director for the 24th Region of the National Labor Relations Board issued a Complaint and Notice of Hearing on September 30, 2010, based on a charge filed by United Steelworkers, Local 6873, AFL-CIO (hereinafter "Union") against Alonso & Carus Iron Works, Inc. (hereinafter "Respondent") in the above-captioned case. The Complaint essentially alleges that Respondent violated Section 8(a)(1) of the Act by refusing Weingarten rights to employees Carlos Camacho and Hector Rivera prior

to their discharge, and threatening to discharge Weingarten representatives. Additionally, the Complaint was amended at the start of the hearing to include the allegation that Respondent maintains in its employee rulebook an unlawful overly broad rule.¹ The hearing on these matters was held before the Honorable Administrative Law Judge Michael A. Rosas on November 14, 2010, in San Juan, Puerto Rico, during which both parties had an opportunity to offer evidence and cross-examine witnesses.

On March 10, 2011, Judge Rosas issued his decision in this case wherein he determined that Respondent violated Section 8(a)(1) of the Act by refusing to honor the Weingarten rights of employees Carlos Camacho and Hector Rivera, threatening to discharge employees that serve as Weingarten representatives, and maintaining an overly broad and ambiguous no-solicitation rule. On April 7, 2011, Respondent filed exceptions to Judge Rosas' decision.

II. **FACTS²**

A. Background

Respondent is engaged in the manufacture and production of iron and steel products. The Union and Respondent are currently bound by a collective bargaining agreement, which is effective from May 1, 2010 to April 30, 2014. Unit employees

¹ At the onset of the trial, the Complaint was amended to include sub-paragraph 1(c) to read as follows:
“1(c) The second amended charge in this proceeding was filed by the Union on November 30, 2010, and a copy was served by regular mail on Respondent on the same date.”

Paragraph 7 of the Complaint was amended to read as follows:

“7(a) About February 19, 2010, Respondent, by Jose Hernandez, at Respondent's facility, threatened an employee with discharge if said employee attempted to represent an employee in the interview referred to above in paragraph 6.

7(b) Since at least July 1, 2010, Respondent, through an employee rulebook, maintained the following overly broad and unlawful rule:

“Norms of Prohibited Conduct: ...46. Hold meetings and/or activities related to the Union during work hours and without prior notification to management.””

² In Respondent's Brief in support of its Exception, specifically in its “Statement of the Case”, it deceptively summarizes the facts of the present case in a manner which, among others, omits essential facts supported by the record and credibility determinations made by Judge Rosas.

Carlos Camacho, a sandblaster and painter, and Hector Rivera, a fabricator and beam cutter, have worked for the Respondent for over 22 years and 31 years, respectively (tr.17, 51).³ Rivera is also the local Union's president (tr. 55, 63).

B. Facts Leading to the Discharge of Carlos Camacho

i. February 18, 2010 Incident

Upon refusing to follow an order by his direct supervisor, Ana Luisa Osorio, Camacho was sent to a meeting with Manager Jose Hernandez and Supervisor Osorio and at the shop office.⁴ Camacho testified that immediately upon starting the meeting, which lasted around 30 minutes, he requested union representation, but Manager Hernandez responded that he would not have any and showed him a copy of a "last chance" agreement letter, signed in March 2009, according to which he would be immediately discharged for any future violations of company rules (tr. 19-20, 32, 45, JX-1).⁵ After Camacho explained his reasons for refusing to follow Osorio's order and Osorio gave her version, Hernandez told Camacho that he had already committed various disciplinary acts and been given various chances, making reference to the "last chance" agreement. Camacho began crying and begged to leave things as they were and not to take the issue to a higher level because he knew he would lose his job (tr. 91-92, 108-109).

When the meeting concluded, Camacho was informed that the issue would be referred to Human Resources for a final decision and he left without having worked that

³ Record references are as follows: "GC" refers to the General Counsel's exhibits; "R" refers to the Respondent's exhibits; "tr" refers to the transcript of the hearing; "JX" refers to Joint Exhibits; and "JX Fact #___" refers to a Joint Stipulation of Fact.

⁴ In his decision, Judge Rosas credited Supervisor Osorio's version of Camacho's refusal to follow her order (ALJD page 4, footnote 9).

⁵ Judge Rosas credited the testimony of Manager Hernandez and Osorio, both of whom claimed that Camacho never requested union representation, over Camacho's version to the contrary after finding that Camacho's version had several inconsistencies revealed during his cross-examination (ALJD page 4, footnote 11).

day (tr. 20-21, 92). After the meeting, Hernandez and Osorio reported the incident to Human Resources Director, Eileen Lugo, by telephone and they agreed that Camacho would be fired (ALJD page 5).

ii. Camacho's Weingarten Request

On February 19, at around 8:30 a.m., Supervisor Hector Negron ordered Camacho to the shop manager's office (tr. 21). After washing up, Camacho went to talk to employee Hector Rivera, the local Union president, and informed him that he had been summoned to a meeting and needed union representation (tr. 21-22, 52). Rivera agreed to accompany Camacho, so while he cleaned up and turned off his machine, Camacho continued onwards to the supervisor's office (tr. 22, 53). However, when Rivera went to inform Supervisor Negron that he would represent Camacho during his meeting with management, Negron told Rivera that Camacho had "...waived his rights to the union..." and that if he went up with Camacho he would be fired as well (tr. 53). Thus, Rivera returned to his work area (tr. 54).⁶

Meanwhile, Camacho continued to wait at the Manager's office, where he waited for around an hour until Manager Hernandez told him that the meeting was at the office of Director Lugo (tr. 22). Since Rivera had yet to show up, Camacho told Hernandez that he needed union representation, but he responded that he did not have any right to union

⁶ Respondent's counsel tried to discredit Camacho's testimony by claiming that he had lied in his board affidavit since his board affidavit reflects Rivera's conversation with Negron (tr. 33-38). However, Respondent's counsel was unable to show that in his Board affidavit Camacho claimed to be present during said conversation. Furthermore, Camacho's Board affidavit does not reflect that he alleged to be present during said conversation. Moreover, Camacho clarified that he was not actually present during Rivera's conversation with Negron. Therefore, Judge Rosas credited Rivera and Camacho's unrefuted testimony (ALJD page 5, footnote 13).

representation (tr. 24, GC-10).⁷ Thus, Camacho went to the meeting without any union representation.

*iii. Camacho's Disciplinary Meeting*⁸

At around 9:30 a.m., Camacho met with Director Lugo at her office, accompanied by Manager Hernandez and Supervisor Osorio (tr. 24, 77, 95, 135). The meeting started with Hernandez and then Osorio giving their version of the February 18 incident and after they each concluded, Lugo asked Camacho if he had heard what had been said about him and solicited his side of the story (tr. 24-5). At that moment, Camacho renewed his request for union representation, either by Hector Rivera or Adolfo Ayala (grievances and complaints committee member), but Manager Hernandez responded that if any of those two employees accompanied him, they would be discharged (tr. 25). Therefore, Camacho proceeded to give his version of the February 18 events (tr. 26).

Director Lugo testified that she asked Camacho if he remembered that he had signed a last chance agreement and asked him why he continued behaving in the same manner.⁹ After Camacho acknowledged the agreement, Lugo read the last chance agreement, recapped his incident with Osorio and then informed him that he was

⁷ During his testimony, Manager Hernandez denied that Camacho asked for union representation, Hector Rivera or any other employee to accompany him during the meeting with Director Lugo (tr. 112-113). Hernandez only admitted that while he was walking with Camacho to the Human Resources Department, Camacho made a hand gesture to someone as if signaling to approach them, but that he told Camacho that did not need anyone because he was just going to be informed (tr. 112). However, Hernandez' testimony is discredited by Respondent's own position statement wherein it acknowledges that "[b]efore the [February 19] meeting was held, Mr. Camacho requested the presence at the meeting of another union employee, Mr. Hector Rivera. Mr. Hernandez rejected Mr. Camacho's request." (emphasis supplied)(See GC-4, page 2). Consequently, Judge Rosas found Camacho's testimony more credible than Hernandez (ALJD page 5, footnote 14).

⁸ Again, Judge Rosas credited Camacho's testimony that he made a request for union representation which was denied, finding that he provided a more detailed version of what transpired during the meeting, while Hernandez, Lugo and Osorio gave inconsistent versions (ALJD pages 5-6, footnote 5).

⁹ Although Lugo did not testify that she asked Camacho "why he continued behaving in the same manner", Manager Hernandez admitted that Lugo asked said question (tr. 96, 136).

discharged (tr. 136).¹⁰ Camacho admitted his wrongdoing, asked for clemency, but Lopez told him that he had already received too many opportunities, there would be no forgiveness and that he was terminated (tr. 26, 79, 83, 136).¹¹ At that moment, the meeting, which lasted around 20 minutes, concluded and Camacho left to pick up his belongings (tr. 27).

iv. Camacho's Discharge Letter

While Supervisor Negron was watching, Camacho spoke with Hector Rivera and after telling him that he had been fired, Rivera asked if he had received a discharge letter (tr. 27-28, 54). Supervisor Negron, still next to Camacho, mentioned that at his previous job employees were fired verbally (tr. 28, 54-55). Rivera disagreed and told Negron that Camacho was supposed to have received a discharge letter (tr. 28, 55). Negron then left the area and, shortly after, Camacho was told to go to Director Lugo's office where he picked up his discharge letter (tr. 28).

According to Osorio and Lugo, Camacho did not receive a discharge letter at the meeting because he left before they had the chance to do so (tr. 79). Nevertheless, Camacho received his discharge letter when he returned to Director Lugo's office. Lugo testified that the standard procedure when an employee does not sign a disciplinary action is to have a witness place a checkmark and a comment noting that the employee refused to sign the document, as was the case with Hector Rivera's discharge letter (compare JX-

¹⁰ Both Osorio and Hernandez denied that Lugo asked them any questions at the onset of the meeting as testified by Camacho (tr. 78, 96). Osorio claimed that Lugo began the meeting by reading the letter to Camacho and then told him that he was discharged (tr. 77-78). On the other hand, according to Hernandez, Director Lugo started the meeting by telling Camacho that since he had made a prior commitment to the company to not incur in any further disciplinary acts and because he had been aggressive to Supervisor Osorio and his co-workers, including throwing the crane control on the platform, he was going to be discharged (tr. 95-96). Regarding the suspension/last chance agreement, Hernandez testified that Director Lugo only showed Camacho the letter, but he did not testify that she actually read it (tr. 109).

2 with JX-5)(tr. 152,). However, although Camacho did not sign his discharge letter, none of Respondent's witnesses, including Lugo, explained why the discharge letter did not reflect his failure to do so (tr. 29).

The record reflects two discharge letters issued to Camacho. The distinction between the two letters is the signature of Supervisor Osorio (JX-1 and R-1). Osorio testified that she only signed one discharge letter (referring to R-1) and pointed out that she did not sign the other discharge letter (referring to JX-2) despite the fact that it contained her name (tr. 87-88). Neither Osorio nor Director Lugo could explain the existence of a second discharge letters (referring to JX-2) containing a signature with Osorio's name not written by her (tr. 87-88). Judge Rosas found the circumstances surrounding Camacho's two discharge letters "confusing and somewhat suspicious", thus, further diminishing the credibility of Director Lugo and Supervisor Osorio (ALJD page 6, footnote 16).

C. Facts Leading to the Discharge of Hector Rivera

i. May 7, 2010 Incident

On Friday, May 7, Production Vice-President Jose Soto and Manager Jose Hernandez held a meeting with employees Hector Rivera and Edgar Santiago as a result of a heated argument between the two employees (tr. 56-57, 97, 120-121). After interviewing the employees, Manager Hernandez ended the meeting by telling Rivera that he would inform the Human Resources Department of his conduct (tr. 100). At around 3:30 p.m., Manager Hernandez and Soto held a meeting with Director Lugo during which they allegedly decided to fire Camacho because it had been the third time he had engaged

¹¹ Although not corroborated by Osorio or Lugo, Hernandez claimed that Camacho cried when pleading for another opportunity (tr. 96).

in misconduct within the past year (tr. 101, 116, 141).¹² They also claimed to call Ruben Cosme, Union President, and inform him of the decision to fire Rivera based on his conduct and because he was the local union president (tr. 101, 103, 143-144). However, as Judge Rosas noted, they did not inform Cosme that they intended to meet with Rivera.

ii. Rivera's Weingarten Request

On Monday, May 10, Rivera was instructed by Manager Hernandez to go to Director Lugo's office (tr. 58). Upon asking about the purpose of the meeting, Hernandez replied that it was regarding his conduct in his office on May 7 (tr. 104). Rivera told Hernandez that he needed a union representative, but Hernandez told him that he did not need any (tr. 59). Rivera repeated that he needed to call a union representative or a member of the grievance committee, but Hernandez again responded that he did not need any, "...what was going to be done was going to be very quick..." (tr. 59). Rivera further told him that he had not been able to contact the Union President (tr. 59).¹³

iii. Rivera's Disciplinary Meeting

During the meeting with Director Lugo, which lasted around one hour, Manager Hernandez, Vice-President Soto, employee Santiago and Rivera were present (tr. 59, 62, 105, 127). Lugo admitted that Santiago was present at the meeting because, despite being an employee, Rivera had denied any wrongdoing and she wanted to confront Rivera with what Santiago was saying (tr. 153).

Lugo began the meeting by telling Rivera that she was investigating the argument between him and Santiago (tr. 60, 105). Lugo admitted that she asked Rivera what had

¹² Judge Rosas determined that their testimony about this meeting was diminished by the fact that Director Lugo did not reflect anything in this regard in her subsequent memo regarding the incident (ALJD page 7, footnote 22).

happened between him and Santiago (tr. 60, 127).¹⁴ Rivera initially responded that he did not remember anything and nothing had happened (tr. 105, 127, 144-145). However, Director Lugo told Rivera that Santiago had claimed that they had an incident between them (tr. 145). Soto further testified that Lugo asked Rivera if he would maintain his position that nothing had happened even though Hernandez and Soto heard him insulting Santiago, but that Rivera repeated that he did not remember (tr. 127). When Director Lugo asked employee Santiago about the veracity of Rivera's version, he accused Rivera of insulting him, gave his version and asked for an apology (tr. 105-106, 127, 145).¹⁵ Director Lugo asked Rivera to apologize to Santiago, which Rivera did and shook his hand, after which Lugo asked Santiago to leave the office (tr. 60, 106, 127).¹⁶

After Santiago left, Director Lugo asked Rivera if he was aware of what he had done and he responded that he had not done anything (tr. 127, 145). After Lugo explained to him that he had committed a third act of misconduct, was informed that he was fired for arguing with Santiago and that the decision had already been notified to Union President Cosme (tr. 61, 106, 128, 146). Rivera got very upset and accused Lugo of having an unlawful agenda (tr. 106, 129, 145-146). At that moment, Rivera is shown his discharge letter which he refused to sign (tr. 61, 106, 128).¹⁷

¹³ Judge Rosas did not credit Hernandez' testimony, who merely denied that Rivera asked for union representation (ALJD page 8, footnote 23).

¹⁴ As corroborated by Vice President Soto (tr. 127).

¹⁵ Director Lugo testified that employee Santiago actually interrupted her and started to dispute Rivera's answers and accused him of cursing his mother (tr. 145). While Lugo testified that Rivera started to insult Santiago right in front of her, neither Manager Hernandez nor Vice-President Soto corroborated Lopez' version in this respect (tr. 145). Nevertheless, Lugo claimed that she told Rivera that he was doing exactly what he had been accused of doing on May 7, 2010 (tr. 145).

¹⁶ Employee Santiago was not disciplined in any manner for his argument with Rivera (tr. 118)

¹⁷ The supervisors wrote on his discharge letter that he had refused to sign it (tr. 107).

III. RESPONDENT'S EXCEPTIONS No. 1 to 3

In its exceptions, Respondent argues that Judge Rosas incorrectly sustained CAGC's objection to a question made by Respondent's counsel to Director Lugo. Respondent essentially points to this particular ruling to support its first three exceptions which are discussed jointly herein.

During direct examination, Director Lugo testified that she prepared a minute of her February 18 meeting with Camacho, which was admitted into evidence, regarding the incident that led to his discharge on the following day (tr. 139). Respondent's legal counsel then asked her to read a particular sentence of the minute and to have her explain what she meant when she wrote that particular sentence. Judge Rosas sustained CAGC's timely objection to such a question. However, Respondent's counsel failed to make any offer of proof during the hearing to show the substance of the excluded evidence as required by Rule 103 of the Federal Rules of Evidence which explicitly provides that "... error may not be predicated upon a ruling which ... excludes evidence unless a substantial right of the party is affected, and ... the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Fed. R. Evid. 103(a)(2)(requiring offer of proof to preserve objection to ruling excluding evidence); see also United States v. Rodriguez-Velez, 597 F.3d 32 (1st Cir. 2010) citing United States v. Jadusingh, 12 F.3d 1162, 1166 (1st Cir.1994) ("When challenging an exclusionary ruling ... the aggrieved party must show ... that the 'substance of the evidence [sought to be introduced] was made known to the court by offer or was apparent from the context within which questions were asked.' " (citation omitted)).

Even if Judge Rosas had incorrectly characterized Respondent's counsel's question as inadmissible hearsay, Respondent's failure to make an offer of proof results in a waiver of review of whether the evidence was excluded improperly. Appellate courts have consistently required counsel to articulate the theory of an evidentiary offer, especially when the proof is subject to a hearsay objection and alternative purposes for admission may be present. Maddox v. Patterson, 905 F.2d 1178 (8th Cir. 1990). Failure to make a timely offer of proof showing the substance of allegedly inconsistent statements which are sought to be admitted generally precludes the appeal of district court's refusal to admit such statements. United States v. Dennis, 843 F.2d 652 (2d Cir. 1988); United States v. Leisure, 844 F.2d 1347 (8th Cir. 1988).

Respondent apparently calls on the Board to decide whether this specific rejection of Lugo's testimony was prejudicial to its case, i.e., whether the evidence is crucial to an informed legal assessment of the Respondent's defense. Associated Milk Producers, 259 NLRB 1033 (1982); Operating Engineers Local 18 (Ohio Contractors), 204 NLRB 681 (1973). In its brief to the Board, Respondent claims that its "right to a due process" was affected since Lugo was not permitted to explain during the hearing what she meant in a document that was prepared on the day of Camacho's meeting. Respondent argues that Lugo's testimony on this point is essential since Judge Rosas "...came up with his own inference as to what Ms. Lugo meant." (page 6 of Respondent's Exceptions).

Judge Rosa relied, albeit only in part, on Lugo's minute to conclude that her testimony of what happened during the meeting contradicts what is stated in her minute. However, Respondent's argument by itself is insufficient to establish that the exclusion of Lugo's testimony seriously hindered its defense. Having failed to make an offer of

proof, it is impossible at this juncture to reach a determination what the precise content of her answer to the objected question would be, and thus, what, if any, bearing it would have on the outcome of this case. Regency Electronics, 276 NLRB 4 (1985). Furthermore, as reflected in his decision, Judge Rosas relied on other factors which the Respondent fails to mention in its Exceptions, such as contradicting testimony among Respondent's witnesses, general demeanor, etc., to make Judge Rosas' credibility findings. Since it is 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, Respondent's arguments in support of Exceptions No. 1 to 3 should be dismissed. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

IV. RESPONDENT'S EXCEPTION No. 4

In this particular exception, Respondent clearly is attacking Judge Rosas' credibility findings as to whether Hector Rivera had requested union representation and was denied such during his meeting with management. As mentioned before, 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 it that they are incorrect. Standard Dry Wall Products, supra. Thus, Respondent's exception should be dismissed on these grounds alone. Nevertheless, Judge Rosas correctly determined that Rivera had a reasonable basis to believe an investigatory interview would ensue during his meeting with Director Lugo based on such factors as Rivera's prior meeting with Manager Hernandez about the argument with his co-worker, Hernandez' assessment of misconduct by Rivera during the meeting, the location of the meeting and the person

conducting the interview. Circuit-Wise, Inc., supra.; Potter Electric Signal Co., 237 NLRB 1289, 1291 (1978), enfd. in relevant part 600 F.2d 120 (8th Cir. 1979)(the Board considers whether the interview took place in a location where discipline was customarily investigated and administered); and New York Telephone Co., 219 NLRB 679, 682 (1975)(when a supervisor, who has the authority to impose discipline, conducts an investigatory interview regarding a matter that calls for discipline under the employer's policies, it is reasonable for an employee to believe the interview could lead to discipline).

Rivera's Weingarten rights were clearly triggered when he told Manager Hernandez that he needed union representation prior to his meeting with Director Lugo. Consolidated Edison Co., 323 NLRB 910, 916 (1997)(a request for representation may even be posed in the form of a question). However, although Manager Hernandez replied that he did not need any and that the meeting would be very quick, the meeting ended up lasting almost an hour, a fact that was not disputed by Respondent (tr. 59). And as was the case with Camacho's meeting with Director Lugo, Rivera was subjected to inquiry and was confronted with evidence against him. Director Lugo admitted that she started the meeting by asking Rivera about his argument and that co-worker Santiago was present during the meeting to confront Rivera. Thus, Director Lugo clearly sought to obtain more information from Rivera in order to substantiate or bolster its decision. Baton Rouge Water Works Co., supra. Therefore, Judge Rosas correctly determined that Respondent's refusal to provide Rivera with union representation violated Section 8(a)(1) of the Act.

V. RESPONDENT'S EXCEPTIONS No. 5 AND 6

Respondent takes exception to Judge Rosas' determination that Manager Jose Hernandez threatened to discharge any employee attempting to represent Camacho during his meeting with management held on February 19. Respondent's supporting arguments are twofold. In first place, Respondent claims that Camacho testified that he was not present when the Manager Hernandez made the threat and that he found out about the threat after Hector Rivera informed him. However, contrary to Respondent's claim, the record clearly reflects that Camacho, during his direct examination, testified that after requesting for union representation, either by Hector Rivera or Adolfo Ayala (grievances and complaints committee member), prior to attending the February 19 meeting with HR Director Lugo, Manager Hernandez responded that if any those two employees accompanied him, they would be discharged (tr. 25).¹⁸

In second place, Respondent incorrectly argues that Hernandez' threat is *de minimis*, since there is no evidence that anyone, other than Camacho and Rivera, were fired as a result of the threat. However, the cases cited by Respondent in support of its position, all of which relate to objectionable conduct within an election setting, do not apply in the present case. The Respondent's defense in this regard is inapplicable to the facts in the present case, particularly where as here Respondent unlawfully failed to honor the Weingarten requests of two employees. See e.g. Rodeway Inn, 255 NLRB 961, 962 (1981) (single interrogation of one employee not "de minimis"). In fact, in one of the cases cited by Respondent, Lowndes County Health Service, Inc., 325 NLRB 250 (1997), the Board specifically found that the hearing officer had "... failed to recognize

that a threat of discharge is highly coercive and one of the most serious forms of employer misconduct.” (citations omitted).

In addition to the above, the fact that the threat was made by high level management in the midst of a discharge meeting militates against Respondent’s *de minimis* argument. Moreover, a dismissal based on *de minimis* normally requires that a charged party took steps on its own volition to remedy the violation, which clearly did not occur in the present case. See, e.g., Musicians Local 76 (Jimmy Wakely Show), 202 NLRB 620, 620-622 (1973).

It is evident that an employee’s request for union representation constitutes protected concerted activity. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). Based on this premise, the Board has reasoned that a threat, such as Hernandez’ threat to discharge Hector Rivera or Adolfo Ayala if they participated as his Weingarten representative, “is no less interference and restraint than an outright denial of his right.” Consolidated Edison Co. of New York, Inc., 323 NLRB 910 (1997) citing Southwestern Bell Telephone Co., 227 NLRB 1223 (1977). Therefore, Respondent’s argument that a threat of discharge under the circumstances of the present case could be considered *de minimis* is ludicrous.

VI. RESPONDENT’S EXCEPTIONS No. 7 to 10 (Overly Broad No-Solicitation Rule)

As admitted by Respondent, it maintains in its Employee Manual the following rule (herein Rule 46), which provides for progressive discipline (tr. 67, 149, GC-2):

¹⁸ In its Exceptions, it appears that Respondent is confusing Rivera’s testimony regarding the threat made by Supervisor Negron, which CGC sought to amend in its post-trial brief but was denied by Judge Rosas (ALJD page 11).

“Norms of Prohibited Conduct: ...46. Hold meetings and/or activities related to the Union during work hours and without prior notification to management.”

As provided in the employee manual, an employee who violates the above rule will be subjected to a written warning for a 1st violation, a 1-week suspension for a 2nd violation, and discharge for a 3rd violation.

Respondent generally bases its exceptions No. 7 to 10 on Judge Rosas’ finding that its no-solicitation rule (Rule 46) is overly broad and ambiguous. Respondent’s Rule 46, on its face, establishes a ban on all unauthorized meetings and/or union related activities during work hours, which would include lunch and break periods. However, according to Respondent, the phrase “work hours” is commonly used in Puerto Rico, referenced in local state laws, and would equate it to “work time”. Thus, in making such an argument, Respondent is essentially seeking that the Board make a special distinction for Puerto Rico.

In support of its argument, Respondent relies on a report prepared by a certified court reporter, which was never offered during the hearing, but rather attached to its post-trial brief. Without going into the appropriateness of trying to insert such a report after the conclusion of the hearing, the report actually corroborates that the rule was correctly translated to reflect the phrase “working hours” and not “working time” as the Respondent contends.

The Board has repeatedly instructed that the term "work hours", as opposed to "working time," is inherently ambiguous and thus presumptively unlawful, because it connotes all hours of the workday, including employees' break and lunch times. St. George Warehouse, Inc., 331 NLRB 454, 462 (2000), *enfd.* 261 F. 3d 493 (3d Cir. 2001)

(the employer's employee manual prohibited solicitations and distribution of written matters in working areas during working hours). "[A] rule is presumptively invalid if it prohibits solicitation on the employees' own time," and a ban against soliciting during "working hours," as distinguished from "working time," comes within the adverse presumption. Southwest Gas Corp., 283 NLRB 543, 546 (1997) citing Our Way, Inc., 268 NLRB 394, 395 (1983).

Rule 46 is also unlawful since it fails to clarify if it only applies to working areas or if it includes non-working areas as well. As a result, the rule is drawn so broadly as to encompass non-working hours as well as non-working areas. Such a broad prohibition on union activities clearly violates Section 8(a)(1) of the Act. Our Way, Inc., supra. 268 NLRB 394 (1983). The Board has held that while an employer can lawfully impose some restrictions on employees' statutory rights to engage in union activities, such restrictions, however, must be clearly limited in scope so as not to interfere with employees' right to solicit their coworkers on their own time or to distribute literature on their own time in non-work areas. Satellite Services, Inc., 356 NLRB No. 17 (2010).

"Indeed, the mere maintenance of an ambiguous or overly broad rule tends to inhibit or threaten employees who desire to engage in legally protected activity but refrain from doing so rather than risk discipline." Grandview Health Care Center, 332 NLRB 347, 348 (2000), citing Ingram Book Co., 315 NLRB 515, 516 (1994). In order to defeat this presumption of illegality of its overly broad rules, Respondent was required to show a compelling and legitimate business reason necessitating the rule. Midland Transportation Co., 304 NLRB 4, 5 (1991). However, Respondent failed to provide any evidence to establish a compelling and legitimate business reason which would justify its

rule. See e.g. Champion International Corp., 303 NLRB 102, 105 (1991), citing Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945)(“Interference with employee circulation of protected material in non-working areas during off-duty periods is presumptively a violation of the Act unless the employer can affirmatively demonstrate the restriction is necessary to protect its proper interest.”).

Respondent’s Rule 46 is further unlawful since it requires permission from management prior to engaging in union activities. The Board has consistently held that such a pre-condition to engaging in protected activity during the employees’ free time and non-work areas is unlawful. Brunswick Corp., 282 NLRB 794, 795 (1987); See also Norris/O’Bannon, A Dover Resources Company, 307 NLRB 1236, 1245 (1992) (Board found unlawful a rule requiring employee to secure employer’s permission as pre-condition to engaging in protected activity on employees’ free time and non-work areas). Finally, Rule 46 is unlawful since there is no evidence that Respondent maintains such a ban on other non-work related matters. Interstate Security Services, Inc., 263 NLRB 6 (1982).

In conclusion, Judge Rosas correctly determined that the parameters of Respondent’s Rule 46 are ambiguous and overly broad and, that Respondent having failed to show some legitimate purpose is served, the rule is unlawful on its face in violation of Section 8(a)(1) of the Act.

VII. CONCLUSION

For the foregoing reasons, Counsel for the Acting General Counsel respectfully requests that Respondents' Exceptions to the Administrative Law Judge's Decision be dismissed.

Dated at San Juan, Puerto Rico this 29th day of April 2011.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that the “BRIEF ON BEHALF OF COUNSEL FOR THE GENERAL COUNSEL TO THE ADMINISTRATIVE LAW JUDGE” has been served by electronic mail to Respondent’s attorney Luis Ferrer lferrer@cbqlawoffices.com and the Union’s President, Ruben Cosme at rcosme@usw.org.

Dated at San Juan, Puerto Rico this 29th day of April 2011.

_____/s/
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