

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

PRAXAIR DISTRIBUTION, INC.

and

Case 28-CA-23266

PABLO RIVERA, an Individual

**ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT
OF EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the Board's Rules and regulations, Counsel for the Acting General Counsel (General Counsel) files the following Brief in Support of Exceptions to the Decision of Administrative William L. Schmidt, [JD(SF)-26-11] (ALJD), issued on July 19, 2011, in the above captioned case. As set forth in the General Counsel's Exceptions, filed under separate cover, the General Counsel excepts to the ALJ's failure to find that: (a) Pablo Rivera (Rivera) engaged in protected concerted activity, including his failure to find a connection between Rivera's conduct which led to the November 4, 2010 investigatory interview and Rivera's prior protected concerted activity; (b) Respondent interrogated Rivera; (c) Respondent promulgated an overly-broad and discriminatory rule prohibiting employees from discussing their concerted activities with others; (d) Respondent threatened employees with unspecified reprisals; (e) Respondent denied Rivera his request to be represented by a coworker during an investigatory interview from which he believed discipline would result;

and (f) that Respondent subjected Rivera to an investigatory interview in retaliation for his protected activities.¹

I. INTRODUCTION

This case involves Respondent's November 2010 investigatory interview of 14 year employee Pablo Rivera (Rivera).² Rivera, along with his former coworker Abram Tarango (Tarango), played a leading role in *Praxair Distribution, Inc.*, JD(SF) 33-10, (August 4, 2010) (*Praxair I*) which is currently pending before the Board.³

In *Praxair I* the Administrative Law Judge (ALJ) found that Rivera and Tarango had engaged in protected concerted activity by making complaints about safety, workplace violence, and other related matters, and drafting two reports to management, discussed further below, outlining their concerted complaints. *Praxair I*, slip op. at 16-17. The ALJ further found that Respondent violated the Section 8(a)(1) of Act by threatening employees with unspecified reprisals, closer supervision, and with discharge, all because of Tarango and Rivera's concerted complaints. *Id.* at slip op. 34. Furthermore, the ALJ found that Respondent violated Section 8(a)(1) by conditioning employees' continued employment on foregoing protected concerted activities; creating the impression of surveillance; and promulgating an overly-broad and discriminatory rule prohibiting employees from engaging in protected concerted activities. *Id.* at slip op. 34-35. The *Praxair I* ALJ dismissed various allegations, including the allegation that Respondent fired Tarango in violation of Section

¹ Included in this exception is the ALJ's failure to grant the General Counsel's proposed amendment to the Complaint.

² All dates are in 2010 unless otherwise indicated.

³ Respondent Praxair Distribution, Inc., will be referred to as "Respondent" or "Praxair." References to the official transcript will be designated as (Tr.) with appropriate page citations. References to the General Counsel, and Respondent Exhibits will be referred to as (GCX) and (RX) respectively with the appropriate exhibit number. References to the record in Praxair I will be denoted as "Praxair I."

8(a)(1). The General Counsel has filed exceptions to the dismissal of the allegation concerning Tarango's discharge, which are currently pending at the Board.

In the instant case, in August 2010, shortly after the ALJ decision in *Praxair I* issued, Rivera made a subsequent complaint about safety and workplace violence issues. In return, Respondent subjected him to threats and interrogation during a two-hour investigatory interview. In connection with that interview, Respondent prevented Rivera from contacting anyone outside the room, thereby precluding him from having the chance to engage in concerted activity, such as speaking with a coworker or asking that one be present during the interview. While Respondent asserts that Rivera was interviewed to investigate his safety complaints, the evidence shows otherwise. The meeting was actually an investigatory interview, to investigate Rivera, and Rivera reasonably believed the interview could result in his being disciplined. Respondent's interview of Rivera was also in retaliation for his protected, concerted, activities, as demonstrated, in part, by comparing Rivera's interview with Respondent's interviews of other employees.

Despite the fact that the investigatory interview was directly linked to Rivera's concerted complaints, and the fact that Respondent used the November 4 investigatory interview as a vehicle to retaliate against Rivera, and to thwart the Act's protections, the Administrative Law Judge dismissed the complaint. It is respectfully submitted that the ALJ erred by failing to find that Respondent violated the Act as described more fully set forth below.

II. STATEMENT OF FACTS

A. Respondent's Operation

Respondent is engaged in the business of the retail sale, storage, and packaging of gases including oxygen and helium. (ALJD 1; GCX 1(d)) At its Phoenix facility,

Respondent employs 15 drivers and 8 cylinder filler employees.⁴ (Praxair I GCX 10) Drivers report to Distribution Supervisor Sam Castillo (Castillo). Three of the cylinder filler employees report to Night Shift Lead Dan Beeker (Beeker). (GCX 2) The remaining five cylinder fillers report to Production Supervisor Jemal Norwood (Norwood). Castillo, Beeker, Norwood, and Quality Reviewer William Friedlander all report directly to Plant Manager Dave Schmidt (Schmidt). (GCX 2) Respondent's Phoenix facility is overseen by area managers in Utah who, in turn, report to Respondent's executives in California. Human Resources Manager Carson Mellott (Mellott), who is located in Salt Lake City, Utah, is responsible for hiring, training, and disciplining employees. (ALJD 5) As part of his duties, he also travels the region conducting investigations for Respondent; employees may be terminated or disciplined as a result of Mellott's investigations. (ALJD 5; GCX 2) Rivera, who Respondent admitted is a good employee, has been employed by Respondent for 14 years as a cylinder filler; he is Respondent's most senior Phoenix-based employee. (GCX 2)

B. Rivera's Complaints to Respondent

1. Prior Protected Concerted Activity

In October and November of 2009 Rivera and Tarango engaged in protected concerted activity, by making concerted complaints to Respondent about working conditions at the Phoenix facility. (ALJD 2; GCX 2) See also *Praxair I*, slip op. at 16-17. Over a period of years both had separately approached plant manager Schmidt about correcting various issues concerning employee working conditions. Schmidt failed to address their concerns, and in October 2009 Rivera and Tarango drafted and submitted what has come to be called their

⁴ The administrative record in *Praxair I* was admitted in this proceeding on a CD as GCX 2. Moreover, it is proper for the Board to take administrative notice of the record made in *Praxair I*, which is currently pending before the Board on exceptions. *The Washington Post Company* 256 NLRB 1243, 1243 (1981) (Board takes administrative notice of the records made in related proceedings involving the same parties which form the background and context of the current matter).

“October 20 Report” to Respondent’s upper-management. (ALJD 2:30-53) The October 20 Report was highly detailed and included complaints and concerns about safety issues, workplace violence, and other matters concerning employee working conditions.⁵ (ALJD 2-3;) See also *Praxair I*, slip op at 3-4.

The October 20 Report listed a number of employees and supervisors who engaged in alleged misconduct. Some of these same individuals are also involved in the present case, including plant manager Schmidt, and employees Gary Kallias (Kallias) and Shawn Hernandez (Hernandez).⁶ In the October 20 Report, Rivera and Tarango complained that Kallias had engaged in sexual harassment, including telling offensive sexual jokes, thereby violating Respondent’s own procedures and policies. (GCX 2) In addition, the October 20 Report also noted that Hernandez threatened employees and supervisors with violence, and that Schmidt had misbranded products. Some of Respondent’s employees and supervisors were disciplined as a direct result of the October 20 Report *Praxair I*, slip op. at 32.

Along with submitting the October 20 Report, both Tarango and Rivera engaged in additional protected concerted activities. They made calls to Respondent’s Hotline, reporting issues concerning work conditions, and submitted a follow up report, known as the “November 8 Report,” which they coauthored, and which again contained complaints about safety issues in the workplace. (ALJD 3)

⁵ Along with the other complaints described herein, the October 20 Report also raised issues regarding employees being forced to falsify pressure logs; the disrepair of the hoses and other equipment, making work more difficult; the misuse of company computers by employees to download games and pornography; the use of “demanding tone of voice and a despotic and authoritarian attitude” by supervisors; other concerns specifically invoking OSHA, Title VII, DOT regulations, and the ADEA; and the release by Schmidt in 2005 of misbranded product. The October 20 Report is marked as GCX 4 on the CD containing the administrative record in *Praxair I*, in GCX 2.

⁶ Kallias’ name appears on pages 5, 8, 9, and 10 of the October 20 Report; Hernandez’ name appears on pages 6 and 7 of the October 20 Report, and Schmidt’s name appears on pages 3, 4, 5, 6, 7, 9, 10, and 11.

Because of their actions, both Tarango and Rivera were subjected to investigatory interviews. Continuing with their protected concerted activity, when Respondent sought to question them about their October 20 Report, both Rivera and Tarango resisted being interviewed separately and instead pushed for a joint interview. Respondent denied their request, threatening them with adverse consequences if they refused to be interviewed separately. Only after Respondent's threats did they relent, agreeing to be separate interviews.⁷ As a direct result of Respondent's separate investigatory interviews concerning the October 20 Report, 19-year employee Tarango was discharged.⁸ In addition, because of the October 20 Report, Respondent issued written warnings to employees Adan Marquina and Alonso Mata, as well as to supervisors Castillo and Schmidt. *Praxair I*, slip op. at 32.

2. Recent Protected Concerted Activity

Even after Respondent fired Tarango, as an outgrowth of his previous concerted activities with Tarango, Rivera continued to report issues concerning employee working conditions to Respondent. Specifically, from August 2010, just after the *Praxair I* decision issued, through November 2010, Rivera complained to plant manager Schmidt and production supervisor Norwood about issues concerning workplace violence and safety. (ALJD 5-6; Tr. 58-59; 86) These complaints were directly related to the issues that Rivera and Tarango had previously presented to Respondent in the October 20 Report and were the subject of *Praxair I*.⁹

⁷ Specifically, before the interviews began, Respondent's corporate security investigations manager Sean Covert (Covert) threatened Rivera and Tarango that, if they did not agree to separate interviews, Respondent would note that they were being uncooperative and interfering with the investigation. (*Praxair I* Tr. 383:21-25)

⁸ Rivera was issued a letter addressing his allegation that he observed Schmidt misbranding product which admonished him for taking documents from the company (that he had used to establish the allegations against Schmidt) and to not wait as long before reporting matters of serious concern in the future. (*Praxair I* GCX 9)

⁹ The General Counsel has taken exceptions to the ALJ's failure to find that Respondent discharged Tarango in violation of Section 8(a)(1) of the Act in *Praxair I*. Accordingly, the General Counsel asserts that, as an illegally discharged discriminatee, Tarango is still considered an employee of Respondent. Cf. *Tomadur, Inc.*, 179 NLRB

Some of the employees and supervisors named in the October 20 Report were upset with Rivera, and were attempting to ostracize him in the workplace. For example, in September 2010 Kallias spoke negatively to a new employee about Rivera, telling him that Rivera was difficult to work with. This employee told Rivera about the misinformation Kallias was spreading. (ALJD 5:29-30)

A number of the issues raised by Rivera in the present case concern the misbehavior of Kallias, whose previous conduct was also one of the subjects of the October 20 Report discussed in *Praxair I*. In this matter, Rivera reported to Respondent that Kallias had assaulted him, parked in his parking space, and mocked him by whistling whenever he came near. Rivera also asserted that Kallias interfered with Rivera's production by pretending to use equipment that Rivera needed, and by locking the lunchroom doors and refusing to open them for Rivera. (ALJD 5-6; GCX 4:2; GCX 5; GCX 7) Finally, Rivera complained to Schmidt about employees tampering with his safety helmet by filling it with water, and Kallias' continuing unprofessional conduct. (Tr. 58; 80; 86; GCX 3) These workplace violence and safety complaints concerned many of the same types of issues, implicating some of the same people, that were previously discussed in the October 20 Report.

C. Respondent's Response

On the morning of November 4, Mellott visited the Phoenix facility. The purpose of the visit was two fold, to investigate Rivera's complaints, and to also investigate complaints made by Kallias against Rivera. (ALJD at 6) On November 1, Kallias had complained to Mellott that Rivera was trying to get people into trouble, and had inappropriately "bumped" into him while at work. (ALJD 6: 8-15; GCX 3)

1029, 1039 (1970) enfd. 442 F.2d 1180 (9th Cir 1971) decision supplemented 196 NLRB 706, 706 (1972) (illegally discharged discriminatees are considered employees of the employer and eligible to vote in representation election).

As part of this investigation Mellott spoke with Schmidt, Kallias, Hernandez, and Rivera; Schmidt, Kallias and Hernandez had all been mentioned in Rivera's October 20 Report. More specifically, Mellott spoke to Schmidt about a week prior to November 4, and had talked with Kallias on November 1, via telephone for 20 minutes, and then again on November 4, in person, for 30 minutes. (Tr. 31-32) Mellott also testified that he spoke with Hernandez via telephone on November 8; Hernandez allegedly witnessed the incident between Rivera and Kallias. (Tr. 31-31) Mellott admits that he only took notes during his interviews with Hernandez and Kallias, and did not require that either employee complete a written report. (Tr.31-32) Schmidt admitted that Hernandez did not substantiate the pushing allegation. (Tr. 27; 53)

On November 4, after speaking with Kallias, Mellott met with Rivera. (ALJD 6) While Rivera was working, Schmidt requested that Rivera accompany him to supervisor Castillo's office. Rivera was unaware of the purpose of the request; unbeknownst to Rivera, Mellott was waiting in the office. (Tr. 122) Once Rivera and Schmidt arrived, Schmidt advised Rivera that Mellott was there to investigate Rivera's complaints. (Tr. 115) As the two entered the office, the door was shut behind them.

Mellott then met with Rivera to conduct an investigatory interview; investigating both Rivera's complaints about working conditions and Kallias' complaints against him. (ALJD 6) Rivera testified that, during his 14 years working for the Respondent, it was common knowledge that, when Mellott arrives at the Phoenix facility, a "head is going to roll." (Tr. 69) Thus when Rivera saw Mellott, he knew that there was a problem, because when Mellott is present at the plant something is wrong. (Tr. 69) Mellott previously had participated in the investigatory interview that resulted in Tarango's discharge. *Praxair I*, slip op. at 9.

With Schmidt present, Mellott asked Rivera to describe of all of his complaints; this took about an hour. (ALJD 6; Tr. 116) Mellott and Schmidt took notes as Rivera spoke. (Tr. 116) During Rivera's recitation of his complaints, Mellott interrupted him and pointedly questioned Rivera about the delay in reporting his claims, and accused Rivera of lying about having previously reported these complaints to Respondent. (Tr. 59) Rivera denied the accusation and told Mellott that he had reported the claims to both Norwood and Schmidt. Rivera's testimony was corroborated by Schmidt. (Tr. 51-52)

Mellott told Rivera that he (Mellott) had spent a lot of time investigating the October 20 Report, and that he did not like the fact that Rivera's new complaints had accumulated like those in the October 20 Report.¹⁰ (Tr. 61) Mellott then asked Rivera whether he had deliberately bumped into Kallias. (ALJD 6:32; GCX 3) Rivera denied the accusation.

Schmidt admitted that Rivera could have been subjected to discipline if he had been dishonest, or if he had "bumped" into Kallias as alleged. (Tr. 40-41; 54) Also, the last time Rivera and Tarango had been interviewed by Respondent about workplace complaints, Tarango was fired. Consequently, under these circumstances, Rivera could reasonably conclude that discipline could result from this investigatory interview.

After Rivera told Mellott about his complaints, Mellott directed Rivera to reduce his complaints to writing. Rivera refused to do so, and told Mellott that he had already verbally reported Kallias' misconduct to Schmidt, and that it was not necessary for him to write down what Mellott had taken as notes. (Tr. 62-63; 117; 123; 131) Mellott again demanded Rivera write down his complaints, and Rivera moved toward the door in an effort to leave.¹¹ (Tr. 64;

¹⁰ Mellott denied making any mention of the October 20 Report, but admits discussing the ALJD with Rivera in September, just two months before the November 4 investigatory interview. (T 137)

¹¹ Schmidt admits that Rivera wanted to make a phone call, and that he wanted to leave prior to writing down his complaints (T 117).

95) In response, Rivera testified that Mellott told him, “You are not going anywhere. You don’t have to worry about your work. Take your time and write it down.”¹² (Tr. 64-65)

When Rivera refused to write down the complaints that he had already stated orally, Mellott became enraged and told Rivera, “If you don’t write down the issue of your complaint, I will write down a statement saying that you refused to do it.”¹³ (Tr. 63:11-12) Rivera then reached for his cell phone and told Mellott he needed to make a call. However, Mellott, who was loud and unhappy, responded by telling him, “You do not need to call anybody. Who are you going to call? You are not going to call Gary [Kallias], Jemal [Norwood], or somebody in the plant. You are going to call somebody outside the plant.” (Tr. 63; 65; 94:22-25)

Rivera did not respond.¹⁴

In his decision, the ALJ incorrectly stated that “Rivera admitted that he wanted to call his wife to [ask her] for her opinion as to whether Mellott could require him to write out his compliant” (ALJD 6 fn. 11) Rivera actually testified, over objection, that “[t]he first person I had in mind was to call my wife to ask her to look for legal advice just to be sure of the request from Carson Mellott was a lawful request to me to do what I already told that I didn’t want to do.” (Tr. 109:11-14) (underline added)

Fearful that a negative report stating he had been uncooperative could result in his termination, Rivera acquiesced and began writing his statement. (ALJD 6 37-40) As Rivera

¹² Mellott admitted that Rivera was hesitant to give a written statement, but the ALJ credited Mellott and Schmidt’s denial of Rivera’s claim that he only completed the report after Mellott physically barred him from leaving (ALJD 6-7).

¹³ This is almost the same statement made by Covert, when Mellott and Covert interrogated Rivera during an investigatory interview in *Praxair I*, a fact that was not missed by Rivera. (Tr. 63)

¹⁴ Schmidt admits that Rivera wanted to make a phone call about whether to make the statement, and that he wanted to leave prior to writing down the complaints. (Tr. 117) Mellott, contrary to Schmidt, denied that Rivera ever requested to leave the room, or that he prevented Rivera from leaving the room. (Tr. 132) Schmidt testified that he left the room as Rivera was going to begin to write the report, but contrary to both Rivera and Mellott, testified that he did not recall a discussion regarding whether Rivera should prepare the written statement. (Tr. 117; 123)

was writing the report, Mellott interrupted him three times, asking him whether he had finished. (Tr. 66) After about 30 minutes, Rivera completed the report, and handed it to Mellott, who immediately and loudly proclaimed “This is Praxair Property.” (Tr. 67:9) Rivera asked for a copy of his statement, but Mellott refused to provide him with one. (Tr. 67) This exchange went back and forth for about five minutes. Rivera asked why he could not have a copy of his own written report, to which Mellott responded, “I need to check something, I want to be sure that I’m not involved in this and that later I will get a surprise because (a lawyer) will be involved in this or you contact one of the agencies.” (ALJD 9; Tr. 68:3-6) In the end, Mellott did not provide Rivera a copy of his written complaint, and Rivera went back to work. However, several hours after the meeting, Schmidt provided Rivera a copy of the written report in a Praxair envelope.¹⁵ (ALJD 7; Tr. 99-100; GCX 6)

In response the November 4 meeting, one month later, Mellott sent Rivera a letter purportedly notifying him of the results of the investigation. (ALJD 7; GCX 3) Although the ALJ states that the letter made suggestions for improvements of the atmosphere at the plant, the letter instead appears to suggest that Rivera engaged in misconduct. (ALJD 7) Regarding the accusation by Kallias that Rivera deliberately bumped into him in the bathroom, the letter states, “I want to remind you that retaliating by bumping, brushing or striking another employee is totally inappropriate and will not be tolerated.” (GCX 3) Respondent did not provide any explanation regarding this statement, despite Rivera’s vehement denial of the alleged “bumping” incident, and the fact that Schmidt admitted that the claim was unsubstantiated.

¹⁵ At hearing, Schmidt initially testified that he had not provided Rivera a copy of the written report, but after being confronted with the envelope during cross-examination, Schmidt admitted that he had provided Rivera with a copy. (Tr. 120; 124). Mellott admits that he did not give Rivera a copy of his written statement when requested. (Tr. 135)

III. ARGUMENT

A. The ALJ Erred By Failing To Find That Pablo Rivera Engaged In Protected Concerted Activity.

The ALJ, citing *Meyers Industries, Inc.*, 268 NLRB 492 (1984) (*Meyers, I*) and *Meyers Industries, Inc.*, 281 NLRB 882 (1986) (*Meyers, II*), found that, although the *Meyers* test was clearly met in the prior case (*Praxair I*), Rivera's complaints in the present case did not amount to protected concerted activity. (ALJD 8:10-18) However, the ALJ failed to properly address the relationship between Rivera's complaints in the present matter in relation to the complaints that he and Tarango made in *Praxair I*. As demonstrated in *Praxair I*, Rivera and Tarango, who were Respondent's most senior employees, had complained for years without any satisfactory results from Respondent. It was only until their concerted complaints as set forth in the October 20 Report, that Respondent took notice.

The evidence demonstrates that Rivera's complaints were not, as the ALJ found, "personal in nature", but were an outgrowth of the issues delineated in Rivera and Tarango's October 20 Report, which raised serious issues concerning safety and workplace violence, the same matters that Rivera complained about in August and November of 2010. It is noteworthy that Kallias, whose behavior the ALJ found to be perturbing and petty, was specifically named in the October 20 Report as having engaged in misconduct, and is the same person that Rivera complained about here.

While the ALJ cites *Meyers I* for the proposition that employee's activity must be engaged in with or on the authority of other employees, and not solely by and on behalf of an individual employee, he neglected to view Rivera's complaints in the present case in the context of the concerted complaints in *Praxair I*, and more specifically the October 20 Report. In reaction to Tarango and Rivera engaging in protected concerted activity, Respondent

discharged Tarango. Adopting the ALJ's rationale would enable any respondent who is confronted by only two employees brave enough to assert their Section 7 rights, to audaciously skirt the Act's protection merely by discharging one of them. As stated above, Rivera has been isolated from other employees because he engaged in protected concerted activities. This position is further supported by the ALJ's finding that Kallias spoke negatively about Rivera to a new employee, and advised him how difficult Rivera was to work with. (ALJD 5:29-30)

Here, Rivera's complaints about Kallias touched upon safety and workplace violence, issues that affect all employees, and constituted a continuation of, and logical outgrowth from, the concerted complaints raised in the October 20 Report. *Every Woman's Place*, 282 NLRB 413, 413 (1986) enfd. 833 F.2d 1012 (an employee's call to the Department of Labor constituted concerted activity because it was the logical outgrowth of earlier group activity); *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (employee's call to the Department of Labor constituted concerted activity under the logical outgrowth theory even though no other employees knew about or authorized the employee to make the call); *Mike Yurosek & Son., Inc.*, 306 NLRB 1037, 1038 (1992) (employees' unplanned and uncoordinated action constituted was an outgrowth of previous protests by employees concerning their working conditions). Accordingly, Rivera engaged in protected concerted activity by raising complaints with Respondent's management which were an outgrowth of the previous complaints he made with Tarango, and the ALJ erred in finding otherwise.

B. The ALJ Erred By Failing to Find a Connection Between Rivera's Conduct Which Led To The November 4, 2010 Investigatory And Rivera's Prior Protected Concerted Activity in *Praxair I*.

The ALJ erred, in three different ways, in failing to find that there was a connection

between Rivera's prior protected activity and his conduct that led to the November 4 investigatory interview. (ALJD 8: 39-41) First, the ALJ does not specifically state the basis for his conclusion that no connection existed between the concerted complaints in *Praxair I* and Rivera's complaints in this matter. The evidence shows otherwise. Rivera's complaints about safety and workplace violence were "truly group" complaints that affected not only Rivera, but other employees, and were a continuation of, and logical outgrowth from, the concerted complaints raised in *Praxair I*.

Some of Kallias' antics were the subject of the complaints in *Praxair I*. When Kallias, who was never disciplined as a result of the investigation in *Praxair I*, continued unabated with his behavior, which affected employee working conditions, after the issuance of the *Praxair I* decision, it was logical that Rivera would again complaint to Respondent about Kallias. As such, Rivera's subsequent complaints about Kallias constituted a continuation of, and logical outgrowth from, the concerted complaints raised in the October 20 Report. *Every Woman's Place*, supra.; *Salisbury Hotel* supra.

Second, Rivera testified that, like in *Praxair I*, he was accused of wrongdoing when he filed a complaint with Respondent, and that he was instructed that if he did not cooperate, it would be negatively noted by Respondent. Respondent reacted in the same manner here, in response to the same conduct, as it did in *Praxair I*. Rivera engaging in protected concerted activities by raising complaints related to safety and workplace violence issues, and was threatened with adverse consequences for doing so.

Third, Mellott testified that just two months prior to his investigatory interview with Rivera, he initiated a conversation with Rivera regarding the *Praxair I* decision. (Tr. 137) Rivera further testified that during the November 4 investigatory meeting, Mellott compared

the October 20 Report, which was the subject of *Praxair I*, with the complaints Rivera made in the present case. (Tr. 61) This supports the position that not only did Rivera believe, and act, as if his complaints were a continuation of *Praxair I*, but that Respondent's reaction was that Rivera's current complaints were a continuation of the concerted complaints in *Praxair I*. Accordingly, the ALJ erred in not finding that there was a connection between Rivera's prior protected concerted activity in *Praxair I* and his current conduct.

C. The ALJ Erred By Failing to Find that Respondent Interrogated Rivera.

The ALJ erred by dismissing the allegations that Mellott interrogated Rivera when he demanding him to repeat his complaints in writing, and when he sought the identity of the person Rivera wanted to call during the November 4 meeting. Looking at the totality of the circumstances, the evidence supports a finding that Respondent's conduct violated Section 8(a)(1).

When considering communications from an employer to employees, the Board applies an "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). In *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000), the Board explained that it analyzes whether the questioning of an employee constitutes an unlawful interrogation under the "totality of circumstances" *Rossmore House* test citing *Rossmore House Hotel*, 269 NLRB 1176 (1984), *aff'd* 760 F.2d 1006 (9th Cir. 1985), and "the *Bourne* factors" citing *Bourne v NLRB*, 332 F. 2d 47, 48 (2d Cir. 1964). The *Bourne* factors include the background of the parties' relationship (i.e. whether there is a history of employer hostility and discrimination), the nature of the information sought, the identity of the questioner, the place and method of

interrogation, and the truthfulness of the reply. *Medcare Associates*, supra, 330 NLRB 935, 939 (ALJD 23:15-24) Contrary to the ALJ's conclusion, the credited record evidence demonstrates that Mellott unlawfully interrogated Rivera.

1. Mellott's Demand that Rivera Repeat his Complaints in Writing.

The ALJ, although correctly citing *Rossmore House*, 269 NLRB 1176, 1178 n. 20 (1984), enfd. 760 F.2d 1006(9th Cir. 1985), did not apply the *Bourne* factors, and erred when he concluded that "Mellott's request that Rivera put his personal complaints in writing does not amount to coercive questioning concerning any protected subject." (ALJD 8:21-50) The first *Bourne* factor relates to how Respondent deals with concerted activity. Here, Mellott's questioning takes place against a background of hostility and discrimination. In the face of its employees' concerted complaints, in *Praxair I*, Respondent was found to have violated Section 8(a)(1) in numerous respects including, according to the General Counsel, terminating Tarango. It is undisputed that Mellott was thoroughly aware of Rivera's prior protected concerted activities, including his testimony at the Board hearing. In addition, Rivera testified that Mellott mentioned his prior protected concerted activity (the submission of the October 20 report) during the investigatory meeting.¹⁶ Rivera testified that Mellott, with a raised voice, demanded that Rivera submit and repeat his complaints in a written report. Rivera then requested to make a telephone call, which Mellott denied. More specifically, Rivera testified that as he moved to the door, Mellott told him, "You are not going anywhere. You don't have to worry about your work. Take your time and write it down." (Tr. 64-65) It is hard to imagine a more hostile situation as described above.

¹⁶ Although Mellott denied mentioning the October 20 report, he admitted he discussed the Praxair I decision with Rivera just two months prior to the November 4 investigatory interview.

The second *Bourne* factor, the nature of the information sought, involves an attempt to have Rivera confirm all of his complaints, without any limitation as to filter out whether the complaints involved concerns discussed or shared by other employees. The questioner was Mellott, Respondent's Human Resources Manager, who also was intimately involved in Respondent's conduct as alleged in *Praxair I*.

As to place and method of interrogation, Rivera was called into Castillo's office to meet with Schmidt and Mellott, and Rivera did not know the purpose of this meeting until he arrived at Castillo's office. There was nothing informal about Mellott's demands and remarks--he wanted answers in the form of the written report and he wanted them immediately. As to the truthfulness of the reply, Rivera testified that he felt as if he had no choice but to accede to Mellott's demand. Specifically, he was mindful of what happened in the previous investigatory interview in which Mellott participated—Tarango was discharged, and Rivera was accused of wrongdoing. In addition, there were no assurances that reprisals would not be taken against Rivera if he refused to provide Mellott a written report. To the contrary, Mellott advised Rivera that if he refused, he (Mellott) would make a notation of the refusal and would leave the facility. (Tr. 131-142) Considering the totality of the circumstances, Mellott's conduct constituted an unlawful interrogation, in violation of Section 8(a)(1) of the Act. *Rossmore*, supra.; *Bourne* supra.

2. Mellott's Demand to Know the Identity of the Person Rivera Wanted to Call.

The ALJ also erred when he failed to use the *Bourne* factors to properly analyze Mellott's questioning of Rivera with respect to Rivera's attempt to make a phone call. After demanding that Rivera repeat his complaints, this time in writing, Mellott questioned Rivera when he tried to make a phone call. In response to not being able to leave the room, Rivera

testified that he tried to make a telephone call, that he reached for his cell phone and told Mellott he needed to make a call, but Mellott responded by telling him, “You do not need to call anybody. Who are you going to call? You are not going to call Gary [Kallias], Jemal [Norwood], or somebody in the plant. You are going to call somebody outside the plant.” (Tr. 65; 94:22-25)

Rivera, who was in an investigatory meeting, and fearing discipline, was trying to reach somebody for assistance. Mellott was prohibiting him from doing so, telling him that he was not going to call Kallias (a coworker) or Norwood (a supervisor) and further sought the identity of the individual that Rivera was trying to call for help. Rivera never answered Mellot’s question as to who he was trying to call.

All of the *Bourne* factors militate in favor of finding that Mellott violated Section 8(a)(1) of the Act by asking Rivera to identify the individual he intended to call. *Trump Plaza Hotel & Casino*, 310 NLRB 162, 1169 (1993) (supervisor interrogated employee who was engaging in union activities by asking him “where he was going next”); *Wilson Tree Co., Inc.*, 312 NLRB 883, 896 (1993) (supervisor interrogated employees by asking them “where they were going” and engaged in surveillance by disputing their answer and insisting they were going to a union meeting). Based on the foregoing, it is respectfully submitted that the ALJ erred by failing to find that Mellott interrogated Rivera as alleged.

D. The ALJ Erred by Failing to Find that Respondent Promulgating an Overly-Broad And Discriminatory Rule Prohibiting Employees From Discussing Their Concerted Activities With Others.

The ALJ erred when he did not find that, by denying Rivera’s request to make a phone call, Mellott promulgated a rule prohibiting concerted activity. (ALJD 9:14-27) The ALJ based his conclusion on the fact that there was no evidence to support a finding that Rivera

intended to call another employee or ever disclosed to Mellott that he wanted to call another employee. (ALJD 9:24-27)

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that by reasonable interpretation tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). “If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). It is irrelevant whether the rule takes the form of a written policy or an oral instruction to employees. *NLRB v. Ferguson Enter. Inc.*, 349 NLRB 617, 618 (2007).

In the instant case, no reasoned or reasonable interpretation is necessary -- there is no doubt that the rule explicitly restricts activities protected by Section 7. Moreover, even if there is any doubt as to the chilling nature of the rule, the record establishes that Respondent’s rule runs afoul of item (2), above, inasmuch as it was instituted in response to Rivera’s protected conduct.

Although Rivera testified that first thought about calling his wife to call a lawyer to determine if Mellott’s request was lawful, Mellott’s directive to Rivera that he was not going to call *anyone* amounts to a rule prohibiting Rivera from calling other employees for mutual aid and protection. Such a directive would also tend to chill an employee from telling other employees what occurred during the meeting, or otherwise engaging in protected concerted activity. Specifically, since Respondent’s refusal to allow Rivera make a telephone call explicitly restricts Section 7 activity, under the first prong of the Board’s analysis in *Luther Heritage Village-Livonia*, supra, such a rule is unlawful. Alternatively, even if it is found that

Mellott's refusal to allow Rivera to make a phone call, immediately following his question in regard to who Rivera intended to call, does not explicitly restrict Section 7 activity, employees could reasonably construe such a refusal as a rule prohibiting such activity, i.e., calling to report complaints or filing complaints in furtherance of matters related to issues of concerted concern to employees.

Because Mellott followed his directive to Rivera not to make a phone call with, "Who are you going to call?" etc., this suggests that Mellott was not primarily concerned with the call itself but with the nature of the call. It should be noted that this statement was made during a conversation in which Mellott stated that he did not want to "get a surprise" because a lawyer was involved or that Rivera contacted "one of the agencies," meaning the Board. Accordingly, Mellott's directive to Rivera is violative of Section 8(a)(1) of the Act. *Miller Electric Pump & Plumbing*; supra.

E. The ALJ Erred by Failing to Find That Respondent Threatening Employees With Unspecified Reprisals.

The ALJ erroneously found that Mellott's statement, that he wanted, "to check something, I want to be sure that I'm not involved in this and that later I will get a surprise because (a lawyer) will be involved in this, or you contact one of the agencies," was not a threat of unspecified reprisal. (ALJD 9:40-45). The ALJ specifically found that the statement was "nothing more than an expression of caution on his part likely based on his experience with the prior proceeding. " (ALJD: 9 40-44) Aside from stating that Mellott himself reacted based on the prior protected concerted activity of Rivera in *Praxair I*, and thus demonstrating that Respondent viewed Rivera's complaints as a continuation or at least related, Mellott's statement was an unlawful threat of unspecified reprisal.

Rivera testified that after he completed the written report, he handed it to Mellott who immediately after receiving the report, loudly told him “This is Praxair Property.” (Tr. 67:9) Rivera asked for a copy of his statement, but Mellott refused to provide him with one. (Tr. 67) This exchange went back and forth for a few minutes. Rivera asked why he could not have a copy of his own written report, to which Mellott responded with the threat of unspecified reprisal.

The credible record evidence indicates that Mellott’s statement referred to Rivera’s prior concerted activity and charge filing, and the litigation of *Praxair I*. Although Mellott denied mentioning the October 20 report during the November 4 investigatory interview, as Rivera testified he had, Mellott corroborated Rivera’s testimony that two months prior, Mellott had discussed the *Praxair I* ALJ decision with Rivera.

Mellott’s statement to Rivera signaled to employees that the content of their complaints about work-related issues to Respondent could result in adverse consequences, including, discharge (like Tarango). Faced with the possible negative consequences, employees would not file any complaints regarding their terms of conditions of employment or any other complaint with Respondent. Accordingly, Mellott’s statement is a threat of unspecified reprisal and is violative of Section 8(a)(1) of the Act *Miller Electric, supra*.

F. The ALJ Erred by Failing to Find That Respondent Violated Section 8(A)(1) Of The Act By Denying Rivera His Request To Be Represented By A Co-worker During the Investigatory Interview.

The ALJ erroneously found that Respondent did not unlawfully deny Rivera representation during the November 4 investigatory investigation. Citing *IBM Corp.*, 341 NLRB 1288 (2004) the ALJ found that *Weingarten* rights do not apply to unrepresented

workers at Respondent's facility.¹⁷ (ALJD 10) The ALJ further found that even under prior Board law, *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), because Rivera admitted that he intended to call his wife rather than a co-worker, Rivera would not be entitled to *Weingarten* rights because the right did not contemplate the presence of an outside representative. (ALJD 10:10-25) While the ALJ declined to address whether Mellott acted properly if it could be assumed that Rivera's request to make the phone call amounted to a request for coworker representation, he implies that there can be no violation because Rivera's wife is an outside representative. (ALJD 10:22-24)

1. Rivera's Right to Representation under Board and Supreme Court Precedent.

Under Section 7 of the National Labor Relations Act, all workers, union represented, or not, have the right to engage in concerted activities for the purpose of mutual aid or protection. In *Weingarten*, the Supreme Court recognized that an employer's denial of an employee's request that a union representative be present at investigatory interview which employee reasonably believed might result in disciplinary action interfered with, restrained and coerced employee's right to engage in concerted activities for mutual aid or protection and constituted an unfair labor practice. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975). The Court, in upholding the Board's finding of a violation, found that an employee's action in seeking representation in such circumstances "falls within the literal wording of Section 7 of the Act that "[e]mployees shall have the right ... to engage in ... concerted activities for the purpose of mutual aid or protection." Id. at 260. The Court explained further as follows:

¹⁷ In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) and a companion decision, *Ladies' Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276 (1975), the Supreme Court, agreeing with the Board, ruled that employee insistence upon union representation at an employer's investigatory interview, which the employee reasonably believes might result in disciplinary action, is concerted protected activity.

The union representative whose participation he seeks is however safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. *Id.*

Under *Weingarten*, once an employee makes such a valid request for union representation, the employer is permitted one of three options: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. Under no circumstances may the employer continue the interview without granting the employee union representation, unless the employee voluntarily agrees to remain unrepresented after having been presented by the employer with the choices mentioned above, or if the employee is otherwise aware of those choices. The primary concern is the right of employees to have some measure of protection when faced with a confrontation with the employer which might result in adverse action against the employee. *Anchortank, Inc.*, 239 NLRB 430, 431(1978).

In *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 678 (2000) enfd. 268 F.3d 1095 (D.C. Cir. 2001) the Board held that the Supreme Court's decision in *Weingarten* supports the right to representation, even in nonunion settings, because that right is grounded in Section 7, and because the "right to have a coworker present at an investigatory interview . . . greatly enhances the employee's opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'" quoting *Weingarten*, 420 U.S. at 260.

A few years later, the Board departed from this precedent in *IBM Corp.*, 341 NLRB 1288 (2004), where a divided Board found that *Weingarten* rights do not extend to employees in a nonunionized setting. While acknowledging that Board's decision in *Epilepsy*

Foundation is “a permissible interpretation of the Act” the Board majority invoked “policy considerations” for refusing to adhere to it. *Id.* at 1289-90. Therefore, the *IBM Corp.* Board overruled *Epilepsy Foundation*, and found that *Weingarten* rights do not apply in a nonunion setting. *Id.* at 1289.

2. Weingarten Applies to All Employees, Regardless of Union Status.

The General Counsel asserts that the *IBM Corp.* Board erred in its interpretation of *Weingarten*. As the Board previously noted in *Materials Research Corp.*, 262 NLRB 1010, 1012 (1982), “with only very limited exceptions, the protection afforded by Section 7 does not vary depending upon whether or not employees are represented by a union, or whether the conduct involved is related, directly or indirectly, to union activity or collective bargaining.” As further noted by the *Materials Research Corp.* Board, a request for assistance of a fellow employee is concerted activity, “in its most basic and obvious form – since employees are seeking to act together. It is likewise activity for mutual aid or protection: by such, all employees can be assured that they too can avail themselves of the assistance of a coworker in like circumstances.” *Id.* at 1015. As noted by the United States Court of Appeals for the District of Columbia Circuit, limiting *Weingarten* rights to only unionized employees is “a view of concerted activity [that] is terribly shortsighted.” *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1100 (D.C. Cir. 2001) Accordingly, the General Counsel urges that the Board adhere to the Supreme Court’s decision in *Weingarten*, as interpreted in *Materials Research Corp.* and *Epilepsy Foundation*, and find that a request for assistance of a fellow employee is concerted activity, even in a nonunionized setting.

3. Rivera had a Reasonable Basis to Believe the November 4 Interview Would Result in Discipline.

Weingarten rights apply during investigatory interviews in which the employee reasonably believes might result in disciplinary action. 420 U.S. at 267 (1975). Here, Rivera had ample reason to believe that his November 4 interview would lead to his being disciplined. As Rivera testified, once he observed that Mellott was waiting for him, based upon his past experiences, he knew that there was going to be “problems” and that something was wrong. In addition to Respondent’s admission that this was an investigatory meeting, Schmidt admitted that Rivera could have been subject to discipline regarding the accusation that he had “bumped” into fellow employee Kallias, or if Rivera had been dishonest during the investigatory interview. Moreover, Rivera’s previous experience with Respondent (and with Mellott in particular) concerning the October 20 Report, lends more support to a finding that Rivera reasonably expected that he would be subjected to discipline, including the possibility that he could be discharged, which happened to Tarango the last time he participated in a meeting with Mellott. In short, the record evidence clearly supports a finding that Rivera’s November 4 meeting was an investigatory interview in which Rivera reasonably believed might result in disciplinary action.

4. Respondent’s Actions Violated Rivera’s *Weingarten* Rights.

The ALJ erred by finding that Rivera’s *Weingarten* rights did not vest, even under the Board’s *Epilepsy Foundation* precedent, because Rivera “made no explicit request for assistance by a coworker” but instead testified that he was contemplating calling his wife, “who is not an employee of Respondent.” (ALJD at 10). For an employee’s *Weingarten* rights to vest, there is no requirement that the employee specifically seek assistance from another statutory employee. *Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984). Instead, the Board has made it clear that to trigger *Weingarten* rights, an employee’s actions

need only be sufficient to put the employer on notice of the employee's desire for representation. *Consolidated Edison Company of New York*, 323 NLRB 910, 917 (1992)

In *Montgomery Ward & Co.*, the Board found that an employee's request for a supervisor as a representative was sufficient to invoke that employee's *Weingarten* rights, where the employee was subjected to a two-hour investigatory interview, and asked that his supervisor be allowed to be present in the interview. The employer denied the request, "stating that the employee could not see anyone and that a tape recording of the interview would serve as his representative." 273 NLRB at 1227. The Board, assuming that the employee requested a statutory supervisor, and someone ineligible to serve as a *Weingarten* representative, nonetheless found a violation, stating that the employee's request put the employer on notice that the employee desired representation. *Id.* This knowledge was reflected in the employer's response. *Id.* The Board further stated that, in effect, the respondent told the employee that "no matter who he requested as a representative, he would have to be content with a tape recording of the interview." *Id.*

Therefore, under the Board's analysis in *Montgomery Ward*, it is irrelevant that Rivera's testified that the "first person I had in mind was to call my wife" and that his wife was not an employee of Respondent. Instead, what is relevant is that Rivera's actions put Respondent on notice that he was seeking representation. This knowledge is reflected in Mellott's statement to Rivera that "You do not need to call anybody. Who are you going to call? You are not going to call Gary [Kallias], Jemal [Norwood], or somebody in the plant. You are going to call somebody outside the plant." (Tr. 63; 65; 94:22-25) Clearly, Respondent was not going to let Rivera contact anybody to assist him during this investigatory interview. At the time, Mellott did not know who Rivera intended to call.

Instead, he prohibited Rivera from calling anybody; Mellott told him he was prohibited from calling Kallias, a coworker, or Norwood, a supervisor. Out of fear of being insubordinate, Rivera didn't call anybody. As such, Respondent preemptively denied Rivera's ability to seek assistance from anybody during his investigatory interview. *Montgomery Ward & Co.* 273 NLRB at 1227.

Rivera's attempts to use his cell-phone to telephone somebody outside Castillo's office was sufficient to trigger his Weingarten rights. Regarding Rivera's actions, the ALJ's analysis in *Buonadonna Shoprite, LLC*, 356 NLRB No. 115 (March 18, 2011) is instructive. In the *Buanadonna Shoprite*, the ALJ found that an employee's act of trying to make a telephone call, when faced with an investigatory interview, is protected conduct and sufficient to trigger the employee's *Weingarten* rights. *Id.* slip op. at 9. The ALJ noted that, while the union agent was not physically present, it is reasonable that he might well have been available by telephone to consult with and assist during the interview, and the employer presented no evidence as to why it could not have accommodated this request.¹⁸ *Id.*

Here, Rivera's attempts to seek assistance from someone outside the office, by making a telephone call before succumbing to Respondent's demand that he reduce his complaints to writing, was sufficient to put Respondent on notice that he was seeking representation. Respondent presented no evidence as to why it could not have accommodated Rivera's request to make a phone call. Rivera's actions, "in light of the Respondent's preemptive denial, was sufficient to invoke the *Weingarten* protections. *Montgomery Ward & Co.*, 273 NLRB at 1227. By refusing to allow Rivera to contact anybody, but instead requiring him to

¹⁸ The Board *Buonadonna* did not pass on the merits of the ALJ's analysis on due process grounds, finding that this allegation was not contained in the complaint. 356 NLRB No. 115 slip op. at 2.

proceed with the investigatory interview, and reduce his complaints to writing, Respondent violated Section 8(a)(1) of the Act.

G. The ALJ Erred by Failing to Grant the General Counsel's Proposed Amendment to the Complaint.

In his brief to the ALJ, the General Counsel requested that the Complaint be amended to include an allegation that on or about November 4, 2010, Respondent required its employee Rivera to communicate his complaints, concerns, and reports to Respondent in writing, and that it did so because Rivera engaged in protected concerted activities and to discourage other employees from engaging in such protected conduct, in violation of Section 8(a)(1) of the Act. The ALJ failed to address the motion to amend the Complaint in his decision.

The Board's Rules provide that a complaint may be amended subsequent to a hearing. Specifically, Section 102.17 provides as follows:

Amendment.---Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing by the regional director issuing the complaint; as the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

Though Respondent may assert a lack of due process, such an assertion lacks merit. Due process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense. The Board has long held, with court approval, that it "may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Kenmore Electric Company, Inc. et al.*, 355 NLRB No.173, slip op.7 (2010), citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf.d. 920 F.2d 130 (2d Cir.1990).

The “closely connected” element of the *Pergament* test requires both a close congruence between the complaint allegation and the unalleged violation found by the Board, and that the respondent had sufficient notice of the conduct found unlawful. *Kenmore Electric Company*, supra. The dual requirements of *Pergament* are easily satisfied here, as the issue of whether to include the amendment is closely connected, both factually and as a matter of law, to similar allegations in the Complaint. The Complaint allegations concern the lawfulness of the November 4 investigatory interview. There is no doubt that the underlying issues and allegations, as more fully discussed above, are part and parcel of those related to the amendment concerning the November 4 investigatory interview used in retaliation against Rivera because he had engaged in protected concerted activities.

Moreover, the record establishes that Respondent had notice of the issue of regarding the amended allegation. Notice does not mean that a respondent must be advised of the legal theory upon which the General Counsel intends to proceed but rather, “notice must inform the respondent of the acts forming the basis” of the violation ultimately found, so that it can “prepare a defense . . . and fashion[] an explanation of events that refutes the charge of unlawful behavior.” *Pergament*, supra, 920 F.2d at 135. The ultimate issue is the same when considering the lawfulness of the November 4 investigatory interview, i.e., whether Respondent unlawfully retaliated against Rivera because he engaged in protected concerted activities, by requiring Rivera to submit to the November 4 investigatory interview. Respondent was on notice, from the outset of and throughout the underlying proceeding, that the legality of the November 4 investigatory interview -- was the ultimate issue in the case. Respondent’s defenses to the allegation are the same as they would have been had the

Complaint been amended before hearing. Thus, Respondent was afforded an ample opportunity to prepare its defense.

The second element of the *Pergament* test is whether the legality of the November 4 investigatory interview was fully litigated. The record shows that all the key issues surrounding the Section 8(a)(1) investigatory interview allegation were fully litigated. This is demonstrated by the documentary and testimonial evidence introduced at the hearing by Respondent, which the ALJ considered in deciding the case. Respondent presented Mellott and Schmidt in defense of the investigatory interview, and to the Section 8(a)(1) allegations generally. See *Desert Aggregates*, 340 NLRB 289, 293 (2003) (noting, among other factors, that the “Board has concluded that where the respondent’s witnesses testified to facts giving rise to the unalleged violation, ...the ‘fully litigated’ requirement is met”). The investigatory allegation involves the identical underlying legal theory and factual framework, and is subject to the same defenses. *Redd-I, Inc.*, 290 NLRB 1115, 118(1988); *Precision Concrete*, 337 NLRB 211 (2001).

Based on the foregoing, including the fact that Respondent was afforded due process and that the proposed amendment is factually and legally related to the allegations of the timely-filed charges, the amendment is appropriate. *Redd-I, Inc.*, supra. The CAGC respectfully request that this allegation be amended to the Complaint.

H. The ALJ Erred by Failing to Find that Respondent Subjected Rivera to an Investigatory Interview in Retaliation for his Concerted Activities.

As the ALJ erred by not allowing the amendment to the Complaint, he further erred by not finding that Respondent violated the Act in conducting the November 4 investigatory interview in retaliation for Rivera engaging in protected concerted activity. The amendment was based upon evidence at trial that established that Respondent, by Mellott, interviewed

two other employees, Kallias and Hernandez, but did not require a written statement from either of them. In addition, Respondent, by Mellott, questioned both of them for less time than Mellott questioned Rivera.

Under a *Wright Line* analysis, the record evidence in this matter conclusively establishes that all requisite elements of a *prima facie* showing are present. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Respondent requiring Rivera, who already had already orally recited his complaints to Mellott, to then subsequently present a written report, while not requiring the same of the other employees interviewed (about their own or related complaints), amounts to retaliation in violation of Section 8(a)(1) of the Act.

The *prima facie* case is established by the credible record evidence that demonstrated that Rivera engaged in protected conduct, including his prior and current complaints about work, as well as his charge-filing and testimony in *Praxair I*. Undoubtedly; Respondent was aware of such protected conduct, as evidence in *Praxair I*, Mellott's statement to Rivera in September 2010 related to the *Praxair I* decision, and complaints made to Respondent concerning safety and workplace violence which allegedly served as the reason for the November 4 investigatory interview.

There has been a strong and persuasive showing that animus was harbored by Respondent and contributed to Respondent's decision to subject Rivera to the November 4 investigatory interview. Rivera had been subjected to interrogation, threats, and rules promulgated in response and in retaliation to his (and Tarango's) protected concerted activity. Respondent harbored hostility toward such conduct, as evidenced by Mellott's "agencies" statements; and requiring Rivera to submit a written complaint or written summary of facts.

By requiring Rivera to do so, Respondent was treating him in a manner disparate from the way it treated the other two employees who were questioned (and put Rivera at greater risk than other employees of having his statements used against him).

As to Respondent's burden under *Wright Line*, especially within the framework of the statements uttered by Mellott, the credible record demonstrates that Respondent, under *Wright Line*, supra, failed to establish that it would have subjected Rivera to the November 4 investigatory interview if he had not engaged in the protected, concerted activities. The credited evidence in this matter demonstrates that, but for Rivera having engaged in the documented protected concerted activities, there would have been no cause for the Respondent to take adverse action against him. Respondent present no evidence that would persuade "by a preponderance of the evidence that the same action would have been taken even in the absence of the protected activities." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). As shown, Respondent took these actions to punish Rivera for his protected, concerted activities, and to block any further concerted activities by the remaining employees.

Based on the foregoing, CAGC respectfully request a finding that on or about November 4, 2010, the Respondent required its employee Rivera to communicate his complaints, concerns, and reports to Respondent in writing, and that it did so because Rivera engaged in protected concerted activities and to discourage other employees from engaging in such protected conduct, in violation of Section 8(a)(1) of the Act.

IV. CONCLUSION

Based upon the foregoing and the record evidence considered as a whole, the General Counsel respectfully submits that the ALJ erred by failing to find that Respondent unlawfully, promulgated rules prohibiting employees from engaging in protected concerted activities,

interrogating employees because they engaged in protected concerted activity, threatened employees for having engaged in concerted activities; denying employees' request for representation during an investigatory interview, and by failing to find, and include in his Conclusions of Law, that Respondent violated Section 8(a)(1) by subjecting its employee Pablo Rivera to an investigatory interview in retaliation of his concerted activities.

Dated at Phoenix, Arizona, this 24th day of August 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND BRIEF IN SUPPORT in Case 28-CA-23266, was served by E-Gov, E-filing, and E-Mail, on this 24th day of August 2011, on the following:

Via E-Gov, E-Filing:

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