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**Praxair Distribution, Inc. and Pablo Rivera and  
Abram P. Tarango.** Case 28–CA–22806

September 21, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

On August 4, 2010, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Acting General Counsel filed exceptions, a supporting brief, an answering brief, and a reply brief. The Respondent filed cross-exceptions, a supporting brief, a brief in opposition to the Acting General Counsel's exceptions, and a reply brief.

The National Labor Relations Board has considered the judge's decision and the record in light of the exceptions<sup>1</sup> and briefs, and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order as modified.<sup>3</sup>

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<sup>1</sup> There are no exceptions to the judge's recommended dismissal of allegations that the Respondent violated Sec. 8(a)(1) of the Act by: (a) failing to assign duties to, and failing to promote employee Pablo Rivera; (b) promulgating a rule that prohibits employees' spouses from involvement in employees' protected activities and that prohibits employees from contacting various management personnel; and (c) Supervisor Jemal Norwood creating the impression of surveillance of, and interrogating, Rivera.

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

In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(1) by threatening employees Abram Tarango and Pablo Rivera for insisting on being interviewed jointly, we find in agreement with the judge that there is no evidence that the employees were threatened for having made such a request.

In adopting the judge's dismissal of the allegation that the Respondent unlawfully discharged employee Tarango, we agree with the judge that the Acting General Counsel did not establish that animus toward Tarango's protected activity was a motivating factor in the decision to discharge him. In so finding, we clarify that under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel's initial burden requires a "showing that (1) the employee was engaged in protected activity, (2) the employer had knowledge of the protected activity, and (3) the employer bore animus toward the employee's protected activity." E.g., *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). It does not include a fourth element, set forth by the judge, that the General Counsel establish a link or nexus between the employee's protected activity and the adverse employment action. *Id.*

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Praxair Distribution, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix."<sup>28</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily

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Finally, in adopting the judge's findings that the statements of the Respondent's corporate security investigations manager, Sean Covert, to Ana Rivera constituted various threats in violation of Sec. 8(a)(1), we find no merit to the Respondent and the dissent's contention that dismissal of these allegations is warranted due to an absence of evidence that the threats were conveyed to Ana Rivera's husband, Pablo Rivera. It is well settled that such threatening statements are "no less [coercive when] made to the [spouse] of an employee—particularly one who had already been in contact with [management officials] on the subject of [the] activity involving [the employee spouse]." *Quality Rubber Mfg. Co.*, 176 NLRB 40, 50 (1969), enfd. 430 F.2d 519 (D.C. Cir. 1970). Moreover, and contrary to the dissent's contention, the fact that Ana Rivera initiated the discussion does not make it less likely that she relayed Covert's remarks to her husband. We further note that, with respect to the findings that Covert's statements to Ana Rivera created an impression of surveillance and promulgated an unlawful rule, the Respondent's exceptions are limited to arguments concerning the judge's credibility resolutions.

Contrary to his colleagues, Member Hayes questions whether the "spousal conduit" inference applies where the nonemployee spouse, rather than the employer, initiated the conduit relationship, initiated the specific conversation in question, and essentially provoked the employer representative into an irritated and spontaneous outburst. Cf. *Walgreen Co.*, 206 NLRB 124, 124 (1973), enfd. 509 F.2d 1014 (7th Cir. 1975) (spousal conduit inference warranted where the record showed "that the [r]espondent deliberately attempted to use [the non-employee spouse] as a conduit to the employees and fully intended and could reasonably expect [him] to influence his wife and other employees" (footnote omitted)). Moreover, he would eschew reliance on a dubious inference to establish a dispositive fact—i.e., that the non-employee spouse conveyed the alleged threat to the employee—when the best evidence of that dispositive fact was readily available to the General Counsel. Here, both Mrs. Rivera and her husband testified at the hearing and the General Counsel could have asked either or both whether Mrs. Rivera relayed her conversation with Covert to Mr. Rivera. The General Counsel did neither. Under the circumstances, Member Hayes would not infer what the General Counsel failed to prove. He would dismiss the 8(a)(1) allegations premised on the statements Covert made to Mrs. Rivera.

<sup>3</sup> We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in the these proceedings, the Respondent shall duplicate and mail, at its own expenses a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 24, 2009.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 21, 2011

Mark Gaston Pearce,	Chairman
Craig Becker,	Member
Brian E. Hayes,	Member

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with reprisals for engaging in protected concerted activities, and/or for continuing to engage in such activities.

WE WILL NOT threaten you with discharge for engaging in protected concerted activities.

WE WILL NOT threaten you with closer supervision for engaging in protected concerted activities.

WE WILL NOT threaten you by conditioning continued employment on your relinquishing your right to engage in protected concerted activities.

WE WILL NOT create an impression among you that your protected concerted activities are under surveillance.

WE WILL NOT promulgate an overly broad and discriminatory rule prohibiting you from engaging in protected concerted activities.

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

PRAXAIR DISTRIBUTION, INC.

*William Mabry III, Esq.*, for the General Counsel.  
*Frederick C. Miner, Esq.*, of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, from April 13 to 15, and on May 3, 2010. This case was tried following the issuance of an Order Consolidating Cases, consolidated complaint, and notice of hearing (the complaint) by the Regional Director for Region 28 of the National Labor Relations Board (the Board) on January 29, 2010. The complaint was based on unfairly labor practice charges filed, respectively, in Case 28–CA–22806 by Pablo Rivera (Rivera), an individual, and in Case 28–CA–22809 by Abram P. Tarango (Tarango), an individual (hereafter referred to collectively as the Charging Parties). The complaint alleges that Praxair Distribution, Inc. (the Respondent or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.<sup>1</sup>

Counsel for the General Counsel and counsel for the Respondent appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,<sup>2</sup> I now make the following findings of fact and con-

<sup>1</sup> All pleadings reflect the complaint and answer as those documents were finally amended at the hearing. In its answer, the Respondent admits the various dates on which the enumerated charges were filed, respectively, by Rivera and Tarango, and served on the Respondent as alleged in the complaint.

<sup>2</sup> The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 US 404, 408 (1962). Where witnesses

clusions of law

## FINDINGS OF FACT

### I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent, a Delaware corporation with an office and place of business located in Phoenix, Arizona (the Respondent's facility), has been engaged in the retail sale, storage, and packaging of gases, including oxygen and helium. Further, I find that during the 12-month period ending December 8, 2009, the Respondent, in conducting its business operations, derived gross revenues in excess of \$500,000; and during the same period of time, also purchased and received at its Phoenix, Arizona facility goods valued in excess of \$50,000 directly from points located outside the State of Arizona.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Dispute*

The complaint alleges that the two Charging Parties engaged in protected concerted activity, specifically that they complained to the Respondent's supervisors and managers about alleged unsafe working conditions, sexual harassment, the improper conduct of certain supervisors, and other matters relating to wages, hours, and working conditions at the Respondent's facility. According to the General Counsel, the Respondent retaliated against the Charging Parties because of their concerted activity by discharging Tarango and by denying a promotion to Rivera. Further, the complaint alleges that the Respondent threatened its employees, created an impression of surveillance among them, more closely-monitored them, and refused to assign work to its employees because of their having engaged in protected activity. In an effort to prevent its employees from lodging future complaints, it is alleged that the Respondent promulgated an overly-broad and discriminatory rule prohibiting them from continuing to engage in concerted activities. All such conduct is alleged in the complaint to constitute a violation of Section 8(a)(1) of the Act, as in restraint of the employees' right to engage in concerted activity.

The Respondent denies the commission of any unfair labor practices. It is the position of the Respondent that Tarango was discharged for falsifying records that documented the results of certain tests required to be performed on the Respondent's product, and that Rivera was issued a written reminder for removing company documents from the Respondent's facility without authorization. The Respondent denies any failure to promote Rivera. Further, the Respondent contends that the actions taken against the Charging Parties were unrelated to any protected concerted activities in which they may have been

have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

engaged. The Respondent denies that any of its actions were discriminatory or in any way intended to interfere with its employees' right to engage in Section 7 activity.

#### B. *Background Facts and Resolution of Disputed Facts*

The Respondent is engaged in the business of the retail sale, storage, packaging, and transportation of gases, including oxygen and helium. At its Phoenix facility, the Respondent employs 15 drivers and 8 cylinder fillers. The plant manager is Dave Schmidt, to whom the two cylinder filler supervisors, Dan Beeker (night) and Jemal Norwood (day), report. William Friedlander, the lead quality reviewer, also reports directly to Schmidt. The Phoenix facility is overseen by the Respondent's area managers in Utah, who in turn report to the Respondent's executive managers in California.

The two Charging Parties are longtime employees of the Respondent. Tarango was employed by the Respondent for 19 years, and at the time of his discharge he was classified as the lead cylinder filler. In the lead position, he was the highest paid cylinder filler, having been promoted to that classification by Dave Schmidt. Schmidt testified that Tarango was a good employee, who he promoted to the lead position because Tarango was at the top of his pay-grade as a cylinder filler. At the time of the promotion, the Respondent had not utilized the position of lead cylinder filler for a significant period of time. Schmidt also testified that Rivera, who has been employed by the Respondent for 13 years, is a good employee. Rivera is one of the highest paid cylinder fillers.

Both Tarango and Rivera were concerned about various matters associated with their work and conditions of employment. They testified that over the years they had separately approached Schmidt about correcting these various issues. However, Schmidt failed to address their concerns, at least to their satisfaction. Ultimately, in July 2009, Tarango and Rivera began to collectively discuss their common concerns. They then decided to meet collectively with Schmidt, but were once again dissatisfied with his response. Allegedly, Schmidt told them that he was tired of their complaints, and that they should take their problems to Jemal Norwood, a newly hired supervisor.

It was their frustration with local management's failure to address their complaints that led to the decision to bring the complaints to the attention of higher corporate management. Tarango and Rivera, along with their respective wives, met at Rivera's home and prepared a written "report" to submit to corporate management. This was a collective effort by Tarango and Rivera, with significant input from their wives, in particular Rivera's wife, Ana Rivera. She helped compose the report, contributed language, typed the report using her computer's word processor, and was the person who actually sent the report to various management officials by fax. Although it might at times appear otherwise, Ana Rivera was not an employee of the Respondent.

On October 20, 2009, the report was faxed to the Respondent's area director, Eddie Davis, and its vice president, Steve Bogard.<sup>3</sup> The report was entitled, "Violations: Business Integ-

<sup>3</sup> All dates are 2009, unless otherwise indicated.

rity, Safety, EEOC, and Human Rights.” The report was 12 pages in length, accompanied by a cover letter signed by both Tarango and Rivera. It was highly detailed, listing a multitude of complaints, including the following: employees forced to falsify pressure logs; the disrepair of hoses, an air compressor, and other equipment used to fill gas cylinders; the use of cell phones by supervisors while driving forklifts and other vehicles around the work area; the use of company computers to download games and pornography; the use of “demanding tone of voice and despotic and authoritarian attitude” by supervisors; possible gang connections of employees; the violations of various Federal statutes; release to a customer of a misbranded product in 2005; filling cylinders that had not been properly tested; and the failure of managers and supervisors to wear safety gear.<sup>4</sup> (GC Exh. 4.)

It is without question that these complaints included safety issues and other concerns about working conditions. Further, it is obvious that in issuing their report Tarango and Rivera had deliberately gone over the heads of their local managers and sought redress of their complaints with the Respondent’s upper corporate managers. In the attached cover letter, the Charging Parties contend that “current plant management” has already been notified about the majority of their concerns, “without any success” in remedying them. They conclude that these complaints “need to be addressed in an urgent and accountable manner.”

Ana Rivera’s involvement in these proceedings was significant. She did not hesitate to directly contact the Respondent’s managers whenever the spirit moved her. She testified at the hearing, and, while I generally found her testimony credible, I do believe that she engaged in some exaggeration, embellishment, and histrionics. She testified that as early as October 12 she called Schmidt and told him that things were out of control at the plant, that he needed to be addressing concerns proactively, and that he needed to talk with her husband. On October 20, she called Eddie Davis in an effort to get his fax number and that of Steve Bogard. As Davis was reluctant to give her Bogard’s fax, she called Bogard’s office and spoke with his secretary who furnished the number. She spoke to Davis again on October 21, after he had received the report, and she testified that he spoke to her in an “intimidating way.” Allegedly he told her that as she was not an employee, she needed “to get out of this.” She informed Davis that she was involved because she cared about her husband, was concerned for his safety, and that his local manager just did not care to correct the problems at the plant. During this conversation, Davis apparently mentioned several times that since she was not an employee, these matters were none of her business, and that she should not be

<sup>4</sup> The Respondent maintains a national “hotline” system through which employees at any of its facilities or the general public can make complaints about the Respondent’s operation, anonymously or otherwise. It is undisputed that several days prior to submitting their report, Tarango, Rivera, and at least Mrs. Rivera, if not also Mrs. Tarango, placed approximately eight anonymous hotline calls. These calls registered complaints about many of the same issues raised subsequently in the report. Following the receipt of the report, the Respondent’s managers realized that Tarango and Rivera were also the source of these anonymous hotline calls, which the Charging Parties acknowledged.

involved.

Ana Rivera made these calls to Davis to his cell phone number, reaching him once while he was attempting to transit through the airport. While he told her that he was at the airport and that he was busy and having a hard time hearing her because of the noise, she was clearly a very difficult person to dissuade when on a mission to accomplish something. Further, according to Davis’ testimony, he informed Mrs. Rivera during these phone conversations that he was no longer responsible for the Phoenix plant. He identified Steve Bogard as the person who should be contacted regarding her husband’s complaints, as Bogard had overall responsibility for the plant.

On October 20, the day the report was faxed to Davis and Bogard, Schmidt called Rivera to his office. According to Rivera’s testimony, Schmidt was angry, mentioned that he thought that he and Rivera had a “good understanding,” and then asked, “Why is your wife calling and asking for Eddie Davis’ fax number? What is she trying to do? Why is she calling and getting this information? What is she trying to do?” Schmidt mentioned that he had helped Rivera in the past when Rivera had needed help, and asked, “So, why did you do that to me?” Obviously, Schmidt was concerned that Mrs. Rivera was contacting upper management, and, in so doing, was by passing him.

Rivera responded that he and Tarango had submitted a report of complaints to upper management because he had talked with Schmidt about his concerns for years, but Schmidt had just ignored him. Schmidt asked Rivera what was in the report, however, Rivera refused to tell him. Rivera asked Schmidt to “respect my privacy and my wife’s privacy,” and that if Davis and Bogard, the recipients of the report, wanted Schmidt to know what was contained in the report, they would tell him. That essentially ended the conversation. While Schmidt testified that he did not make the statements attributed to him, I credit Rivera. Rivera’s testimony was inherently probable. Schmidt was clearly concerned about Rivera and his wife taking their complaints “over his head” to upper management. It was only natural that he wanted to know what was in the report, and asked Rivera for this information.

Sometime later in the day on October 20, Rivera received a telephone call from Davis and Carson Mellott, a human resources manager with the Respondent. According to Rivera, Davis said that they had received a copy of the report submitted by Tarango and Rivera. Further, Davis said that he and Mellott were looking at the report, were taking it “very seriously,” and were going to “take care of it.” Rivera understood Davis to mean that an investigation would be conducted. Davis wanted to know who else knew about the report, and Rivera mentioned Dave Schmidt. Davis questioned Rivera about how Schmidt learned of the report, and Rivera recited the conversation that he had with Schmidt earlier that day. Davis asked Rivera not to talk with anyone else about the report while they were investigating the matter. Further, Davis asked Rivera why his wife was involved in the matter. Rivera responded that as his wife, she was worried about his health and safety, and wanted to see his complaints resolved.

For the most part Davis and Rivera agree as to the substance of this conversation. To the extent that there are any dispari-

ties, I tend to credit Rivera, whose version is more complete and is inherently plausible. It seems that the conversation was friendly, was not adversarial, and that Davis and Mellott agreed to conduct an investigation over the complaints, which was exactly what Rivera and Tarango had wanted to happen. The managers also apparently shared the Charging Parties' concerns that the matters contained in the report be kept confidential.

On the following day, October 21, Ana Rivera initiated a call to Davis. Apparently having been told by her husband that Davis had questioned her involvement, she wanted to explain her interest in the matter directly to Davis. According to Mrs. Rivera, she advised Davis that she was involved because she was concerned about her husband's safety in view of an explosion that had previously occurred at a Praxair facility in Missouri. She testified that in response, Davis informed her that she could not be involved in these matters because she was not an employee. Further, she contends that Davis informed her that both she and her husband should restrict their communication of the report's contents to Bogard alone.

Davis denied that the conversation occurred at all. While I do generally credit Mrs. Rivera, and believe that a conversation did occur on this date, I also believe that she may have oversimplified the conversation in question, as this portion of the conversation seems unnaturally abbreviated. I have no doubt that she tried to justify her involvement in the matter, however, I do not believe that Davis told her only that she could not be involved because she was not an employee. I think it much more plausible that Davis, who I observed to be rather thorough when testifying, explained that she could not be involved in presenting evidence as to the allegations in the report, since she was not an employee of the Respondent, did not work at the facility, and had no independent knowledge of the events in question, or words to that effect. In any event, even if, in fact, these additional words, or similar words, were not actually spoken by Davis, I believe that in the context of the conversation, Mrs. Rivera, or a similarly situated reasonable person, would have understood that such a meaning was implied.<sup>5</sup>

It is alleged by Rivera that on almost every work day since October 21, his immediate supervisor, Jemal Norwood, closely monitored his movements throughout the facility. Allegedly this included Norwood following Rivera to the breakroom during breaks and staying within a foot of him while doing so, occasionally glancing at the time. This also included following Rivera on every trip to the bathroom. According to Rivera, during these incidents of closely monitoring him, Norwood would stare at him, without speaking or performing any work tasks. It is claimed by Rivera that such close monitoring was never done prior to his having filed the report. However, Rivera does not claim that these incidents of monitoring occurred while he was engaged in any protected concerted activity, but apparently just at various random times.

Norwood testified that he engaged in no such monitoring of Rivera. He testified in a sincere, straightforward, no nonsense

way, with no indication of embellishment or exaggeration. He seemed genuinely bemused and indignant at the suggestion that he would engage in such conduct, which, in my opinion, was correctly characterized by counsel for the Respondent in his posthearing brief as "stalking." As Norwood pointed out, he also had occasions to use the bathroom and breakroom, during some of which times Rivera might also be present. I found Norwood highly credible. Although I also believe that Rivera was generally credible, he did seem prone to exaggeration, embellishment, and hyperbole. Further, he seemed overly sensitive and unnaturally suspicious. It is significant to note that despite this alleged daily monitoring, which, if true, would have been so blatant as to certainly be apparent to fellow employees, no coworkers, including Tarango, testified in support of Rivera. Further, it is highly suspect that although Rivera alleges this conduct to have been very distressing to him, he apparently never said anything to Norwood about it. Accordingly, I credit Norwood and conclude that no unusual monitoring of Rivera occurred.

At the time that the October 20 report was submitted, Tarango was the cylinder filler with the most seniority, and he held the title of lead cylinder filler. In that capacity, Tarango was the highest paid filler in the work group. Besides cylinder filling duties, he was also assigned the job of working in the laboratory part of the day where he performed certain tests on the various gases that the Respondent sold and shipped to customers. It is undisputed that Tarango performed almost identical duties both before and after his promotion to lead cylinder filler.

Rivera was the second most senior cylinder filler, and he testified that for several years, when Tarango was absent, he was generally assigned the lead tasks normally performed by Tarango. Such assignments were made during morning staff meetings. While the Respondent does not dispute this allegation, it does not appear that this was some type of formal arrangement, but, rather, just a custom of generally using Rivera as a substitute for Tarango.

In any event, it appears that on October 23, when Tarango was absent from work, David Schmidt announced at the morning staff meeting that he was assigning Tarango's job tasks for the day to night supervisor, Dan Beeker, and day production supervisor, Jemal Norwood.<sup>6</sup> It seems that the lab duties normally performed by Tarango were sought after as they involved more responsibility and were performed in the air-conditioned lab and office, rather than in the outside elements.

In September 2009, the Respondent acquired a competitor company, Valley Gas and Gear. Pursuant to that acquisition, the amount of helium distributed by the Respondent increased greatly. Schmidt determined that the Respondent's increased helium distribution required a dedicated cylinder processor working at the helium rack. Rivera was asked and accepted the assignment of essentially working full time at the helium rack. However, as with other cylinder processors, from time to time he floated to other racks to meet customer needs. The Respondent arranges cylinders to be filled with gas in various racks.

<sup>5</sup> In reviewing Mrs. Rivera's testimony, as it is somewhat disjointed, it is difficult to determine whether she had one or two telephone conversations with Davis on October 21. However, whether one or two conversations, the substance of the discussion was essentially the same.

<sup>6</sup> There is some indication from the record that this may also have occurred on a date in November, prior to Tarango's discharge.

Each rack is intended to hold cylinders to be filled with a specific gas, such as a particular medical gas or a particular industrial gas. While there was some brief, cryptic testimony that on several days Rivera was reassigned from the helium rack to the less desirable mixed gas area, there is no probative evidence that this was any more than a brief reassignment to handle immediate customer needs.

Jemal Norwood's employment history with the Respondent requires some explanation. He basically ran Valley Gas and Gear as a plant manager when it was an independent business. Following its acquisition by the Respondent in September, Norwood was hired by the Respondent as a supervisor. However, his full integration into the Respondent's operation took some time, as initially he was kept busy servicing the former customers of Valley Gas and Gear. According to the uncontested testimony of both Norwood and Schmidt, among Norwood's new duties, he was assigned to perform lab testing and, in particular, a test known as a "settle pressure test." It appears that Norwood began to perform these duties in October, during which time both he and Tarango shared the lab work. Thereafter, while Tarango was still employed by the Respondent, and during his absences from work, it seems that Schmidt, as part of his attempt to integrate Norwood into his new position, did assign lab work more and more of the time to Norwood. Of course, this caused a corresponding reduction in the amount of lab work available to Rivera.

It is important to note that Norwood was the first production manager that the Respondent had employed in a number of years. Prior to hiring Norwood, Schmidt had, along with his other duties, performed as the day time supervisor, with Beeker doing that job at night. Similarly, Tarango was promoted to the position of lead cylinder fill, despite the absence of that position for a number of years. Schmidt's testimony that he filled the position solely to give Tarango, who was at the top of his pay grade, an avenue for a salary increase went unchallenged. According to Schmidt's un rebutted testimony, Tarango performed the same duties both before and after his promotion to lead cylinder filler. On this basis, the Respondent argues that once Tarango was discharged, it had no need to replace the lead cylinder operator position with Rivera or any other employee.

For reasons that will be apparent later in this decision, much testimony was taken about a test performed on filled cylinders referred to as a "settle pressure test." Prior to his termination, Tarango performed most of these tests. Subsequently, the tests have been performed primarily by Norwood. While various witnesses testified about the test and its importance, or lack thereof, the best explanation came from the testimony of David Bauer, division safety manager.

According to Bauer, a settle pressure test is a U.S. Food and Drug Administration requirement. It involves taking one cylinder a day from each one of the medical racks after it has been filled, isolating the cylinder, allowing the pressure in the cylinder to settle, and then the next morning placing a gauge on the cylinder to determine its pressure based on temperature. All the cylinders in a rack are filled at one time. As the cylinders are filled, the temperature inside increases. When the test cylinder is allowed to sit for a time, meaning settle, the temperature decreases. Since the pressure is based in part on temperature, a

settled cylinder will give a more accurate measurement of its pressure. The purpose of the test is to ensure that the cylinders are not over filled or under filled with a volume of cubic feet of product. As all the cylinders in a rack are filled at the same time, the test cylinder will reflect not only its own pressure, but that of all the other cylinders in the rack.

It appears that the only real concern with cylinders that are out of compliance is that when they are over filled, there is some possibility if dropped or otherwise mishandled, a cylinder could explode. Of course, an under filled cylinder results in the customer receiving less product than it paid for. However, this is not a safety issue.

Logs are kept to record the results of various tests performed on the gases and cylinders. The settle pressure test results are recorded on such a log. When a cylinder fails the settle pressure test, the failure is noted on the log and an effort is made to determine why the cylinder was improperly filled. Equipment is checked such as gauges and hoses and, where necessary, replaced. If the problem is with the cylinder filler, he is counseled as to the correct procedure to follow. While the test cylinder was retained for the time needed for it to settle, the other cylinders from the rack have usually been transported to the customer.

Dave Schmidt testified that it is a violation of U.S. Department of Transportation regulations to transport over filled cylinders, apparently because of the potential for an explosion. However, according to Schmidt, if the cylinders are only slightly over filled, the usual situation, it is not unsafe to transport them. Dave Friedlander, a service technician and the lead quality assurance reviewer, testified without challenge that while the DOT had previously required that a settle pressure test be performed on all gas cylinders (medical and industrial) to determine whether the cylinders were in compliance, towards the end of calendar year 2009 that mandatory requirement was repealed. While no longer required to perform the settle pressure test, the Respondent has continued to do so as a quality assurance measure.

There was some disagreement among the witnesses as to what steps are taken to retrieve the shipped cylinders from a rack that has failed the settle pressure test. However, the consensus among the witnesses seemed to be that the shipped cylinders are almost never recalled. In any event, according to Friedlander, where the cylinders have not yet been shipped there is only very minimal cost in money and time in bringing the cylinders into compliance. For the industrial gases, the excess product is merely bled from the cylinders. The process for medical gases is a little more involved as the excess gas cannot simply be bled out. The cylinders must be emptied and then refilled. According to Friedlander, an entire rack of medical gas cylinders would take 60-90 minutes to empty and refill.

The Respondent's managers were uniform in their testimony that the failure of a settle pressure test was essentially "no big deal." They contend that it would result in merely some paper work showing that the test cylinder had failed, and in an effort to correct the problem so that it did not reoccur. As the shipped cylinders from the rack were almost never recalled, there was very little cost incurred by the Respondent or inconvenience to the customer when the settle pressure test failed.

Abram Tarango had the primary responsibility of conducting the settle pressure test. After performing the test, it was his job to record the results on a log, and where the test had failed, to bring it to the attention of quality assurance reviewer Friedlander. In turn, Friedlander had certain responsibility for recording the test results on a log, and for ensuring that the problem that caused the failure, whether equipment or operator error, was corrected and would not reoccur.

In the report of October 20, Tarango and Rivera had called for an investigation of their complaints. An investigation is, in fact, just what they got. Carson Mellott, human resource manager, and Sean Covert, corporate security investigations manager, traveled from their respective offices to the Phoenix plant precisely to conduct such an investigation. On or about October 26 or 27, Rivera and Tarango were summoned to separate meetings with Mellott and Covert. Both Rivera and Tarango protested being interviewed outside the presence of the other. However, explaining the need to interview them separately due to privacy concerns, the managers denied the requests and insisted that the interviews must be conducted separately. Tarango and Rivera reluctantly agreed.<sup>7</sup>

Both Tarango and Rivera testified that while the managers covered many of the items listed in the report, some were skipped over. According to Tarango, Covert seemed to be defending Dave Schmidt, reminding Tarango of the positive things that Schmidt had done for him. Further, during the interview and in response to the report's allegation concerning the falsification of documents, Tarango admitted that for approximately a year and a half, he had been falsifying records concerning settle pressure test readings. He indicated that he had done so as many as two or three times a month. However, Tarango claimed that his falsifications were at the insistence and direction of Bill Friedlander.<sup>8</sup> Tarango alleged that on those occasions when he notified Friedlander of a failed settle pressure test, Friedlander told him to "take care of it," or to "make it look like it passed." Tarango claimed that he felt he must comply with Friedlander's direction, although he did not contend that Friedlander threatened to take any specific action against him if he failed to do so.

Friedlander denied ever telling Tarango to falsify the settle pressure test records. During the course of the hearing, the undersigned asked virtually every witness for the Respondent and the General Counsel whether that witness could think of any advantage ensuing to the Respondent or to Friedlander

<sup>7</sup> Counsel for the General Counsel stated at trial that the General Counsel was not alleging the Respondent's refusal to allow the two employees to be interviewed collectively as a violation of the Act. However, he indicated that the General Counsel was arguing that the refusal was evidence of animus. Extant Board law holds that in a non-union setting, an employee does not have a Sec. 7 right to refuse to attend an investigatory interview without a representative being present. *IBM Corp.*, 341 NLRB 1288 (2004). Thus, as the Respondent could lawfully insist that Rivera and Tarango attend the interviews separately, that insistence cannot, therefore, demonstrate animus towards the employees' protected concerted activity.

<sup>8</sup> The complaint alleges that Friedlander is a supervisor and agent of the Respondent, an allegation that is denied in the Respondent's answer.

from having Tarango falsify the test logs to make it appear that the cylinders in question had passed the settle pressure test. No witness, including Tarango and Rivera, could give a satisfactory explanation as what advantage might exist, other than a very limited savings in time and paper work.

Further, counsel for the General Counsel has failed in his burden of establishing that Friedlander was a statutory supervisor.<sup>9</sup> Counsel extensively questioned both Friedlander and other witnesses regarding Friedlander's duties in an effort to show that he exercised any of the indicia of supervisory authority under Section 2(11) of the Act. However, counsel's efforts failed, as all the witnesses testified that Friedlander's duties consisted of performing maintenance work and functioning as the lead quality assurance reviewer. Not only did counsel's efforts to establish any of the enumerated indicia of supervisory authority fail, but his efforts to show secondary indicia also were to no avail.

In the alternative, counsel for the General Counsel argues that Friedlander was an agent of the Respondent under Section 2(13) of the Act. However, the evidence is simply inadequate to establish that either the Respondent held Friedlander out to be its agent for some purpose, vesting him with actual authority; or that the Respondent acquiesced in Friedlander's actions, which would demonstrate to employees that he was speaking or acting as a conduit on behalf of the Respondent, establishing apparent authority.

The employee witnesses testified that Friedlander had a temper and when approaching him, they were concerned that he might "blow up." However, I do not believe that Tarango was genuinely concerned about losing his job if he disobeyed Friedlander, who was merely a coworker and neither a supervisor or an agent of the Respondent. I accept Friedlander's testimony that he spends 20 percent of his time as a service technician and the remainder as a quality assurance reviewer. While he is the last reviewer, meaning that he reviews the work of the other reviewers, this is mostly an administrative or clerical function. He can request that the reviewers correct their mistakes, but there is no evidence that he has the authority to take any action against other employees if they refuse his request, or to effectively recommend that management do so.

The suggestion by Tarango and Rivera that Friedlander wanted Tarango to falsify the settle pressure test results because he did not want to do the additional paper work is "very thin." The additional paper work was minimal, and the cost in time and money to the Respondent was de minimis, as there was almost never an actual recall of product from customers once delivered. Accordingly, I credit Friedlander's contention that he never asked of, or suggested to, Tarango that he falsify the settle pressure tests to make it appear as if the cylinders passed, when in fact they had failed. Friedlander's testimony is inherently plausible and internally consistent when compared to the other available evidence and witness testimony. Accordingly, I discredit Tarango's testimony and contention that he falsified the records at Friedlander's insistence, or that he did so because

<sup>9</sup> The party claiming that an individual is a supervisor under the Act bears the burden of establishing supervisory status. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001).

he was fearful of losing his job. Tarango admitted to Mellott and Covert that he had over a period of time repeatedly falsified the settle pressure test records. However, his true reasons for doing so remain a mystery to the undersigned.<sup>10</sup>

In response to their questioning, Tarango admitted to Mellott and Covert that he knew that he could be fired for falsifying company records. However, he told them that he thought that he was protected against termination by a “whistleblower law,” having alleged in the October 20 report that employees were falsifying records. Unfortunately for Tarango, as he was informed by those managers, there was no such whistleblower protection when an employee reports on his own misconduct, as Tarango had done.

Rivera, who was interviewed after Tarango, testified about the interview in a more complete, detailed manner. According to Rivera, the interview began with him telling Mellott and Covert about having observed Dave Schmidt in 2005 “misbranding product.” By this he meant that Schmidt had intentionally removed the labels on cylinders from one type of gas and replaced them with labels for a different type of gas, in order to show nonmedical gas as being of medical grade. Rivera allegedly had some type of documentation, which he claimed proved that Smith had allowed misbranded product to be delivered to customers. At the insistence of the managers, Rivera produced this “proof.” Mellott reminded Rivera that it was a violation of company policy to remove company documents from the facility without permission, and questioned Rivera as to why he had not reported this alleged misbranding in a more timely fashion. In response, Rivera acknowledged being in violation of company policy for the unauthorized removal of documents, and seemed to suggest that he had not come forward in a more timely fashion because he was afraid of retribution.

As with Tarango, Rivera testified that the managers did not seem interested in every complaint that they had registered in their report, but, rather, concentrated on only certain of the complaints. According to Rivera, the next matter that the managers wanted to discuss was the Charging Parties’ allegation that there had been harassment of a sexual nature occurring during a lunch break that was tolerated by management. This allegation involved some “horse play” between employees Geronimo Abaraca and Adam Marquina. While not totally clear to the undersigned, the alleged sexual harassment apparently involved Abaraca touching Marquina’s buttocks and at least one of them exposing his underwear. As neither employee was reported to be offended by these actions, Mellott asked

<sup>10</sup> Still another reason for discrediting Tarango’s version of these events was his claim, as originally made in the October 20 report, that not only Friedlander, but also Schmidt had ordered him to falsify the settle pressure test records. It appears from Tarango’s testimony that he continued to make this claim about Schmidt through the initial stage of giving an affidavit to the Board during the investigation of this case. Subsequently, he apparently thought to change his affidavit and attempted to notify the Board agent assigned the case that Schmidt had not done as he had claimed. According to the testimony of Tarango, listing Schmidt along with Friedlander was simply an unintentional oversight on his part, which he regrets. However, I find this contention unworthy of belief.

Rivera why he was offended. Rivera answered essentially that sexual harassment should offend everyone who observed it, not merely those against whom it was perpetrated.

Next they discussed the Charging Parties’ complaint that Marquina had used a computer in the laboratory to download a pornographic video. This attempted download apparently resulted in the computer crashing, and required the Respondent to spend time and money in an effort to reestablish the computer so that it could function as intended. While I am not entirely sure what Rivera felt should have been the result of his having reported this incident, I assume that he was offended that Marquina did not receive some significant discipline for his alleged misdeed.

The managers then turned their attention to Tarango’s falsification of company logs, specifically the settle pressure test, and whether Rivera was aware of what Tarango earlier had admitted doing. Rivera acknowledged that Tarango had told him on a number of occasions that he was falsifying the settle pressure test results, allegedly because Friedlander and Schmidt had instructed him to do so. Further, Rivera informed Covert and Mellott that he had warned Tarango not to do so, but that Tarango was fearful of losing his job for refusing their orders.

While it does not appear that Tarango and Rivera were questioned regarding every item enumerated in their report, the managers did cover many of them. Also, other employees besides the Charging Parties were interviewed by Covert and Mellott during their visit to the Phoenix facility on October 26 or 27. However, in the interest of keeping the investigation as confidential as possible, the managers did not inform Tarango and Rivera as to who else was being interviewed.

Rivera testified that he complained to Covert and Mellott during his interview that they were not questioning him about all the items in the report. According to Rivera, they told him that their time in Phoenix was limited and they needed to be somewhat selective regarding which reported items to question him about. I will note for the record that Rivera tends to speak in a very laborious, circuitous, and verbose way, making it time consuming for the questioner to obtain a direct answer to a question.<sup>11</sup> In any event, despite the fact that the interview took several hours, Rivera was unhappy with what he considered to be a superficial interview. Finally, according to Rivera, Covert said several times during the interview that “somebody’s going to lose his job.” While this testimony was somewhat disjointed and confusing, it appears that Covert’s comment was related to Rivera’s testimony that he had told Tarango that Tarango could lose his job over his falsification of the settle pressure test results and Tarango’s acknowledgement that he was so aware.

It is unclear to the undersigned just how the interviews with Tarango and Rivera ended, but, in any event, they apparently understood that Covert and Mellott would conclude their investigation and then decide what action, if any, to take regarding the complaints and concerns that the Charging Parties had raised in their report. During this interim period, both Tarango and Rivera continued to perform their duties for the Respon-

<sup>11</sup> This may be because Rivera’s first or primary language was not English. In any event, Rivera, who I found to be intelligent, was clearly proficient in the English language.

dent, but allege that certain unusual events occurred.

As noted earlier, Rivera claims that Norwood more closely monitored his activities and movements around the facility. Specifically, he complains about an incident occurring on November 10. At the morning “tool box” meeting on that date, Dave Schmidt informed the cylinder fillers that some cylinders had been found to be over pressurized and the gauges had been fixed. However, Schmidt wanted the fillers to watch and be sure that the problem did not reoccur. According to Rivera, when the meeting concluded he went to the oxygen manifold, where those cylinders had been filled, and looked at the gauges. Norwood passed by and asked, “Are you still investigating?” Rivera replied that he was just looking at the gauges, and he questioned whether that was a “problem.” Rivera is obviously suggesting that Norwood’s comment was intended to relate back to the matters raised in the Charging Parties’ October 20 report.

However, Norwood remembers the incident somewhat differently. After the morning meeting ended, he noticed Rivera not working, but merely standing around looking at the recently faulty gauges on the oxygen rack. Norwood noticed that Rivera continued to stare at the rack for an extended period of time, and, as his supervisor, Norwood felt that Rivera should get back to work. Finally, he asked Rivera what he was doing, and Rivera replied that he was just looking at the oxygen rack to see what was going on. According to Norwood, he told Rivera, “We are done investigating this. There is no need to investigate it any further. You need to get back to work.” That ended the conversation.

For the reasons that I stated earlier, I found Norwood to be a credible witness. Also, for the reasons that I gave earlier, I found Rivera to be overly sensitive and unnaturally suspicious. This incident is merely a continuation of Rivera’s claim that Norwood was more closely monitoring him following his submission of the October 20 report. As I noted above, I credit Norwood and do not believe that any such monitoring occurred. Accordingly, I am of the belief that Norwood did nothing more on November 10 than he was expected to do as a supervisor, and directed Rivera to return to work when he observed him not working for an extended period of time.

On November 8, Rivera and Tarango submitted a second report to upper management, including Sean Covert, Steve Bogard, Jeff Gage, associate director of physical security, and Bill Woods, director of safety. This second report was entitled “Annex to Previous Report.” (GC Exh. 6.) It was four pages in length, plus cover pages, and primarily concerned the claimed misconduct of Plant Manager Schmidt, who allegedly ignored a fire alarm that was engaged and resulted in the Respondent’s work force leaving the plant, with the exception of Schmidt. Further, it was claimed that when Schmidt did finally exit the facility, he was not wearing his personal protection equipment (PPE). As with the earlier report, it was faxed to the four recipients.

By email dated November 11, sent to both Rivera and Tarango, Covert indicated that he had received their latest report, the “annex.” He informed them that an investigation of the newest complaint had immediately commenced, and that at the present time the investigation of both reports was consid-

ered complete. However, his investigation report and recommendations were being evaluated by higher management, which could take an additional 5–10 days. As a result, he asked them to, “Please refrain from making any additional calls or faxes related to *already presented allegations* to provide us the time to address the myriad of concerns you have presented. However, if you have any new issues not already avowed in any fax or hotline call please e-mail these concerns to me directly.” (Emphasis as contained in original document.) The email concluded that there would be one response to all the faxes and calls from the Charging Parties, but that because of privacy concerns, Rivera and Tarango would not be advised of any disciplinary action that did not involve them directly. (GC Exh. 15.)

On November 20, while at work, Rivera was called into Dave Schmidt’s office. Carson Mellott was present and he presented Rivera with a letter dated November 18. (GC Exh. 9.) The letter indicated that the Respondent had concluded the investigation of the various complaints and concerns that Rivera had made, including those contained in the document faxed on October 20. In the letter, which he authored, Mellott indicated that the Respondent “appreciate[d] [Rivera] bringing these matters to [the Respondent’s] attention.” However, the letter went on to remind him that “the unauthorized removal of company operating or business records from the site is inappropriate and should not occur in the future. Additionally, if you become aware of a future issue of genuine concern, you should report it in a timely manner, not years after the fact.”

Rivera was unhappy with the letter and asked Mellott what was the result of the investigation. Mellott told Rivera that for privacy reasons he could not tell him what actions were taken regarding other individuals whose conduct had been questioned by the Charging Parties in their two reports, but that their concerns had been addressed and they might well begin to see changes at the plant. Rivera was very distressed, stating that he believed he had a right to know what action the Respondent had taken regarding his and Tarango’s numerous complaints. After Mellott again refused to give him any information, Rivera simply signed the letter of November 18, at Mellott’s insistence, and wrote on the page that, “To me this is a notification only.” (GC Exh. 9.) It appears undisputed that the reference in the letter to unauthorized removal of company records and reporting concerns in a timely manner was directly related to Rivera’s acknowledgement that in 2005 he had observed Schmidt mislabeling products, and Rivera’s removal of some company documents as evidence that this had happened.

Tarango also met with Mellott at the plant on November 20. Mellott handed him a letter dated November 19, which indicated that the Respondent had concluded its investigation of a number of allegations, including “falsification of Company documents.” Further, the letter stated that the investigation “established a more than reasonable basis to conclude that you violated Company policy. Accordingly you are discharged effective today.” (R. Exh. 4.) It is undisputed that the reference to falsification of company documents was directly related to Tarango’s admission that over a period of about 18 months that he had on numerous occasions falsified the settle pressure test results to make it appear that cylinders had passed the test,

when in fact they had failed. On cross-examination by counsel for the Respondent, Tarango testified that the employee handbook, of which he received a copy, provided for termination of an employee who falsified company documents.

While Rivera and Tarango were never formally notified of what other specific action the Respondent took in response to the investigation, there were certain other actions taken. Carlson Mellott sent Sean Covert a report dated November 3 stating his findings on the issues raised by Rivera and Tarango. (GC Exh. 7.) On November 12, Mellott prepared a "Closeout Report," indicating the results of his investigation into the hot line calls and the Charging Parties' report of October 20. (GC Exh. 8.) Most of the allegations made in the hot line calls and the report were found to be unsubstantiated or otherwise determined to have no merit. This included the conclusion that as Schmidt and Friedlander had denied any involvement with Tarango in falsifying the settle pressure test logs, there was insufficient evidence to establish their culpability. Similarly, regarding the claim that in 2005 Schmidt had misbranded product, the allegation was found to be unsubstantiated.

However, recommendations were made that disciplinary actions should be taken in regard to four individuals, in addition to Rivera<sup>12</sup> and Tarango. Those recommendations were subsequently adopted by the Respondent. Ultimately the following actions were taken: Schmidt received a written warning for using a cell phone in the plant while operating equipment, and for occasionally failing to wear personal protective equipment (PPE). Employee Sam Castillo received a written warning for utilizing a cell phone while driving a forklift, and for handling cylinders on occasion without gloves. Employee Alonso Mata received a written warning for inappropriate behavior. (The closeout report concluded that Mata had dropped his pants quickly, flashing his underwear to a coworker, but not a bare bottom as alleged.) Finally, employee Adan Marquina received documentation of a prior warning for his unsuccessful attempt in October of 2008 to download nonbusiness-related material from the internet. The material was found to be a music video. (The video was not found to be pornographic as alleged.) Also, as noted, Tarango was fired, and Rivera was issued the letter of November 18.

Ana Rivera testified that she became very concerned about the way her husband was being treated at work, at least as he explained it to her. She decided to complain to Sean Covert and called him on his cell phone on November 24. Covert places the call one day earlier, but in any event she reached him while he was on vacation, waiting in a hospital for his wife to be discharged after having just delivered their second child. He told her where he was and what he was doing there, and she congratulated him and offered some pleasantries. However, according to Covert, she was insistent that he needed to call her husband at the plant immediately because the managers were

<sup>12</sup> It should be noted that while the letter given to Rivera on November 20 and dated November 18 (GC Exh. 9.) seems on its face to constitute a written warning, the letter does not describe itself as such, unlike the other letters issued to Schmidt, Castillo, Marquina, and Mata, each of which is labeled as a written warning. Further, the complaint does not allege the issuance of this letter to Rivera as discipline constituting an unfair labor practice.

"micromanaging" him at work. Covert asked her whether her husband was in any danger of being hurt or of hurting others, and she replied in the negative. He then advised Mrs. Rivera that her husband had his phone number and needed to call him, rather than the other way around. According to Covert, Mrs. Rivera then changed her tone and said that she now knew what side Covert was on, that he should be thanking her for reporting these matters and doing a favor for Praxair, at which point she hung up.

Mrs. Rivera's version of this phone conversation is somewhat different. She claims that as soon as she told Covert who she was that he wanted to close the conversation, telling her that he was with his wife and their baby at the hospital and that was more important to him at the moment. She congratulated him on the birth of his child, but insisted that he call her husband at work. She told him that her husband was being retaliated against at work for having made safety complaints.

According to Mrs. Rivera, Covert used a rather condescending tone of voice towards her and said something to the effect that her husband should be happy that he had a job, and he should "stop reporting things, to stop going around inspecting things, because [Covert] was the inspector [her husband] was not." Further, he warned her that if her husband did not do so, he "might be in trouble, and that he should confine himself to doing his job and only his job." Covert allegedly ended his conversation by telling Mrs. Rivera that her husband should call him on Monday, after Thanksgiving. She claims that the conversation had become very tense, and she sarcastically told Covert that she now understood which side he was on, and "how much [he] really appreciated [her husband's] information in the report." That was the end of her conversation.

As I indicated above, I found Mrs. Rivera to be generally a credible witness. However, I also noted that I found her to have a tendency to engage in exaggeration, embellishment, and histrionics. I noted that she was apparently a difficult person to dissuade when on a mission to accomplish something. This is obvious from her conversation with Covert while he waited at the hospital for his wife and new born infant to be discharged. Even more than that, Mrs. Rivera demonstrated how intrusive she could be. Her insistence that Covert, a husband and father with his wife and new born infant in the hospital, attend immediately to her directive to call Mr. Rivera was really a request that was "beyond the pale."<sup>13</sup>

While I can imagine the annoyance and distress that Covert felt towards Mrs. Rivera as she intruded on his personal time and situation that does not negate the words that he spoke in response. I believe that he did respond as she has testified to, and I find her version of these events more credible than his. While Covert may well have spoken in understandable anger, as an agent and supervisor of the Respondent his words had meaning under the Act, and for that reason cannot be justified.

As noted, Tarango was terminated on November 19. The complaint alleges that since that date, the Respondent has failed and refused to assign to Rivera the job previously held by Tarango, lead cylinder filler, thereby, denying him a promotion.

<sup>13</sup> Meaning unacceptable, outside agreed-upon standards of conduct. See *Phrase Finder, Google Custom Search*.

As was mentioned above, the position of lead cylinder filler had been vacant for a significant period of time when Schmidt promoted Tarango to the position. According to Schmidt, Tarango had topped out in his grade as a cylinder filler, and without the promotion he would receive no further wage increases. The position of lead cylinder filler paid 50 cents more per hour. There was no posting for an opening in the lead cylinder filler position. Rather, Schmidt just gave Tarango the job, resulting in his receiving a wage increase. According to Schmidt, Tarango's duties did not change. He continued to work in the lab performing tests on various gases and cylinders, and, as needed, also filled cylinders. As explained above, following Tarango's termination, his lab work duties were split between production supervisor, Norwood, and evening supervisor, Dan Beeker. The position of lead cylinder filler has remained vacant.

Rivera also complains that he was suddenly denied access to the company computer needed to print labels for the mixed gas cylinders. Rivera testified that he always had unfettered access to the lab, where the computer was located, in order to perform particular associated tasks. However, beginning about November 30, Norwood began to lock the lab door, requiring that Rivera knock on the door in order to first gain entry. By this time, Norwood was performing the daytime lab testing duties previously performed by Tarango. Since he was spending so much time in the lab, he utilized the desk in the lab for his paper work, both official company documents and personal papers. Norwood testified that he received a call from night supervisor, Beeker, who indicated that he had observed Rivera "rifling" through Norwood's desk in the lab. Allegedly, that was the reason that Schmidt and Norwood decided to start locking the lab door. However, Norwood never accused Rivera of rifling through his desk, and Rivera testified at the hearing that he did no such thing.<sup>14</sup>

### C. Analysis and Conclusions

#### 1. The protected concerted activity

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1987); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001); *Meyers Industries*, 268 NLRB 493, 479 (1984). An employer violates Section 8(a)(1) of the Act when it discharges an employee, or takes some other adverse employment action against him, for engaging in protected concerted activity. *Rinke Pontiac Co.*, 216 NLRB 239,

<sup>14</sup> While the complaint does not specifically allege this locking of the lab door as a violation of the Act, it is apparently raised by counsel for the General Counsel as support for the contention that the Respondent's managers were harassing Rivera in response to his having filed the two reports on misconduct at the plant.

241, 242 (1975).

The Board, with court approval, has construed the term "concerted activities" to include "those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB 882 (1986), affirmed 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988); See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (observing that "a conversation may constitute a concerted activity although it involves only a speaker and a listener" if "it was engaged in with the object of initiating or inducing or preparing for group action or . . . it had some relation to group action in the interest of employees"). See also *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing as an example "the lone employee" who "intends to induce group activity").

In the matter before me, there is no doubt that Tarango and Rivera were engaged in protected concerted activity. The hotline calls that they placed, and the two reports dated October 20 and November 8 faxed to upper management clearly constituted their collective attempt to bring their grievances, and presumably those of other employees, to the attention of management. Without question the subject matter of these calls and reports concerned the wages, hours, and working conditions of the employees at the Phoenix plant. The topics raised included safety issues, sexual harassment, job performance, favoritism, and the failure of local management to address these issues. So obvious are the protected concerted activities engaged in by the Charging Parties that the Respondent does not seriously challenge this threshold finding, nor does it deny that management was aware of these activities. After all, the Respondent's upper managers directly responded to these complaints, conducting an extensive investigation of these allegations. However, the Respondent vigorously denies that it took any adverse action against either Tarango or Rivera because of their protected concerted activity. This is the gravamen of the case.

#### 2. The termination of Tarango

Tarango was a longtime employee of the Respondent, and a number of supervisors testified as to his superior performance as an employee. Plant Manager Dave Schmidt promoted him to the position of lead cylinder filler, a position which had been vacant and apparently did not need filling, simply as a way to provide him with additional monetary compensation. While the General Counsel alleges that the Respondent fired Tarango because of the complaints that he and Rivera raised in their calls and reports, the Respondent defends its action based on Tarango's admission, during the investigation of the complaints, that he had over an extended period of time falsified the results of numerous settle pressure tests. Accordingly, it is necessary for me to determine the Respondent's true motivation in discharging Tarango.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1)

turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board’s *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has not made a prima facie showing that Tarango’s protected concerted activity was a motivating factor in the Respondent’s decision to terminate him. In *Tracker Marine, LLC*, 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer’s motivation under the framework established in *Wright Line*. Under the framework, the judge held that the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee’s protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act.<sup>15</sup> To rebut such a presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Mano Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

It is axiomatic that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions. Further, the Board has consistently held that communication between employees “for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities.” *Phoenix Transit Systems*, 337 NLRB 510 (2002), citing *Container Corp. of America*, 244 NLRB 318, 322 (1979).

As I have already found, there is no doubt that Tarango and Rivera were engaged in protected concerted activities by discussing among themselves their complaints about local management, as well as in communicating those complaints directly to upper management in the form of hotline calls and their two reports, respectively dated October 20 and November 8. Of course, the evidence also establishes that numerous upper management officials were aware of those complaints, having either been the recipients of the reports faxed to them by the Charging Parties, or by having been so informed by other managers. Concomitantly, it was the Respondent’s security investigations

<sup>15</sup> More recently, the Board has indicated that, “Board cases typically do not include [the fourth element] as an independent element.” *Wal-Mart Stores*, 352 NLRB 815, 815 fn. 5 (2008); citing *Gelita USA Inc.*, 352 NLRB 406, 406 fn. 2 (2008); *SFO Good-Nite Inn, LLC*, 352 NLRB No. 268, 269 (2008).

manager, Sean Covert, and human resources manager, Carson Mellott, who conducted the investigation into the complaints raised in those calls and reports. This was the very investigation that Tarango and Rivera had requested.

Obviously, the discharge of Tarango on November 19 constituted an adverse employment action. But, was the discharge retaliation for Tarango’s protected concerted activities? I do not believe so.

Tarango and Rivera wanted an investigation by upper management into their complaints. That was their goal in making the hotline calls and in submitting the two reports. They felt that local management was unresponsive to their concerns, and they wanted upper management to look into those concerns and to remedy them. The evidence established that management took their complaints very seriously, dispatching two high ranking officials, Covert and Mellott, to Phoenix to investigate the claims. Following their investigation, the Respondent’s managers took certain affirmative action, including the issuance of letters of warning to Dave Schmidt, Sam Castillo, Adan Marquina, and Alonso Mata. Presumably, the Charging Parties had no problem with this action. However, once they submitted their complaints, they had no control over the information uncovered in the Respondent’s subsequent investigation. As with the opening of the famous “Pandora’s Box,”<sup>16</sup> the investigation led in a direction that the Charging Parties had not expected, namely back towards them. I am of the view that it was not their protected activity that resulted in Tarango’s discharge, but, rather, the discoveries made during that investigation, which their complaints had precipitated.

The report of October 20 mentioned the falsification of company logs, specifically that Tarango had been falsifying settle pressure tests. While the report claimed that Friedlander and Schmidt had coerced Tarango into registering these false test results, the Respondent’s investigation did not substantiate this claim.<sup>17</sup> Tarango, having admitted his repeated falsification of the settle pressure test results, the Respondent terminated him in accordance with its policy against the falsification of records. Tarango acknowledged that he was aware of that policy, and he understood that he could be terminated for falsifying test results. His attempted reliance on some “whistleblower” protection was obviously misplaced.

Similarly, Rivera had admitted during the investigation that he had removed company documents from the facility in 2005, without permission, in an effort to document Dave Schmidt’s alleged misbranding of product. He also understood that the unauthorized removal of documents was a violation of company policy, for which he received a written letter of disapproval.<sup>18</sup>

<sup>16</sup> Meaning a prolific source of troubles. See *Webster’s New Collegiate Dictionary*.

<sup>17</sup> As noted above in the fact section of this decision, I concluded that Friedlander’s denials were credible, and I discredited Tarango’s claim that he had been coerced into falsifying the settle pressure test results. Further, Tarango retracted his claim that Schmidt had been involved.

<sup>18</sup> While there is some disagreement as to whether the letter issued to Rivera on November 20 and dated November 18 constituted a written warning or simply a “reminder,” the question is moot as the General

Accordingly, I do not believe that it was Tarango's protected concerted activity (the submission of the hotline calls and the two written reports) that led the Respondent to terminate him, but, rather, his admissions made in the report of October 20 and during the investigation of his complaints. The General Counsel has failed to meet his evidentiary burden and make a prima facie showing that any protected activity engaged in by Tarango was a motivating factor in the Respondent's decision to terminate him. However, even further assuming, for the sake of argument, that the General Counsel had established a prima facie case, the evidence is clear that the Respondent would still have discharged Tarango, even absent any protected activity.

The Respondent submitted significant evidence to demonstrate that it has a long, well-established policy that provides for the termination of employees who falsify records. Covert's testimony was rebutted that, "It's standard practice and standard procedure that falsification of documents results in termination . . . 100 percent of the time." In this regard, he mentioned the falsification of different types of records including "timesheets, reports, [and] entries." In an effort to document that testimony, the Respondent introduced into evidence records showing that employees had been terminated in the 2008–2009 time period for various types of falsification as follows: misrepresenting the reason for an absence; records of jury duty; records of improperly filled cylinders; results of quality assurance tests; a high pressure cylinder quality control document; a shipping document and an invoice; fictitious inventory count; Department of Transportation logs; timesheets; time records; and company benefits. (R. Exh. 6.)

While counsel for the General Counsel was able to demonstrate that for certain misconduct, including destroying company property, unsafe driving, poor work performance, and mishandling loads and other transportation errors, employees were given discipline less severe than termination, counsel was not able to show that any employee who falsified records was disciplined other than through termination. (GC Exhs. 20, 21, 22.) Accordingly, the General Counsel was unable to show that the Respondent acted in a disparate fashion in terminating Tarango.

In summary, I find and conclude that counsel for the General Counsel has failed to establish a prima facie case that Tarango was terminated because he engaged in protected concerted activity. The probative, credible evidence does not show that such activity was a "motivating factor" in the Respondent's decision to terminate Tarango. Further, I find that even assuming the evidence is viewed as having established a prima facie case, the Respondent has rebutted that presumption as the evidence still supports a finding that the Respondent would have terminated Tarango, even in the absence of any protected concerted activity in which he engaged. See *Mano Electric, Inc.*, supra; *Farmer Bros. Co.*, supra. Accordingly, I shall recommend that complaint paragraph 4(o), and to the extent that they are related to it, paragraphs 4(p), (q), and 5 be dismissed.

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Counsel did not allege the issuance of this letter as disciplinary, and, as such, a violation of the Act.

### 3. The failure to assign duties to and/or to promote Rivera

It is alleged in paragraph 4(m) of the complaint that on about October 23, the Respondent failed and refused to assign lead cylinder filler and lab duties to Rivera. Similarly, it is alleged in paragraph 4(n) of the complaint that since November 19, the Respondent has failed and refused to assign lead cylinder filler and lab duties to Rivera, thereby denying him a promotion. These related allegations are based on the General Counsel's contention that such adverse employment actions were the result of Rivera having engaged in protected concerted activity. Accordingly, I will review these allegations under the *Wright Line*, supra, analysis.

As is set forth in detail above, there is no question that Rivera was engaged in protected concerted activity in the course of his and Tarango's hotline calls and the submission to upper management of the two reports dated October 20 and November 8. Obviously, Rivera was engaged in an activity protected by the Act. Equally clear, the Respondent's managers were aware of Rivera's protected concerted activity as of at least October 20, the date the first report of complaints was received by various managers.

However, in my view, the General Counsel has failed to establish the third element needed to show the existence of a prima facie case, namely an adverse employment action. See *Tracker Marine*, supra. In the fact section of this decision, I set out in detail the duties performed by Tarango, specifically certain lab work, the settle pressure test, and, as needed, cylinder filling duties. I credit Dave Schmidt's testimony that Tarango's duties were the same, both before and after his promotion to lead cylinder filler. Further, I accept Schmidt's testimony as credible that there was no need to fill the lead position, but that he promoted Tarango to that position merely in an effort to provide Tarango, who had been at the top of the cylinder filler salary scale, with a salary increase. At the time Tarango was given the promotion, the position of lead cylinder filler had been vacant for a significant period.

The duties that Tarango performed in the lab were considered desirable since the work was performed indoors, in a climate controlled environment, and the lead position paid 50 cents more per hour. Rivera, as the cylinder filler with the most seniority after Tarango, and as a good employee, had typically filled in for Tarango when he was absent from the facility. However, as I set forth in detail above, that all changed after the Respondent acquired Valley Gas and Gear, and Jemal Norwood began his employment as the production supervisor. Following a short acclamation period, Norwood began to share the lab and settle pressure test duties with Tarango. This integration of Norwood into the lab and testing work correspondingly reduced the opportunities for Rivera to perform this work.

There had never been any type of formal assignment of lab duties to Rivera from Schmidt when Tarango was absent. It had merely occurred on an ad hoc basis, as needed. In any event, on October 23, Norwood was announced as the substitute for the absent Tarango. It was simply an announcement by Schmidt at the morning tool box meeting that Norwood would be performing the lab duties that day, in the absence of Tarango. This did not constitute a formal permanent assignment. Whether Norwood, Rivera, or somebody else, would

have next been a temporary substitute for Tarango will never be known, as Tarango was terminated and a more permanent replacement was then needed.

The complaint specifically mentions this October 23 date. However, the evidence does not establish that Rivera had, based on some informal past practice, any reasonable, justified claim to the lab work. Accordingly, there is no probative evidence that merely because on that one date Schmidt assigned the lab duties to Norwood instead of Rivera that this constituted an adverse employment action. Thus, the General Counsel has failed to establish a prima facie case that Rivera was denied the opportunity to perform the lab duties on October 23 because of his protected concerted activities. The evidence is insufficient to show that Rivera's protected activity was a motivating factor in Schmidt's assignment decision on that date.

Further, even assuming, for the sake of argument, that a prima facie case had been established, the Respondent has rebutted that presumption and shown that Rivera would not have been assigned the lab duties on October 23, even in the absence of his protected concerted activity. Schmidt was in the process of giving his new production supervisor more responsibility. Norwood was sharing the lab and testing duties with Tarango, and, in the course of integrating him into the operation of the plant, Schmidt assigned him the lab duties of the absent Tarango on October 23. Accordingly, the General Counsel has failed to meet his burden of establishing that the failure to assign Rivera lab duties on October 23 was the result of his protected activity.

Closely related is the allegation in the complaint that since on or about November 19, the Respondent has failed and refused to assign Rivera to the lead cylinder filler position and to lab duties, thereby denying him a promotion. Tarango was terminated on November 19, and, according to the General Counsel, this created a vacancy in the lead cylinder filler position, which vacancy should have been filled by Rivera. The problem with this allegation is that the facts do not support the contention that a vacancy was created by Tarango's discharge.

The undisputed facts, as set forth above, show that the lead cylinder filler position had been vacant for an extended period of time when Schmidt gave the position to Tarango. There was no vacancy posting, but, rather, Schmidt simply gave the job to Tarango in an effort to give him a wage increase as Tarango was at the time at the top of the cylinder filler pay scale with no avenue for further wage increases. While the lead position paid 50 cents more per hour, there was no change in the duties that Tarango had been performing before the promotion.

Schmidt credibly testified that following Tarango's termination, he decided not to fill the position because with the acquisition of Norwood as production supervisor, Norwood could perform the lab work and the settle pressure tests.<sup>19</sup> Norwood credibly testified that, in fact, that is what he has been doing since Tarango was fired.

Based on this un rebutted testimony, I conclude that there was no vacancy created by Tarango's discharge that required the promotion of any cylinder filler or other employee to the

<sup>19</sup> Some of these duties were performed during the night shift by night shift supervisor, Dan Beeker.

position of lead cylinder filler. The Respondent could fill that position or not, as it desired and as its business required, so long as in not filling the position there was no unlawful discrimination. Since there was no position that required filling, and as the evidence did not establish that Rivera was denied a promotion that he was otherwise entitled to, I am of the view that there was no adverse employment action taken against him by the Respondent. Accordingly, I conclude that the General Counsel has failed to establish a prima facie case that Rivera had been denied a promotional opportunity by the Respondent because of his protected concerted activity.

However, assuming for the sake of argument that the General Counsel had established that Rivera's protected concerted activity was a motivating factor in the decision not to promote him to the lead cylinder filler position, the Respondent has rebutted that presumption. Assuming that there was a vacancy created in the position with the termination of Tarango, the Respondent has established through the credible testimony of Schmidt that Norwood was given those duties to perform in lieu of moving another cylinder filler into the vacancy. Schmidt testified that the duties previously performed by Tarango were assumed by Norwood as part of his responsibilities as the new production supervisor. Norwood corroborated Schmidt by credibly testifying that, in fact, he had been performing those duties full time since November 19, and part time prior to that date, in addition to his other duties as production supervisor. Accordingly, the Respondent has met its burden of showing that, even assuming the General Counsel had established a prima facie case, it would not have filled the vacant position of lead cylinder filler with Rivera, even in the absence of his protected concerted activity. See *Mano Electric, Inc.*, supra; *Farmer Bros. Co.*, supra.

In summary, as the General Counsel has failed to meet his burden of proof to establish either that Rivera was denied promotional opportunities or denied more desirable work because of his protected concerted activity, I shall recommend that complaint paragraphs 4(m), (n), and, to the extent that they relate to them, paragraphs (p), (q), and 5 be dismissed.

#### 4. Alleged interrogation by Schmidt

It is alleged in paragraph 4(b) of the complaint that on October 20, Dave Schmidt interrogated employees regarding their concerted activities and the concerted activities of other employees. From counsel for the General Counsel's posthearing brief, it is apparent that this allegation is intended to relate to a conversation that occurred in Dave Schmidt's office between him and Pablo Rivera. October 20 was the day that the report of that date was faxed by Mrs. Rivera to Eddie Davis and Steve Bogard. It was also the date that Mrs. Rivera called and first spoke with Davis and called Steve Bogard's office, all in an effort to get their private fax numbers so the report could be sent to them. Clearly she did not want to call local management in order to get the fax numbers since the report asked Davis and Bogard to investigate the alleged misconduct of local management, including Schmidt, and there was an obvious effort on the part of Mr. and Mrs. Rivera and Tarango to keep the report confidential.

As I stated in the fact section of this decision, Schmidt called

Rivera into his office, seemed angry, mentioned that he thought he and Rivera had a “good understanding,” and then asked, “Why is your wife calling and asking for Eddie Davis’ fax number? What is she trying to do? Why is she calling and getting this information? What is she trying to do?” Schmidt mentioned that he had helped Rivera in the past when Rivera had needed help, and asked, “So, why did you do that to me?” Obviously, Schmidt was concerned that Mrs. Rivera was contacting upper management, and, in so doing, was by passing him.

Rivera responded that he and Tarango had submitted a report of complaints to upper management because he had talked with Schmidt about his concerns for years, but Schmidt had just ignored him. Schmidt asked Rivera what was in the report, however, he refused to tell him. Rivera asked Schmidt to “respect my privacy and my wife’s privacy,” and that if Davis and Bogard, the recipients of the report, wanted Schmidt to know what was contained in the report, they would tell him. That essentially ended the conversation.

Traditionally, the Board looks to the “totality of the circumstances” in determining whether a supervisor’s questions to an employee about his protected activity were coercive under the Act. *Rossmore House*, 269 NLRB 1176 (1984), *affd.* sub nom. In *Medcare Associates, Inc.*, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as “*Bourne factors*,” so named because they were first set forth *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). These factors include the background of the parties’ relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply.

Of course, the substance of the conversation involved not only Rivera’s conduct, but also that of his wife, Ana Rivera. It is, therefore, necessary at this point to determine just what rights Mrs. Rivera, a nonemployee, had under the Act. The lead cases involving the “rights” of an employee’s spouse are *Redwing Carriers*, 125 NLRB 322, 323, *enfd.* in relevant part 284 F.2d 397 (C.A. 5, 1960); and *Walgreen Co.*, 206 NLRB 124 (1973). Those cases stand for the proposition that an employer violates Section 8(a)(1) of the Act when it uses the non-employee spouse as a “conduit” to relay messages or information to employees and, in so doing, restrains, coerces, or interferes with those employees’ exercise of their Section 7 rights. It is really the employees, and not the spouse, that are being protected against any unlawful restriction that would chill the employees’ Section 7 rights. So, the question becomes what was intended when supervisors or management officials had conversations with Mrs. Rivera. As set forth above in the fact section of this decision, there were a number of such conversations, all initiated by Mrs. Rivera. However, I do not believe that it matters that Mrs. Rivera initiated these conversations, or how intrusive she may have been, the issue remains what was intended by the comments made to her by the Respondent’s agent. Clearly, there would have been a reasonable expectation that those statements or that information would have been passed from Mrs. Rivera on to Mr. Rivera.

Of course, Ana Rivera was not a participant to the October

20 conversation between Mr. Rivera and Dave Schmidt. Her name was merely brought into the conversation by Schmidt.

I do not believe that under the “totality of the circumstances” standard that this conversation constituted unlawful interrogation of Mr. Rivera. Schmidt was Rivera’s supervisor and the conversation occurred in his office. However, Schmidt, having learned that Mrs. Rivera was attempting to get the fax numbers for Davis and Bogard, was naturally curious and concerned about what Mrs. Rivera wanted with the fax numbers. Not surprisingly, he was also curious as to why Mrs. Rivera was involved in matters concerning the plant at all.

Mr. Rivera and Schmidt had a good personal relationship over a long period, although clearly there had been some friction recently, and Schmidt seemed unhappy that Mrs. Rivera was going over his head and contacting upper management. When Rivera told Schmidt that he had sent a report to Davis and Bogard, Schmidt became even more anxious and wanted to know what was in the report. Rivera answered truthfully that the report was sent to Davis and Bogard, declined to say what was in the report, but indicated that the recipients of the report might tell Schmidt, and asked Schmidt to respect the “privacy” of Rivera and his wife, and not ask him any more questions. At that point the conversation ended.

I do not view the conversation as interfering with, coercing, or restraining Rivera in the exercise of his Section 7 rights. Schmidt’s questions would not have reasonably chilled Rivera’s exercise of protected concerted activity. Rivera did not appear to react in such a way as to indicate that he felt intimidated. To the contrary, he answered Schmidt’s questions truthfully, and simply declined to provide Schmidt with the information Schmidt sought. Schmidt’s inquiry about Mrs. Rivera’s involvement in the matter certainly seems reasonable, in view of the fact that she was not an employee. Clearly, asking about her involvement could not constitute interrogation into the protected activities of other employees, since she was not one.<sup>20</sup> In my opinion, Schmidt’s conduct on October 20 did not violate the Act. Accordingly, I shall recommend that complaint paragraph 4(b) be dismissed.

#### 5. Alleged unlawful rules and interrogation by Davis and Mellott

Paragraph 4(c)(1) and (2) of the complaint alleges that on October 20, Eddie Davis and Carson Mellott interrogated employees regarding their concerted activities, and promulgated an overly-broad and discriminatory rule prohibiting employees from discussing safety concerns with each other and from engaging in concerted activity. It appears from counsel for the General Counsel’s posthearing brief that this allegation involves a telephone conversation that Davis and Mellott had with Rivera after the October 20 report was received by Davis and Bogard. Davis and Mellott collectively called Rivera to tell him that the report had been received, that the managers were taking it “very seriously,” and were going to “take care of it.” Rivera understood this to mean that an investigation was going

<sup>20</sup> Counsel for the General Counsel does not cite a single case standing for the proposition that questioning an employee specifically about his nonemployee spouse’s activities constitutes a violation of the Act, and I am unaware of any such case authority.

to be conducted into the complaints, which was just what he and Tarango had hoped would happen.

During the conversation, which appears to have been very friendly, Davis asked Rivera who else knew of the report, and he learned from Rivera the circumstances surrounding Rivera's conversation with Schmidt the previous day. After hearing this, Davis asked Rivera not to talk with anyone else about the report while the matter was under investigation. It is this statement by Davis<sup>21</sup> that counsel for the General Counsel objects to, taking the position in his posthearing brief that the statement restrained Rivera and Tarango from discussing their report with others.

The problem with the General Counsel's contention is that Rivera and Tarango wanted to keep the complaints that they made in the report of October 20 confidential. In fact, they went to great lengths to keep the information in the report confidential. Mrs. Rivera had made several calls on October 20 to Davis and to Bogard's office, all in an effort to obtain their private fax numbers so that others would not be able to inadvertently see the report. Further, Rivera had specifically refused to tell Schmidt what was in the report, telling him to "respect my privacy and my wife's privacy," and indicating that Davis and Bogard, the recipients of the report, could share that information with Schmidt, if they chose to do so. Even the report itself, on its cover page heading, lists the material as "Confidential." (GC Exh. 4.)

As Tarango and Rivera gave every indication of strongly desiring to keep the complaints in their report confidential, I see no harm in the Respondent's managers also asking them not to discuss the report with anyone while the investigation was in progress. After all, the managers' request to keep the contents of the report confidential could not be said to chill the Section 7 rights of the employees when that was precisely also what Rivera and Tarango wanted to do.

In *Caesar's Palace*, 336 NLRB 271 (2001), the Board reversed an administrative law judge and found that the employer's need to maintain the confidentiality of an on-going drug investigation was a "substantial business justification" that justified the intrusion on its employees' exercise of Section 7 rights. The Board emphasized that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. Further, the Board agreed that the employer's rule prohibiting discussion of the on-going drug investigation adversely affected employees' exercise of that right. However, the Board still found the employer's rule lawful, and concluded that it could be enforced. The Board concluded that the interest of the employees in discussing the drug investigation was outweighed by the employer's legitimate and substantial business justifications. In this case the employer sought to impose the confidentiality rule to ensure that witnesses were not put in danger, that evidence was not destroyed, and testimony was not fabricated. According to the Board, the employer met its burden of demonstrating a legitimate and sub-

stantial business justification for its conduct. The Board cited *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976), and held that the employer's action in maintaining and enforcing the confidentiality rule, or by discharging employees for breaching said rule, did not violate the Act.

The Board reached a different conclusion in *Phoenix Transit Systems*, 337 NLRB 510 (2002), finding in agreement with the administrative law judge that the employer violated the Act by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves. The Board held that the employer had failed to establish a legitimate and substantial justification of its rule. In this case, the events at issue occurred approximately 1-1/2 years after the employer concluded its investigation of the alleged sexual harassment. The Board distinguished this remote time frame from the *Caesar's Palace* case where the enforcement of the confidentiality rule in question was more immediate, and was needed to prevent a cover-up, including to ensure that witnesses were not put in danger, evidence was not destroyed, and testimony was not fabricated.

In light of the *Phoenix Transit* and *Desert Palace* cases, it seems clear to me that the Board is attempting to strike a balance between the employees' Section 7 right to discuss among themselves their terms and conditions of employment, and the right of an employer, under certain circumstances, to demand confidentiality. The burden is clearly with an employer to demonstrate that a legitimate and substantial justification exists for a rule that adversely impacts on employee Section 7 rights.

In the matter before me, I believe that the Respondent has met that burden. The investigation was current. It was on-going. It involved a number of specific employees, who were named in the report, and the plant manager. The Respondent's corporate managers had a reasonable concern that if the named individuals were warned that a cover up might occur, that evidence might be destroyed, and, most particularly, that testimony could be fabricated. In these circumstances, the Respondent's request to keep the complaints contained in the report confidential was reasonable even if it adversely affected the employees' right to discuss such matters.

The Respondent has demonstrated a legitimate and reasonable business justification for the conduct of its managers in requesting that Rivera and Tarango keep the substance of the report confidential while the investigation was on-going. Under such circumstances, the request did not constitute an overly-broad and discriminatory rule. The managers' conduct in requesting confidentiality did not violate the Act.

Concomitantly, Davis' question to Rivera as to whether he had already discussed the report with anyone was directly related to the managers' request that he not do so. Further, this question did not constitute an independent act of unlawful interrogation as it was made during a friendly phone conversation where the managers assured Rivera that they had received his report, and were going to conduct the very investigation that he and Tarango were requesting. *Rossmore House*, supra; *Med-care Associates*, supra. Accordingly, I shall recommend that complaint paragraph 4(c)(1) and (2) be dismissed.

<sup>21</sup> In his posthearing brief, counsel for the General Counsel claims that Mellott made the statement in question. However, whether it was made by Mellott or Davis, who both participated in the phone conversation with Rivera, there is no dispute that the statement was made.

6. The conversation between Davis and Ana Rivera on October 21

The General Counsel alleges in paragraph 4(d)(1) and (2) of the complaint that Eddie Davis, during a telephone conversation with Mrs. Rivera on October 21, promulgated an overly-broad and discriminatory rule prohibiting spouses from involvement in the Respondent's employees' concerted activities; and prohibiting those employees from contacting various management personnel. However, in his posthearing brief, counsel for the General Counsel does not offer any case authority for the assertion that a spouse of an employee has a protected right to engage in concerted activities with the employer's employees.

In the fact section of this decision, I set out in detail the telephone conversation that occurred on October 21 between Davis and Ana Rivera. It is undisputed that Mrs. Rivera called Davis, after having spoken to him the previous day. It is also undisputed that all the calls between Mrs. Rivera and Davis, and with other management officials, were initiated by her. Her stated reason for calling Davis was to explain that her interest in what was going on at the plant was based on her concerns about her husband's safety. Apparently this call was to respond to Davis' earlier inquire of Pablo Rivera as to why his wife was involved in these matters.

As I stated earlier, *Redwing Carriers*, supra, and *Walgreen Co.*, supra, stand for the proposition that an employer violates Section 8(a)(1) of the Act when it uses the nonemployee spouse as a "conduit" to relay messages or information to employees and, in so doing, coerces, restrains, or interferes with those employees' exercise of their Section 7 rights. It is really the employees, and not the spouse, that are being protected against any unlawful restriction that could chill the employees' Section 7 rights. Only where an employer attempts to restrict these rights by using the spouse as a conduit to chill Section 7 activity would the spouse's involvement become a relevant issue. I am unaware of any case authority that stands for the proposition that the spouse of an employee has any independent protection under the Act to engage in concerted activity. While it appears that the General Counsel believes that such a "right" is implicit in the Act, and should be inferred from the above cases, I strongly disagree.

Again, the Act protects the rights of employees to engage in protected concerted activity with fellow employees and with others who may be nonemployees. That is clear. But the Act does not protect the nonemployee spouse who may choose to engage in concerted activity with her/his husband or wife, who is an employee, and with other employees of that employer. This is a subtle, but important difference. An employer is completely within its rights to totally ignore the entreaties of a non-employee spouse, and, in fact, to do what Davis did in his conversation with Ana Rivera on October 21, to tell her that she could not be involved with these matters because she was not an employee, or that as a nonemployee she needed "to get out of this," or that this was none of her business, or words to that effect.<sup>22</sup> She had called Davis to justify her involvement as

based on her interest in her husband's welfare. That was certainly a laudable concern. However, that does not mean that Davis was required to treat her with respect, and he may very well have treated her in an "intimidating way," as she contends. While Davis' conduct may not have been courteous, it was not unlawful. He was free to tell her simply to stay out of the investigation, or to refuse to talk with her at all. Such an expressed attitude did not violate the Act.

It is equally clear that on this occasion, Davis was not using Mrs. Rivera as a conduit to reach her husband or other employees. He told her that *she* should not be involved in the investigation of the complaints that Tarango and Rivera had raised. He never restricted who the Charging Parties or other employees could be involved with in making collective complaints. This is a subtle, but significant distinction. Thus, the Board's holding in *Redwing Carriers* and *Walgreen Co.* does not apply. This subtle difference means that under the Act, Davis' comments cannot be construed to chill the Section 7 rights of Tarango and Rivera.

Further, I fail to see how Davis' telling Mrs. Rivera that since he was no longer responsible for the Phoenix plant, that Steve Bogard was the person her husband's complaints should be addressed to, could possibly constitute a violation of the Act. If anything, Bogard was doing her and the Charging Parties a favor. Tarango and Rivera had wanted to send faxes of their report to those upper management officials who were in a position to take some affirmative action to redress their complaints. Mrs. Rivera sent the faxes to Davis and Bogard because the Charging Parties believed they were the two most appropriated managers. Davis merely informed Mrs. Rivera that the report sent to him was misdirected as he was no longer responsible for the Phoenix plant. He suggested the report be sent to company vice president, Bogard, who was apparently the most senior official directly responsible for the plant.

Nothing Davis said in the October 21 conversation with Mrs. Rivera was intended to prohibit the Charging Parties from contacting various managers or executives of the Respondent. She was never told that there was any particular official or officials who the Charging Parties could not contact. Their right to register collective complaints with management was not being limited in any way. For the General Counsel to suggest otherwise based only on Davis' comment that Bogard was the best person to contact, constitutes quite "a stretch."

However, even assuming for arguments sake that Davis was attempting to restrict the Charging Parties to lodging their complaints with Bogard, I believe this restriction falls under the Respondent's lawful business justification in requesting confidentiality and in limiting the number of individuals, including managers, who should be privy to the complaints in the report. I conclude that as with other such statements as discussed above, this request was reasonable when limited to the period of the pending investigation, and where the Respondent had legitimate concerns about the integrity of the investigation. Such statements are not overly-broad and discriminatory. *Desert Palace, Inc.*, supra.

Accordingly, based on the above, I shall recommend that complaint paragraph 4(d)(1) and (2) be dismissed.

7. Norwood's alleged continuous surveillance and

<sup>22</sup> In resolving this issue, I have credited Ana Rivera's testimony as to what Davis said to her on October 21.

close supervision of employees

Paragraphs 4(e)(1) and (2) of the complaint alleges that since on about October 21, Jamel Norwood has engaged in the surveillance of employees engaged in concerted activities, and has more closely supervised employees because they engaged in concerted activities. In the fact section of this decision, I set out in detail Rivera's contention that since October 21, on almost every work day, his immediate supervisor, Jemal Norwood closely monitored his movements throughout the facility. I will not repeat Rivera's claims here in detail, except to summarize mention that they included Norwood allegedly following Rivera to the breakroom during breaks and even into the bathroom, staring at him without speaking.

As noted earlier, I credited Norwood's denials that he ever engaged in such activity over that of Rivera's testimony. I found that Norwood testified in a sincere, straightforward, no nonsense way, with no embellishment or exaggeration. While I found Rivera generally credible, I also concluded that he was prone to exaggeration, embellishment, and hyperbole. Further, Rivera seemed overly sensitive and unnaturally suspicious. Finally, I concluded that if Norwood had engaged in the conduct alleged by Rivera, which would reasonably be described as "stalking," it was so blatant as to certainly have been apparent to fellow employees. Yet, not a single coworker, including Tarango, testified that he observed such behavior. Even Rivera, who testified that Norwood's behavior towards him was very distressing, did not contend that he ever said anything to Norwood about it. Therefore, I conclude that Norwood's denials are credible, and that no such surveillance or close supervision of Rivera occurred. Accordingly, I shall recommend that complaint paragraphs 4(e)(1) and (2) be dismissed.<sup>23</sup>

#### 8. Alleged threats by Covert and Mellott on October 26 or 27

It is alleged in paragraph 4(f) of the complaint that on about October 26 or 27, Sean Covert threatened employees with unspecified reprisals because they engaged in concerted activity. It is further alleged in paragraphs 4(g)(1) and (2) that on those same dates, Covert and Carson Mellott threatened employees with the loss of favorable treatment because they engaged in concerted activities, and threatened them with unspecified reprisals because they engaged in concerted activities. These events allegedly all occurred on either October 26 or 27 in the conference room at the Phoenix plant when Covert and Mellott interviewed Rivera and Tarango in connection with the investigation into the complaints that they made in their report of October 20. As these allegations are closely related, they will be discussed together.

Counsel for the General Counsel claims in his posthearing brief that Covert and Mellott threatened the Charging Parties with being considered uncooperative, if they refused to be interviewed separately. At a minimum, the Charging Parties were told that they could not be interviewed together for rea-

<sup>23</sup> In complaint par. 4(l), the General Counsel alleges that since about October 21, the Respondent has more closely monitored and supervised Rivera. However, counsel for the General Counsel did not offer any evidence to support this allegation other than what was offered to support the allegation in complaint pars. 4(e)(1) and (2). Accordingly, I shall recommend dismissal of par. 4(l) as duplicative.

sons of confidentiality, and that the interviews must be conducted separately. Ultimately, Rivera and Tarango acquiesced and were interviewed separately.

During the trial of this case, counsel for the General Counsel specifically stated on the record that he was not alleging the Respondent's refusal to allow the two employees to be interviewed collectively as a violation of the Act, but only as evidence of animus. However, in his posthearing brief, he appears to be taking the position that the Respondent's refusal to allow the Charging Parties to be interviewed collectively was, in fact, an unlawful threat of being considered uncooperative and of suffering unspecified consequences.

As I stated earlier in this decision, extant Board law holds that in a nonunion setting, an employee does not have a Section 7 right to refuse to attend an investigatory interview without a representative being present. *IBM Corp.*, 341 NLRB 1288 (2004). Thus, as the Respondent could lawfully insist that Rivera and Tarango attend their interviews separately, that insistence and warning that a refusal to do so could be considered an uncooperative attitude cannot constitute an unlawful threat under the Act, nor can it demonstrate animus towards the employees' protected concerted activity.

During the interview with Tarango, the managers questioned him about the "good things" that Dave Schmidt had done for him over the years, such as allowing him to use company vehicles to move personal items, and using the company freight contract to obtain discounts for shipping personal items. Covert then asked Tarango why he was "doing this" to Schmidt, in view of what Schmidt had done for him over the years. In his posthearing brief, counsel for the General Counsel makes it sound as if the "doing this" comment was in reference to Tarango and Rivera filing their report with upper management. Rather, I believe it is more logical that the reference was being made to the accusation in the report that both Bill Friedlander and Dave Schmidt had ordered Tarango to falsify the settle pressure test logs. In fact, Schmidt had done no such thing, and Tarango admitted so, claiming that he had merely inadvertently made that accusation about Schmidt in the report.<sup>24</sup>

When the question as to why Tarango was "doing this" to Dave Schmidt is placed in this context, I do not believe, as contended by the General Counsel, that it was intended as a threat to discourage further concerted activity, or that it was a threat of unspecified reprisals, or a threat of less favorable treatment, or a violation of the Act of any kind.

I am convinced that Covert and Mellott were at the facility on October 26 or 27 to make a good-faith effort to investigate the complaints made by the Charging Parties in their report of October 20. That was, of course, precisely what Tarango and Rivera wanted. In the course of that investigation, the managers needed to interview the Charging Parties, and, in fact, to question them about admissions that they had made in the report or during the interview. For Tarango that meant explaining why he had falsified settle pressure test results, and for Rivera that meant explaining why he had removed documents from the facility without permission in 2005, and why he had

<sup>24</sup> As noted earlier, I found Tarango's claim of inadvertently naming Schmidt to be incredible.

waited 4 years to report his contention that Schmidt had misbranded product.

When employees engage in protected concerted activity and file complaints with management, it is hoped that their complaints will get a fair hearing. However, a fair hearing does not mean that management will necessarily agree with their complaints and seek to adjust them. In the case of Tarango and Rivera, I believe that their complaints did receive fair and full consideration from the Respondent. Simply because the investigation also uncovered misconduct by the Charging Parties, as well as four other employees including Schmidt, which misconduct resulted in discipline, is no basis to conclude that the Respondent's action constituted a violation of the Act. Accordingly, I shall recommend that complaint paragraphs 4(f) and (g)(1) and (2) be dismissed.

#### 9. Norwood's Alleged Surveillance and Interrogation of November 10

Paragraph 4(h)(1) and (2) of the complaint alleges that on about November 10, Jemal Norwood interrogated Rivera about his concerted activities, and gave Rivera the impression that his concerted activities were under surveillance. This incident is merely a continuation of Rivera's claim that Norwood was more closely monitoring him following his submission of the October 20 report. However, as I noted above, I credited Norwood and found that no such close monitoring occurred.

Regarding this specific incident, Norwood and Rivera disagree to some extent over the substance. On the morning of November 10, at the usual "tool box" meeting, Schmidt informed the cylinder fillers that some cylinders had been found to be over pressurized and, so, the gauges had been fixed. However, Schmidt wanted the fillers to watch and be sure that the problem did not reoccur. According to Rivera, when the meeting concluded he went to the oxygen manifold, where those cylinders had been filled, and looked at the gauges. Norwood passed by and asked, "Are you still investigating?" Rivera replied that he was just looking at the gauges, and he questioned whether that was a "problem." Rivera is obviously suggesting that Norwood's comment was intended to related back to the matters raised in the Charging Parties' October 20 report.

Norwood remembers the incident somewhat differently. After the morning meeting ended, he noticed Rivera not working, but merely standing around looking at the formerly faulty gauges on the oxygen rack. Norwood noticed that Rivera continued to stare at the rack for an extended period of time, and, as his supervisor, Norwood felt that Rivera should get back to work. Finally, he asked Rivera what he was doing, and Rivera replied that he was just looking at the oxygen rack to see what was going on. According to Norwood he told Rivera, "We are done investigating this. There is no need to investigate it any further. You need to get back to work." That ended the conversation.

For the reasons that I stated earlier, I found Norwood credible. Also, for the reasons that I gave earlier, I found Rivera to be overly sensitive and unnaturally suspicious. Therefore, I do not believe that any close supervision of Rivera was occurring. I am of the belief that Norwood did nothing more on November

10 than he was expected to do as a supervisor, and directed Rivera to return to work when he observed him not working for an extended period of time.

There was no interrogation of Rivera regarding his protected activities, nor was there any close supervision of Rivera or impression thereof, caused by Norwood's actions on November 10. Accordingly, I shall recommend that complaint paragraphs 4(h)(1) and (2) be dismissed.

#### 10. Covert's email of November 11

It is alleged in complaint paragraphs 4(i)(1), (2), and (3), that on about November 11, Covert sent an email to Tarango and Rivera that threatened them with unspecified reprisals because they engaged in concerted activities, promulgated an overly-broad and discriminatory rule prohibiting them from engaging in concerted activities and denying them the right to lodge complaints regarding working conditions.

On November 11, 3 days after Covert received the Charging Parties' second report dated November 8 and referred to as the "annex," he sent them an email message. In that message, headed "Praxair Business Confidential," Covert informed them that an investigation of the newest complaint had immediately commenced, and that at the present time the investigation of both reports was considered complete. However, his investigation report and recommendations were being evaluated by higher management, which could take an additional 10–15 days. As a result, he asked them to, "Please refrain from making any additional calls or faxes related to *already presented allegations* to provide us the time to address the myriad of concerns you have presented. However, if you have any new issues not already avowed in any fax or hotline call please e-mail these concerns to me directly." (Emphasis as contained in original document.) The email concluded that there would be one response to all the faxes and calls from the Charging Parties, but that because of privacy concerns, Rivera and Tarango would not be advised of any disciplinary action that did not involve them directly. (GC Exh. 15.)

Frankly, I fail to understand the General Counsel's concerns regarding this email. I find nothing about it improper. All that Covert was obviously attempting to do was to conduct an organized, thorough investigation. The Charging Parties had been filing their complaints in rapid succession without waiting for any of the complaints to be investigated, addressed, and resolved. The hotline calls had been placed about October 17, with the first written report submitted October 20, and the second report submitted November 8. Further, there had been significant duplication of the various complaint allegations raised in the hotline calls and the two written reports. Covert was merely asking the Charging Parties to give him some time to address the outstanding complaints before filing any more duplicative complaints regarding those matters that had already been raised in the hotline calls and two existing reports. As the person who was coordinating the investigation of these various complaints, he simply asked that where they had new complaint allegations to raise, not previously brought to the Respondent's attention, that the Charging Parties do so through him.

Finally, it should be noted that the email was captioned with the word "Confidential." What could possibly be unlawful

about that? The Respondent certainly had every legitimate interest in keeping these matters as private as possible. As I discussed in detail above, under the Board's holding in *Desert Palace*, supra, the Respondent has demonstrated a legitimate business justification for keeping the specifics of the complaints confidential, in particular during the time period that these allegations were under investigation. Even more to the point, Tarango and Rivera themselves had made it very clear to management that they wanted these matters to remain confidential, taking great pains to submit the two reports only through the private fax numbers of the specific management recipients.

When read as a whole, it is clear that the November 11 email contained no threat made to Rivera and Tarango of reprisals for engaging in protected concerted activity, and no promulgation of an overly-broad and discriminatory rule against making complaints. After all, it should be noted that the Respondent had established a long standing system of encouraging employees to make complaints, anonymously if desired, through its hotline telephone system. Further, there is absolutely no evidence that the Respondent had a past practice of discouraging such complaints. Accordingly, I shall recommend that complaint paragraphs 4(i)(1), (2), and (3) be dismissed.

#### 11. Mellott's letter of November 18

Paragraph 4(j) of the complaint alleges that by letter dated November 18 to Rivera, Mellott promulgated an overly-broad and discriminatory rule prohibiting employees from engaging in concerted activity. However, in my view the General Counsel's contention totally misconstrues the plain language of the letter and the results of the Respondent's investigation into the complaints made by Tarango and Rivera in the hotline calls and the report of October 20. At the heart of this allegation is the General Counsel's apparent displeasure with the results of the Respondent's investigation.

As I have discussed above, the Respondent's investigation into the Charging Parties' complaints resulted in the "Closeout Report" dated November 12 and prepared by Carson Mellott. (GC Exh. 8.) This report, an internal company document of 12 pages in length, sets forth in detail Mellott's conclusions after interviewing the nine employees named in the Charging Parties' complaints, interviewing Tarango and Rivera, and interviewing certain other employees who may have witnessed or have had evidence of certain events. As I have previously noted in detail, it provided for written warnings to be issued to Dave Schmidt, Sam Castillo, Adan Marquina, and Alonso Mata. The report also provided for the termination of Tarango for the falsification of company records. It did not actually provide for any discipline for Rivera, although the report indicated that he would receive a "[w]ritten document addressing concerns, knowing of falsification of company records and failing to report, removing company documents from company property without permission and keeping them for about 4 years."

It is obvious from counsel for the General Counsel's post-hearing brief that the General Counsel does not approve of the conclusions reached by Mellott in his report. The General Counsel believes that Rivera and Tarango were treated in a disparate fashion. Counsel for the General Counsel seems to

suggest that the Charging Parties were treated more harshly than other employees whose conduct was questionable, merely because they engaged in the concerted activity of filing the complaints. However, I found Mellott's report well reasoned and detailed. Where sufficient evidence existed to support allegations of misconduct, disciplinary action was taken. But, where such allegations could not be supported, Mellott declined to issue discipline.

Tarango was terminated because it was undisputed that he had falsified numerous settle pressure tests results over an extended period of time. Further, Mellott concluded that the allegation that Bill Friedlander had somehow forced Tarango to falsify the records could not be substantiated.<sup>25</sup> While the General Counsel may not consider Tarango's discharge "fair" or may believe that it was overly "harsh" in view of the lesser discipline given to other employees by Mellott that is really not the standard that the Board looks at in determining whether the Act has been violated. As I have noted in detail earlier in this decision, there was no disparate treatment of Tarango. The Respondent treated him as they historically did with other employees who had falsified documents, records, reports, or other business information. They terminated him.

None of the other employees named in the Charging Parties' complaints were shown by the investigation to have falsified records. Although no other employees were terminated, four were given written warnings. In any event, the standard the Board looks to is not whether an employee was treated unfairly or harshly, but, rather, whether he was treated unlawfully, meaning as a result of his protected activity. I have concluded that in the case of Tarango, he was not.

Turning to the letter dated November 18 from Mellott to Rivera, which was presented to him on November 20, this document was apparently not considered by the Respondent as a written warning. (GC Exh. 9.) The letter indicated that the investigation initiated by Rivera's complaints was concluded, that certain unspecified action had been taken, and that the Respondent "appreciate[d] [Rivera] bringing these matters to [the Respondent's] attention."

In its second and last paragraph, the letter went on to state that Mellott needed to "reinforce" the company policy that the "unauthorized removal of company operating or business records from the site is inappropriate and should not occur in the future. Additionally, if you become aware of a future issue of genuine concern, you should report it in a timely manner, not years after the fact." The last sentence of the letter reads, "As you know, there are a number of confidential and other channels available to you to do this."

I see nothing inappropriate or unlawful about this letter. More than anything, it seems to simply be a reminder to Rivera not to remove company documents from the facility without permission and not to wait years before reporting misconduct. This was, of course, directly related to the complaint that Rivera had made against Schmidt for allegedly misbranding products. In an effort to document that alleged misconduct, he had removed certain documents from the property, but had

<sup>25</sup> As stated earlier, I found Friedlander's denials to be credible, and Tarango's assertions to be incredible.

waited 4 years before making the complaint. The last sentence in the letter merely served to remind Rivera that if he had other complaints to make, that he could make them in a “confidential” manner. However, there was no indication in the letter, and certainly no stated requirement, that such complaints “must” be made in any specific way, confidential or otherwise.

The General Counsel has failed to establish that the issuance of this letter was in retaliation for Rivera’s protected concerted activity. Further, a plain reading of the letter certainly does not establish that the Respondent was promulgating an overly-broad and discriminatory rule prohibiting employees from engaging in concerted activities. To the contrary, if anything, the last sentence of the letter encouraged Rivera, and presumably other employees, to continue to file complaints. Accordingly, I shall recommend that complaint paragraph 4(j) be dismissed.

12. Covert’s November 24 phone conversation  
with Ana Rivera

In the fact section of this decision, I discussed at length a telephone conversation that occurred about November 24 between Ana Rivera and Sean Covert. The General Counsel alleges in complaint paragraphs 4(k)(1) to (7) that during that conversation Covert threatened employees with unspecified reprisals, with discharge, with closer supervision, with conditioning continued employment on relinquishing Section 7 rights, all as a result of their having engaged in concerted activities; and promulgated an overly-broad and discriminatory rule prohibiting employees from engaging in concerted activity; and created an impression among its employees that their concerted activities were under surveillance.

Ana Rivera testified that she had become very concerned about the way that her husband was being treated at work, as he had explained it to her. She decided to complain to Sean Covert and called him on his cell phone on November 24. She reached him while he was on vacation, waiting in a hospital for his wife to be discharged after having just delivered their second child. He told her where he was and what he was doing there, and she congratulated him and offered some pleasantries. According to Mrs. Rivera’s version of the conversation, which I credit, she told Covert that her husband had been retaliated against at work for having made safety complaints, and that Covert needed to call her husband at work right away. Covert replied that he was with his wife and baby at the hospital, and at the moment that was more important to him. However, Mrs. Rivera was insistent that Covert must call her husband immediately.

Mrs. Rivera testified that Covert used a rather “condescending” tone of voice towards her and said something to the effect that her husband should be happy that he had a job, and he should “stop reporting things, to stop going around inspecting things, because [Covert] was the inspector [her husband] was not.” Further, Covert warned her that if her husband did not do so, he “might be in trouble, and that he should confine himself to doing his job and only his job.” She contends that Covert ended his part of the conversation by saying that her husband should call him on Monday, after Thanksgiving. Mrs. Rivera acknowledges that the conversation had become very tense, and she ended the conversation by saying that she now understood

which side Covert was on, and “how much [he] really appreciated [her husband’s] information in the report.”

As I said earlier, I found Mrs. Rivera to be generally a credible witness, although with a tendency to engage in exaggeration, embellishment, and histrionics. I noted that she was very insistent and apparently a difficult person to dissuade when on a mission to accomplish something. This is obvious from her conversation with Covert while he waited at the hospital for his wife and new born infant to be discharged. I also noted that I found her insistence that Covert, whose primary concern was naturally with his wife and new born infant, must call her husband immediately to be highly intrusive.

While I can imagine the annoyance and distress that Covert felt towards Mrs. Rivera as she intruded on his personal time and situation that does not negate the words that he spoke in response. While Covert may well have spoken in understandable anger, as an agent and supervisor of the Respondent his words had meaning under the Act, and for that reason cannot be justified.

The Board’s holding in the *Walgreen Co.*, supra, and *Redwing Carriers, Inc.*, supra, cases is clear. When an employer uses the spouse of an employee as a “conduit” to communicate to its employees, and when that communication restrains, coerces, or interferes with the right of those employees to engage in Section 7 activity, the employer has committed a violation of the Act.

Covert knew that Mrs. Rivera was heavily involved with her husband’s complaints. She had actually placed some of the hotline calls, and, of course, had been the person who typed the two reports and who obtained the fax numbers of those managers who were recipients of those faxes. Covert was aware of these facts at the time of his November 24 conversation with Mrs. Rivera. It would certainly have been reasonable for him to have assumed, and I am convinced that he did, that the statements, and, frankly, threats that he was making in the conversation would promptly be relayed to Mr. Rivera. In all probability, Covert’s anger got the better of him, and he spoke without much thought. Never the less, the statements were made, and coming from Covert, the Respondent’s corporate security investigations manager, they would certainly have had a very chilling effect on employee Section 7 activity.<sup>26</sup>

I, therefore, find that Covert’s statements on November 24, made to the wife of an employee of the Respondent, constituted a threat to employees of unspecified reprisals, a threat of discharge, and a threat of closer supervision, all because Tarango and Rivera had engaged in protected activity; and a threat to employees’ continued employment for engaging in protected activities; and created an impression among the employees that their concerted activities were under surveillance; and constituted the promulgation of an overly-broad and discriminatory rule prohibiting employees from engaging in concerted activities. These statements constituted a violation of Section 8(a)(1)

<sup>26</sup> Because of the unique circumstances surrounding these statements made by Covert, I do not believe that such statements establish that the Respondent, or even Covert when in a different situation, generally harbored feelings of animus directed towards its employees’ protected concerted activities.

of the Act, as alleged in complaint paragraphs 4(k)(1) to (7).

### 13. Summary

In summary, I have recommended dismissal of complaint paragraphs 4(b) through (j), and their respective subparagraphs, as well as paragraphs 4(l) through (o). Regarding paragraph 4(k), subparagraphs (1) through (7), I have concluded that the General Counsel has met his burden of proof and established that the Respondent violated Section 8(a)(1) of the Act.

### CONCLUSIONS OF LAW

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

2. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act.

(a) By threatening its employees with unspecified reprisals for engaging in protected concerted activities, and/or for continuing to engage in such activities.

(b) By threatening its employees with discharge for engaging in protected concerted activities.

(c) By threatening its employees with closer supervision for engaging in protected concerted activities.

(d) By threatening its employees by conditioning continued employment on their relinquishing their right to engage in protected concerted activities.

(e) By creating an impression among its employees that their protected concerted activities were under surveillance.

(f) By promulgating an overly-broad and discriminatory rule prohibiting employees from engaging in protected concerted activities.

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act except as set forth above.

### REMEDY

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

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>27</sup>

### ORDER

The Respondent, Praxair Distribution, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with unspecified reprisals for engaging in protected concerted activities, and/or for continuing

ing to engage in such activities.

(b) Threatening its employees with discharge for engaging in protected concerted activities.

(c) Threatening its employees with closer supervision for engaging in protected concerted activities.

(d) Threatening its employees by conditioning continued employment on their relinquishing their right to engage in protected concerted activities.

(e) Creating an impression among its employees that their protected concerted activities were under surveillance.

(f) Promulgating an overly-broad and discriminatory rule prohibiting employees from engaging in protected concerted activities.

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

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

(a) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix."<sup>28</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its facility in Phoenix, Arizona, at any time since November 24, 2009.

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

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C. August 4, 2010

<sup>28</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>27</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

You have the right to join with your fellow employees in protected concerted activities. These activities include discussing working conditions among yourselves, forming a union, and making common complaints about your wages, hours, and other terms and conditions of employment, including com-

plaints regarding safety issues.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT threaten you with reprisals for engaging in protected concerted activities, and/or for continuing to engage in such activities.

WE WILL NOT threaten you with discharge for engaging in protected concerted activities.

WE WILL NOT threaten you with closer supervision for engaging in protected concerted activities.

WE WILL NOT threaten you by conditioning continued employment on your relinquishing your right to engage in protected concerted activities.

WE WILL NOT create an impression among you that your protected concerted activities are under surveillance.

WE WILL NOT announce a discriminatory rule prohibiting you from engaging in protected concerted activities.

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

PRAXAIR DISTRIBUTION, INC.