UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRAXAIR DISTRIBUTION, INC.

and **Case 28-CA-23266**

PABLO RIVERA, an Individual

ACTING GENERAL COUNSEL'S REPLY BRIEF

I. INTRODUCTION

Counsel for the Acting General Counsel (CAGC) submits the following Reply to Respondent's Answering Brief, filed on September 7, 2011.[1] Respondent's Answering Brief, which is primarily a restatement of its brief to the Administrative Law Judge (ALJ), generally fails to specifically address the issues and arguments raised by CAGC's Exceptions. It is respectfully submitted that the record as a whole, including various admissions by Respondent, as well as many of the ALJ's findings and conclusions, supports a finding that Respondent violated Section 8(a)(1) of the Act as described in CAGC's Exceptions.

II. ANALYSIS AND DISCUSSION

A. The ALJ erred by failing to find that Respondent denied Rivera's request to be represented by a co-worker during the investigatory interview.

In order to obtain the full context of the present case, which involves Pablo Rivera's continued complaints about employees' working conditions, and Respondent's retaliatory response, the allegations in this matter must be viewed in conjunction with the record adduced in *Praxair I*.[2] This matter is essentially a continuation of *Praxair I*. The credible record evidence demonstrates that Respondent, as in *Praxair I*, denied Rivera's request to be

[1] All dates hereinafter are 2010 unless otherwise noted.
[2] *Praxair Distribution, Inc.*, JD (SF) 33-10 (August 4, 2010) (*Praxair I*).

represented by a co-worker during a November 4 investigatory interview, and the ALJ erred by not finding a violation. (ALJD 10)

Under Section 7 of the National Labor Relations Act, all workers, whether represented by a union or not, have the right to engage in concerted activities for the purpose of mutual aid or protection. In *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), the Supreme Court found that an employee who requests union representation during an investigatory interview, in which the employee reasonably believes might result in discipline, is engaged in concerted activity. The Court found that this right was grounded in the language of Section 7 of the Act, specifically the right to engage in concerted activities for the purpose of mutual aid or protection.[3] Here, the credible record demonstrates that, under *Weingarten*, Respondent violated Rivera's request to have a co-worker represent him during the November 4 investigatory interview.

On November 4, as soon as Rivera saw that Carson Mellott was waiting for him in Castillo's office, Rivera reasonably believed that he would be subjected to discipline based upon his prior dealings with Mellott in *Praxair I.* Respondent's Answering Brief does not challenge this fact. Rivera, in an effort to seek representation, requested to make a phone call. However, Mellott preemptively denied Rivera's request and began interrogating as to whom he intended to call. Specifically, Rivera testified that Mellott refused his request and stated "You do not need to call anybody. Who are you going to call? You are not going to call Gary [Kallis], Jemal [Norwood], or somebody in the plant. You are going to call somebody outside the plant." (T 63; 65; 94:22-25) Rivera testified that he did not disclose to Mellott

[3] Because the facts at issue in *Weingarten* involved a request for the presence of a union representative, the Court's decision did not specifically refer to circumstances involving the request for a coworker representative in a nonunion setting. As discussed in the dissent of *IBM Corp*., 341 NLRB 1288 (2004), affording *Weingarten* rights to nonunion employees in these circumstances effectuates the policy that Section 7 rights are enjoyed by all employees.

who he intended to call, but testified that "the first person I had in mind was to call my wife to ask her to look for legal advice just to be sure of the request from Carson Mellott was a lawful request to me to do what I already told that I didn't want to do." (T 109:11-14)

Respondent, in its Answering Brief, unsuccessfully attempts to distinguish *Montgomery Ward & Co*., 273 NLRB 1226 (1984), which involved the preemptive denial of a request for representation, and argues that Rivera did not request representation by requesting to make a phone call. Misreading *Montgomery Ward*, Respondent claims that Rivera did not suggest that he desired representation because "he intended to call his spouse, who is not a PDI employee." *Resp't Ans. Br.* at 12. However, Board law supports CAGC's position that Rivera was denied co-worker representation.[4]

In claiming that Rivera's request was insufficient to invoke *Weingarten* protections, Respondent inaccurately cites Rivera's testimony and has consequently "erred in analyzing the efficacy of [Rivera's] request without reference to Respondent's reply." *Montgomery Ward*, supra at 1227. Specifically, as in *Montgomery Ward*, Mellott's reply to Rivera was preemptive and effectively prohibited Rivera from making a request for representation—from anyone. *Montgomery Ward*, supra at 1227. Moreover, Mellott's reply in effect "told [Rivera] that no matter who he requested as a representative…" he would be denied representation. *Montgomery Ward*, supra at 1227. Notwithstanding Rivera's request for a representative, Respondent foreclosed Rivera from the opportunity to avail himself of the protections of the Act—such conduct stifles concerted activity just as surely as a rule prohibiting employees from discussing working conditions, which is clearly unlawful.

[4] In *Buonadonna Shoprite, LLC*, 356 NLRB No. 115 (March 18, 2011), slip op. at p. 2, the ALJ reasoned that employee's request to make a phone call was a request for representation during investigatory interview. In *Consolidated Edison Company of New York*, 323 NLRB 910 (1992), the Board listed various ways employees' statements amount to request for representation.

Based on the foregoing, it is respectfully submitted that the record evidence establishes that Respondent, by Mellott, denied Rivera's attempt to attain representation by a co-worker during an investigatory interview, in violation of Section 8(a)(1).

B. The ALJ erred by failing to find that Respondent unlawfully interrogated Rivera about his protected concerted activities. (CAGC's Exception 3).

Respondent's Answering Brief fails to rebut the CAGC's arguments regarding Mellott's interrogation of Rivera during the November 4 interview. Respondent simply ignores Board law regarding what acts constitute an illegal interrogation. Looking at the totality of the circumstances, Respondent violated Section 8(a)(1) the Act by interrogating Rivera in two different ways, by demanding him to repeat his complaints in a written report, and by seeking the identity of the person Rivera wanted to call after Mellott requested that he set out his complaints in writing.[5] In evaluating the "totality of the circumstances," and in applying *Rossmore House*, the Board considers "the *Bourne* factors," referred to in *Bourne v NLRB*, 332 F. 2d 47, 48 (2d Cir. 1964).[6]

Respondent's Answering Brief ignores the credible record evidence and fails to fully apply the *Bourne* factors to the facts present in this case. The first *Bourne* factor relates to how Respondent deals with concerted activity. Here, Mellott's questioning takes place against a background of hostility. It is undisputed that Mellott was aware of Rivera's prior protected concerted activities, his testimony at the Board hearing in *Praxair I*, and just two

[5] Although questioning employees is not *per se* unlawful, the test is whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984).

[6] The *Bourne* factors include consideration of whether the interrogated employee engaged in Section 7 activities in and open and active manner; the background of the interrogation; the nature of the information sought; the identity of the questioner; the place and method of the interrogation; the truthfulness of the reply; whether a valid purpose for the interrogation was communicated to the employee; and whether the employee was given assurances against reprisals. See also *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Medcare Associates, Inc*., 330 NLRB 935, 935 (2000).

months prior to the November 4 investigatory interview Mellott had discussed the *Praxair I* decision with Rivera. During the November 4 investigatory interview, Rivera testified that Mellott loudly demanded that he submit and repeat his complaints in a written report. Rivera wanted to leave the room. In response to not being able to leave the room, Rivera requested to make a telephone call. (T 115:15-17) Mellott told him, "You are not going anywhere. You don't have to worry about your work. Take your time and write it down." (T 64-65) Rivera further testified that, as he reached for his cell phone and told Mellott he needed to make a call, Mellott responded by telling him, "You do not need to call anybody. Who are you going to call? You are not going to call Gary [Kallis], Jemal [Norwood], or somebody in the plant. You are going to call somebody outside the plant." (T 65; 94:22-25) During this interview Mellott demonstrated his continued hostility toward Rivera and his protected concerted activity.

Turning to the other *Bourne* factors, the second factor inquires into the nature of the information sought. *Bourne*, 332 F. 2d at 48. Here, Respondent attempted to have Rivera confirm all of his complaints, regardless as to whether they involved concerns discussed or shared by other employees. Respondent also sought the specific identity of the individual who Rivera sought to call. As to the third *Bourne* factor, the identity of the questioner, Mellott was Respondent's Human Resources Manager, and was intimately involved in Respondent's conduct in *Praxair I*. As to place and method of interrogation, the fourth *Bourne* factor, Rivera, without knowing the reason beforehand, was called into Castillo's office to meet with Schmidt and Mellott. With Mellott and Schmidt both present, there was nothing informal about Mellott's demands and remarks--he wanted answers in the form of a written report and the identity of the person Rivera wanted to call, and he wanted them

immediately. As to the truthfulness of the reply, Rivera testified that he felt he had no choice but to accede to Mellott's demand to write down his complaint, but he did not disclose the identity of the person he intended to call. Given his previous experience with Mellott in *Praxair I*, such a response was expected. Specifically, Rivera was mindful of Mellott's presence at the facility, and the outcome of the previous investigatory interviews in which Mellott participated, and where Rivera was accused of wrongdoing, as discussed in *Praxair I*. In addition, there were no assurances that reprisals would not be taken against Rivera if he refused to provide Mellott a written report. To the contrary, Mellott told Rivera that if he refused, Mellott would make a notation of the refusal (as Respondent announced in the investigatory interview in *Praxair I*), and would leave the facility. (T 131-142) All of the *Bourne* factors militate in favor of a finding that Mellott violated Section 8(a)(1) of the Act by interrogating Rivera by both demanding that he repeat his complaints in a written report and by asking Rivera the identity of the individual he intended to call during the November 4 investigatory meeting. *Bourne*, supra*; Rossmore*, supra.

C. The ALJ erred by failing to find Respondent, by Mellott, violated Section 8(a)(1) of the Act by subjecting Rivera to an investigatory interview in retaliation to his protected concerted activities. (CAGC's Exceptions 6 and 7).

Respondent's Answering Brief fails to rebut CAGC's arguments concerning Respondent's retaliation against Rivera by subjecting him to an investigatory interview.[7] The record evidence demonstrates that Respondent, in response to Rivera's complaints in *Praxair*

[7] Although Respondent in its Answering Brief argues that it was denied due process in regard to the CAGC's proposed amendment to the Complaint, Respondent claim lacks merit. Specifically, Respondent failed to provide any basis to demonstrate the amendment was inappropriate. The investigatory interview allegation involves the identical underlying legal theory and factual framework, and is subject to the same defenses. *Redd-I, Inc.*, 290 NLRB 1115, 118(1988); *Precision Concrete*, 337 NLRB 211 (2001). The Board has long held, with court approval, that it "may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Kenmore Electric Company, Inc. et al*., 355 NLRB No.173, slip op.7 (2010), citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir.1990).

I and the present case, retaliated against him. In *Praxair I*, the ALJ found and Respondent admitted that employees Tarango and Rivera were engaged in protected concerted activity when they called Respondent's hotline and submitted two reports to Respondent on October 20, 2009 and November 8, 2009, raising issues concerning harassment, workplace violence, and safety. (GCX 2). The October 2009 report listed a number of employees and supervisors engaged in misconduct in violation of Respondent's own policies and procedures, including Plant Manager Schmidt and employees Gary Kallis (Kallis) and Shawn Hernandez (Hernandez), who all are involved in the present case. (GCX 2) (ALJD 3) As a direct result of Respondent's investigatory interviews concerning the October 20 report, 19-year employee Tarango was discharged and Rivera was issued a reminder letter.[8] (GCX 2)

Undaunted by Respondent's unexpected discharge of Tarango, Rivera, who had been unjustifiably labeled as difficult to work with by Kallis to a new employee, continued to report to Respondent issues of concern at the workplace, including issues that Rivera had previously complained to Respondent in about *Praxair I*. (ALJD 5:29-30) A number of the issues raised by Rivera in the present case concerned the misbehavior of Kallis, which included acts and conduct which appeared to violate Respondent's own procedures and policies concerning workplace violence and safety.

The record demonstrates that Respondent, because of Rivera's complaints in *Praxair I*, engendered a strong and persuasive showing of animus toward Rivera that resulted in Respondent's decision to subject Rivera to the November 4 investigatory interview. Respondent, by Mellott, who had interrogated Rivera in *Praxair I*, continued his hostility toward Rivera. Specifically, this is demonstrated in the present case by Mellott's "agencies"

[8] In addition, because of the October 20 report, Respondent issued written warnings to employees Adan Marquina and Alonso Mata, as well as to supervisors Castillo and Schmidt.

statements; and Mellott requiring Rivera to submit a written complaint or written summary of facts. Respondent, in its Answering Brief, does not challenge the fact that Mellott interviewed two other employees, Kallis and Hernandez, but did not require either of them to draft a written statement. In addition, Respondent, by Mellott, questioned both of them for less time than Mellott questioned Rivera. Respondent also fails to explain why it engaged in this disparate treatment of Rivera.

Under a *Wright Line* analysis, the record evidence in this matter conclusively establishes that all requisite elements of a *prima facie* showing are present. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The credible record evidence that establishes that Rivera engaged in protected conduct, including his prior and current complaints about work, as well as his charge-filing and testimony in *Praxair I*. Respondent was aware of such protected conduct, as evidenced in *Praxair I*, Mellott's statement to Rivera in September 2010, related to the *Praxair I* decision, and complaints made to Respondent concerning safety and workplace violence which allegedly served as the reason for the November 4 investigatory interview. Moreover, Respondent presented no evidence that would persuade "by a preponderance of the evidence that the same action would have been taken even in the absence of the protected activities." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). Respondent failed to establish that it would have subjected Rivera to the November 4 investigatory interview if he had not engaged in the protected, concerted activities. Consequently, but for Rivera's having engaged in the documented protected concerted activities, there would have been no cause for the Respondent to take adverse action against him. Respondent took these actions to punish Rivera for his protected concerted activities, to signal to other employees

what would happen if they complained, and to block any further concerted activities by the remaining employees.

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

III. CONCLUSION

It is respectfully requested that, based on the record as a whole, and as discussed above and in CAGC's Exceptions and Brief in Support, that the Board find that Respondent violated the Act as alleged in the Complaint and amendment to the Complaint, and the Board issue an appropriate order providing for a full and appropriate remedy the would be just and proper to remedy the unfair labor practices found.

Dated at Phoenix, Arizona, this 21st day of September 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF in PRAXAIR DISTRIBUTION, INC., Case 28-CA-023266, was served by E-Gov, E-Filing, and E-Mail, on this 21st day of September 2011, on the following:

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