

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

In the Matter of:)	
)	
CASE FARMS PROCESSING, INC.,)	Case Nos. 8-CA-39152
)	8-CA-39187
and)	8-CA-39257
)	
UNITED FOOD AND COMMERCIAL WORKERS)	
UNION, LOCAL NO. 880.)	

**BRIEF IN SUPPORT
OF
RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

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INTRODUCTION

Case Farms Processing, Inc. (“Case Farms” or “Respondent”) respectfully submits this Brief in support of its Exceptions to the Decision of Administrative Law Judge Mark Carissimi (“ALJ”) on the Consolidated Amended Complaint (“Complaint”) issued by the National Labor Relations Board, Region 8 (“NLRB”), based on unfair labor practice charges filed by Charging Party, the United Food and Commercial Workers Union, Local 880. At issue in these consolidated cases is whether Respondent violated §§8(a)(3) and 8(a)(1) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. §151 et seq (the “Act”).

As set forth below, the ALJ erred in its September 16, 2011 Opinion when he found that Case Farms violated §§8(a)(3) and 8(a)(1) of the Act. Specifically, the ALJ erred when he determined that Case Farms terminated an employee for engaging in protected activity in violation of §§8(a)(3) and (1) of the Act. A review of record evidence reveals that the employee was not in fact engaged in protected activity but was instead insubordinate while pursuing a personal grievance. Further, the ALJ erred in finding that even if the conduct was arguably protected, the outrageous conduct of the employee did not remove his actions from protection under the Act.

In addition, the ALJ found multiple violations of §8(a)(1). In this regard, the ALJ’s findings are erroneous as the ALJ’s §8(a)(1) conclusions have no support in law or fact.

For the reasons set forth herein, the ALJ erred in not dismissing the Complaint in its entirety.

STATEMENT OF THE CASE

This action commenced on February 24, 2011, when the NLRB filed the Complaint and Notice of Hearing issued against Case Farms based on the charges and amended charges filed by the Charging Party. The Complaint alleged violations of both §§8(a)(1) and 8(a)(3) of the Act. A trial on the allegations of the Complaint commenced on May 16, 2010 in Cleveland,

Ohio; and ended May 24, 2011. On September 16, 2011, the ALJ issued his Decision and Order affirming several of the unfair labor practices alleged in the Complaint.

Notwithstanding the ALJ's legal and factual findings, a review of the record evidence and applicable Board law clearly demonstrates that the ALJ's conclusions of law and fact as to all found unfair labor practices are not supported by the record. Accordingly, Case Farms files this Brief in support of its Exceptions to the AJL's Decision.

QUESTIONS PRESENTED

The questions presented that are addressed below are the following:

I. Whether the ALJ erred in finding Respondent violated §8(a)(3) of the Act for terminating an employee engaged in concerted and protected conduct where the record shows: (a) that the General Counsel's witnesses testimony is not credible concerning the circumstances surrounding the confrontational incident between the terminated employee and a supervisor; (b) the employee's outburst occurred while pursuing a personal gripe and not while engaged in concerted protected activity; (c) that the employee's actions removed his conduct, even if arguably protected, from the purview of the protection afforded by the Act; and (d) the proper application of the "Wright Line" standard reveals that the termination of the employee was lawful; (see, Exceptions 1-6), and

II. Whether the ALJ erred in finding that an employee, a member of Case Farms' management, met privately over the course of several months during which several unfair labor practices purportedly occurred where (a) the facts in the record indicate that no meetings ever took place; (b) the alleged and unlawful statements were only supported by testimonial evidence of an unreliable witness; and (c) the alleged statements, even if made, do not arise to the level of a §8(a)(1) violation (see, Exceptions 7-10); and

III. Whether the ALJ erred in finding that Respondent conferred actual or apparent authority to an employee whose conduct, allegedly performed on behalf of Respondent, violated §8(a)(1) of the Act (see, Exceptions 11-13); and

IV. Whether the ALJ erred in finding that Respondent violated §8(a)(1) of the Act by (a) stating, through an agent, that as long as the employees belonged to the union their salary would not increase and that he would terminate union employees if an employee continued to request for transfers and (b) when Respondent's manager stated to employees they could not come to the Human Resources office during breaks; that employees could not "time the lines"; and that employees must be in the break room during breaks. (see, Exceptions 14-20).

LAW AND ARGUMENT

It is axiomatic that "[i]n unfair labor practice proceedings, the Board bears the burden of proof and persuasion of showing that an employer has engaged in an unfair labor practice." *NLRB v. Pentre Elec.*, 998 F.2d 363, 370-71 (6th Cir. 1993); see also, NLRB Statements of Procedure, 29 C.F.R. §101.10(b); *NLRB v. Trasp. Management Corp.*, 462 U.S. 393 (1983). In his September 16 Order, the ALJ found that the General Counsel met this burden on twelve unfair labor practice violations arising under both §§8(a)(1) and 8(a)(3) of the Act as alleged in the General Counsel's Complaint. A review of the record evidence reveals, however, that the ALJ's factual and legal conclusions on each of these unfair labor practice allegations is not adequately supported by facts and/or law and should therefore be dismissed.

I. THE ALJ ERRED IN FINDING THAT THE RESPONDENT VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY DISCHARGING OMAR CARRION RIVERA.

Omar Carrion Rivera ("Carrion Rivera") was suspended on September 8, 2010 and discharged on September 10, 2010¹ for his grossly disrespectful and intimidating conduct toward Supervisor Adolfo Padilla ("Padilla") (G.C. Ex. 7). Carrion Rivera's confrontation in which he prevented Supervisor Padilla from transferring an employee caused a severe disruption on the production floor. Respondent submits that the ALJ erred in finding that Carrion Rivera's confrontational actions were protected (ALJ Decision, p. 21, lines 32, 33) and that the

¹ All dates refer to the year 2010 unless otherwise noted.

Respondent violated §8(a)(1) and (3) of the Act by discharging Carrion Rivera (ALJ Decision, p. 35, lines 48-50). Because the record does not support the ALJ's ruling, the Board should reverse and hold that Respondent's discharge of Carrion Rivera did not violate §§8(a)(1) and (3) of the Act.

A. Background.

The Winesburg Plant Deboning Department has five deboning lines and a sixth training line. Each of the deboning lines has two trainers and as many as 34 stations where employees are involved in deboning chickens. Carrion Rivera was a trainer on Line 5. In order to meet production quantity demands (customer orders), Lines 1-4 must run at 30 birds per minute (Tr. 792-793). Maintaining that line speed requires that those lines must be fully staffed (Tr. 793). However, there is a problem with chronic absenteeism – up to 30% on some days (Tr. 600). In order to cover for absenteeism on Lines 1-4 (which also run the most profitable products), Case Farms must take trained employees from Line 5 to keep the four critical deboning lines fully staffed with trained employees (Tr. 792-793). The job of a trainer is to do production work and to train other employees in the performance of their jobs (Tr. 604). Trainers are not supervisors (Tr. 604, 722). The department manager has the authority to transfer employees permanently from one line to another (Tr. 721) and supervisors have the authority to transfer employees temporarily (one day or less)(Tr. 721).

1. Carrion Rivera's Personal Gripe About Having to Train New Employees was the Basis for his September 8, 2010 Grossly Disrespectful and Intimidating Conduct.

The staffing priority on Lines 1-4 was an irritant to Carrion Rivera who felt himself aggrieved at having to train a disproportionate number of new hires on Line 5 (Tr. 193-194). Instead of asking the supervisors or the department manager to transfer new hires to Lines 1-4, Carrion Rivera embarked on a one-man campaign to convince Case Farm to risk dilution of productivity on its most critical lines by evenly distributing new hires between all five lines (Tr. 793).

According to Carrion Rivera, his concerns began when Case Farms hired “Cuban” employees from the Miami, Florida area. He stated that it bothered him that when the Cubans arrived, they were not trained on Line 6 but were sent directly to his line and it bothered him that they were not distributed evenly between all five lines (Tr. 243). The record is clear that the new hires from the Miami area arrived in late July.² Carrion Rivera started his campaign with Human Resources Manager Abel Acen (“Acen”). Carrion Rivera testified that he complained to Acen: “I couldn’t train all the new people.” (Tr. 193). He asked Acen to put some of the new people on the other line (Tr. 193). When nothing changed, he complained to Plant Manager Hambrick Edmonson about “having so many new employees” on Line 5 and that “I couldn’t train ... all of them.” (Tr. 194). Carrion Rivera’s proposed solution was to “distribute some of the new employees to other lines” (Tr. 194). When nothing changed, he petitioned General Manager Chuck McDaniel to “distribute the new ones” to other lines (Tr. 196).

According to Carrion Rivera, things improved following his conversation with McDaniel (Tr. 199-200). Then in August, Line 5 began receiving English-speaking new hires with whom Carrion Rivera had unspecified “problems” (Tr. 201, 255). Carrion Rivera told Acen that he didn’t want to train “dumb gringos” (Tr. 1008). He freely admits that at this point, he became frustrated and decided to engage in self-help. Rather than go back to management about the perceived problem, he decided to fix the problem himself (Tr. 255).

2. Events Leading to the Suspension and Termination of Carrion Rivera.

On August 31, employees Noe Lozada (“Lozada”) and Arquelio Reyes (“Reyes”) were pulling tenders on Line 5 when Supervisor Padilla directed them to move to another work station (thigh deboning) on the same line. Lozada and Reyes defied Padilla’s directives and received five day suspensions which began September 1 and ended September 7. In order to fully staff

² Carrion Rivera’s Affidavit reveals significant antipathy towards “Cubans” to wit: “Myself, and many of the other works are originally from Guatemala.... All Cubans look for easy jobs.... Nor are the[y] good workers...None of the Cubans go to the Union meetings. The people who go to the Union meetings are the Guatemalans.” (R. Ex. 2, p. 3, line 2; p. 5, lines 11 & 13; p. 8, line 10).

Lines 1 and 2, Supervisor Padilla had received authorization from Bernard Cooper (“Cooper”), Department Manager, to permanently reassign Lozada from Line 5 to Line 2 and to reassign Reyes from Line 5 to Line 1 (Tr. 311-312, 606, 607, 611). Padilla testified that on September 7 he informed Carrion Rivera, the trainer on Line 5, that the Lozada/Reyes reassignments would be permanent and Carrion Rivera did not deny it (Tr. 606, 608). Padilla also on September 7 informed Supervisor Ramon Ayala and Jose Otero that the transfer was permanent (Tr. 606, 607, 609). Both worked on their new lines on September 7. While Reyes honored his transfer and returned to Line 1 on September 8 as instructed (Tr. 611), Lozada took it upon himself to return to his old line (Line 5) on Wednesday September 8 (Tr. 333).

Because Line 2 was understaffed when the shift began on September 8, Lozada was needed in order to commence production (Tr. 612, 680). Trainer Jose Otero asked Supervisor Padilla to retrieve Lozada from Line 5 (Tr. 774). Padilla proceeded to Line 5, accompanied by Supervisor Ayala and Deboning Manager Cooper (Tr. 612). When they arrived at Line 5, Lozada was cutting shoulders (Tr. 316, 612). When Padilla asked him why he didn’t report to Line 2, Lozada initially ignored his supervisor (Tr. 612). When Padilla insisted that he return to Line 2, Lozada refused, claiming that Line 5 was his line and that he was going to stay (Tr. 613, 681-682).

Carrion Rivera acknowledged that it was not unusual for supervisors to come to Line 5 to transfer employees to other lines (Tr. 211). Carrion Rivera heard Padilla telling Lozada that he had to go to Line 2 to which Lozada replied “I don’t want to go, this is my line.” (Tr. 214). Carrion Rivera acknowledged that “[w]hen I got there, Adolfo wanted to take that employee to another line.” (Tr. 213). However, instead of facilitating the transfer back to Line 2, Carrion Rivera stepped in between Supervisor Padilla and Lozada and told Padilla that “You can’t take this employee.” (Tr. 214). On cross-examination, Carrion Rivera confirmed that he twice told Padilla that Lozada was going to stay on Line 5 (Tr. 256-268). General Counsel’s witness, Yasha Waleska Rivera Melendez, was working on Line 5 about ten feet from Lozada’s work

station on September 8 (Tr. 1139-1140). Although a friend of Carrion Rivera (Tr. 1150), she confirmed his defiance of Padilla, stating that Carrion Rivera “stepped in front of Supervisor Padilla and said ‘Noe is not going to another line because Line 5 is his line.’” (Tr. 1149).

The employees deboning birds on Line 5 work on a slightly elevated platform (See, photo, R. Ex. 6; Tr. 591).³ They step up to the elevated platform via a green mesh stand (R. Ex. 6; Tr. 615-16). When Carrion Rivera inserted himself between Padilla and Lozada, he stepped onto this stand (Tr. 615, 635). Supervisor Padilla remained on the floor (Tr. 614).

From his slightly elevated position, Carrion Rivera commenced an angry tantrum. Padilla testified that Carrion Rivera was yelling and “shaking his finger in my face” (Tr. 614). Carrion Rivera had a deboning knife in one hand and repeatedly shouted that Lozada is “going to stay here” (Tr. 619). On cross-examination, Padilla testified:

Q. [Ms. Bordelois] Omar, Trainer Omar Carrion Rivera was yelling at you for three to five minutes; correct?

A. [Mr. Padilla] That’s correct.

* * *

Q. You were paying attention to him, weren’t you? He had a knife in his hand; right?

A. Yes.

Q. You didn’t take your eyes off of him.

A. Of course, **I was in danger.**

[Tr. 656]

Supervisor Ayala (who had accompanied Padilla to Line 5 to retrieve Lozada) described Carrion Rivera’s tirade:

Q. [Mr. Rooney] What did Omar do or say at that time?

A. [Mr. Ayala] He jumped on top of the stand. And he was – and he was mad and told Adolfo that he can’t take his people from Line 5.

* * *

Q. Yes. While Omar was talking to Mr. Padilla, was Omar doing anything?

A. He was pointing his fingers in Adolfo Padilla’s face.

³ Respondent’s exhibits are referred to as “R. _____” and General Counsel’s exhibits are referred to “GC _____.”

- Q. Is there a significance among Hispanics of pointing a finger in someone's face?
- A. Yes.
- Q. What is the significance?
- A. It's almost like as if you were wanting to attack or fight the person.
- Q. Did Mr. Rivera have anything in his hand?
- A. Yes.
- Q. What did he have in his hand?
- A. A knife.
- * * *
- Q. Okay. Did he say anything?
- A. ... **he's never going to allow them to take his people.**

[Tr. 682-84]

Deboning Manager Cooper also accompanied Supervisors Padilla and Ayala to Line 5. Cooper does not speak Spanish but observed that Carrion Rivera was "very angry" when he thrust his finger towards Padilla's face (Tr. 724-725). Trainer Otero who observed the confrontation from an elevated position on Line 2 also described Carrion Rivera as "mad" at Padilla (Tr. 775).

Carrion Rivera's tirade triggered chaos on the deboning lines. As is obvious from photographs, the area where the incident occurred is highly congested (R. Ex. 6; Tr. 652, 755). Padilla testified that during Carrion Rivera's confrontation of Padilla, approximately 25 employees started shouting and banging their deboning knives on metal equipment (Tr. 624) and that the ensuing melee brought production to a stop. "Nobody placed the chicken on any cone in any line." (Tr. 629, 630). Supervisor Ayala confirmed that the reaction from other employees to the confrontation was the shouting and banging of knives on the table and that the line employees stopped working (Tr. 684, 685). Department Head Cooper also confirmed that the employees started beating on the cones, yelling and disrupting the production (Tr. 725).

Carrion Rivera, however, flatly denied that this fellow employees were shouting or banging their knives (Tr. 259, 260). Interestingly, of all of the employees who testified on the subject, only Carrion Rivera heard no shouting. General Counsel's witness, Melendez, had no

trouble hearing the shouting (Tr. 1149). When confronted with his affidavit, Charging Party Lozada also confirmed the shouting and knife banging, stating that “many employees in my line and in other lines began to shout...” and he heard them “banging their knives against some metal object.” (Tr. 344, 345). Line 2 Trainer Otero, who was training on Line 2, also had no trouble hearing the estimated 20 to 25 deboning employees who were shouting and banging their knives (Tr. 775).

When the deboning employees stopped working, a number of them surrounded Padilla (Tr. 632). Padilla testified that if he backed-up just one foot “I would touch them or they would touch me” (Tr. 632). Carrion Rivera continued to harangue his besieged supervisor (Tr. 633). Supervisor Ayala had never seen employees act like this to a supervisor (Tr. 685, 686). He testified that this prompted employees to move from their assigned positions and gather close to Carrion Rivera and Padilla (Tr. 685, 686).

Deboning Manager Cooper had seen enough. With the situation threatening to spin out of control, he extracted Padilla and retreated to his office, Cooper said the employee noise was a ten on a scale of one to ten and that Carrion Rivera was shouting at Padilla (Tr. 726). He took Padilla out of the area “Because had knives in their hands and pointed them at him, and . . . surrounding him, and I - - honestly, . . . I felt he - - he was in danger.” (Tr. 726-728).

Q. [Mr. Rooney] You said they surrounded him. How close were they to Adolfo Padilla?

A. [Mr. Cooper] Touching distance.

* * *

Q. What knives do employees have on the line?

A. They have what is called drumstick knives and they have shoulder cut knives.

Q. And what’s the length of the blade on those knives?

A. Drumstick knife 12 inches, and shoulder cut knife 4 inches.

[Tr. 726-728]

Lozada admitted that the retreat by the three supervisors was so hasty that the supervisors left him on Line 5 and not escorted to Line 2 (Tr. 345, 346).

B. The ALJ Erred in Crediting Rivera and Melendez to the Extent that Their Testimony Conflicted with that of Padilla, Cooper and Ayala regarding the Incident between Padilla and Rivera and in Crediting Tim Mullins and Carmen Beltran regarding Alleged Statements Made by Ayala at a Union Meeting.

The ALJ credited Rivera and Melendez to the extent that their testimony conflicted with that of Padilla, Cooper and Ayala regarding the incident between Padilla and Rivera (ALJ Decision, p. 18, lines 37-39). The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces the Board that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361, 40 LRRM 1374 (1957). Respondent submits that the clear preponderance of all of the relevant evidence establishes that the ALJ's finding is incorrect.

Carrion Rivera's testimony that no one was shouting during his confrontation with Padilla contradicts all other witnesses who testified on the matter and severely impairs his credibility which appears to be shaped in a way to bolster his ULP charge. General Counsel's witness, Melendez, had no trouble hearing the shouting (Tr. 1149). General Counsel's witness, Lozada, not only confirmed that "many employees in my line and in other lines began to shout" but also banged their knives against some metal objects on the lines (Tr. 344, 345). Line 2 Trainer Otero witnessed approximately 20 to 25 deboning employees who were both shouting and banging their knives (Tr. 775). And Supervisors Padilla and Ayala and Department Manager Cooper all testified that the employees on the lines were not only shouting and banging their knives on the lines but that during the chaos, production stopped (Tr. 624, 629, 630, 684, 685, 725). Trainer Otero, who remained in the deboning area after Cooper ushered Padilla out of the melee, stated that the employees kept banging their knives on the production lines and shouting for about five minutes (Tr. 776).

Another reason for not crediting Carrion Rivera in his testimony is that during the confrontation, he said Padilla and Carrion Rivera were two meters apart (Tr. 257). Padilla, Ayala and Cooper all testified the two were within touching distance. Staying two meters apart

during a five minute conversation in which you are defying your supervisor's attempt to transfer an employee is not credible.

Melendez' credibility is also compromised. Melendez, who admitted that she was a friend of Carrion Rivera, testified that while she was only ten (10) feet away from the confrontation, she did not see Supervisor Ayala during the confrontation and testified that Cooper didn't arrive until after the confrontation was over (Tr. 1147). All other witnesses testified that not only were both Ayala and Cooper present during the entire confrontation, they were standing close to Padilla and Carrion Rivera.

The ALJ correctly found that Lozada's insubordination warranted his discharge and concluded that the Respondent did not violate Section 8(a)(3) and (1) with respect to Lozada's discharge (ALJ Decision, p. 28, lines 20-23). It is only logical that unless the situation was rife with the potential for violence, Padilla would not have permitted Lozada to prevail in his act of outright defiance. As Supervisor Ayala testified, Cooper "went to rescue Adolfo [Padilla] from there" (Tr. 686, (*emphasis added*)). The fact that Lozada was not escorted to Line 2 emphasizes the volatility of the situation. Five witnesses testified that as many as 25 employees were shouting and banging knives. And the ALJ found that production stopped for three to five minutes. Had Carrion Rivera stood there and had a calm conversation with Padilla, there would have been no such reaction from the line employees. Thus, the testimony of Padilla, Ayala and Cooper as to the look of anger on Carrion Rivera's face and the fact that he pointed his finger at Padilla and was shouting at him is more credible as to the volatility of the situation than testified to by Carrion Rivera and Melendez.

The volatility of the situation is also demonstrated by the effect it had on Supervisor Padilla. When Cooper and Padilla left Line 5, they went to Cooper's office: Cooper observed that Padilla was very nervous and shaking (Tr. 729). Padilla then went to the Human Resources Office and explained the confrontation to Acen (Tr. 637). Acen reported the incident to McDaniel (Tr. 824). McDaniel interviewed Padilla, Cooper and Ayala. Even at the time

McDaniel interviewed Padilla, he observed that Padilla was shaking and expressed to McDaniel how afraid and scared he was out there on the floor at that time (Tr. 799).

The ALJ also credited Tim Mullins and Carmen Beltran regarding alleged statements about Carrion Rivera made by Ayala at a union meeting held at a community center named Mi Guate on February 8, 2011. (ALJ Decision, p. 19, lines 36-40). For the following reasons, Respondent submits that the clear preponderance of all the relevant evidence established that the ALJ's finding is incorrect.

Local 880 organizer Tim Mullins claimed that Ayala came to a weekly union meeting in Dover on February 8, 2011 where the following exchange allegedly occurred:

A. [Mr. Mullins] ...we were all kind of getting up to leave and I asked [Ayala] **if he was there when Omar was fired.**

Q. [Mr. Rooney] And did he respond to that?

A. Yes, he did.

Q. What did he say?

A. He said Omar didn't do anything, in Spanish.

[Tr. 1078 (*emphasis added*)]

Ayala's alleged response is ambiguous at best. Carrion Rivera was "fired" on **September 10** and Mullins' alleged question related to that date (**not** September 8). Assuming for the sake of analysis that nothing was lost in Mullins' translation of Ayala's alleged comment which was made in Spanish, Ayala's alleged response could, at most, mean that Carrion Rivera "didn't do anything" **on September 10**. That's true but irrelevant.

Local 880 committeeperson Carmen Beltran embellished Mullins testimony by claiming that Ayala "said that Abel wanted to fire and let go the representatives of the Union and the other employees from Guatemala" (Tr. 1156). However, Mullins did not recall Ayala saying that (Tr. 1171). And importantly, while Tim Mullins said he takes notes at all Union Committee meetings if important things that are said during the meeting nothing in his notes supports Mr. Beltran's statement in any way (Tr. 1168-1170).

It perhaps bears repeating that Acen was **not** the person who made the decision to terminate Carrion Rivera. As for Ayala's supposed "attendance" at the February 8 meeting, Ayala flatly denied it (Tr. 1189-1191).

Even if one were to credit Mullins' notes, an ambiguous four-word phrase allegedly uttered five full months after the September 8 incident cannot overcome the mountain of record evidence which conclusively demonstrates that Carrion Rivera's tantrum was anything but "innocent."

Thus, the testimony of Mullins and Beltran is not credible and that of Acen and Ayala should be credited along with Padilla, Ayala and Cooper as demonstrating that the Respondent did not violate Section 8(a)(1) and (3) in discharging Carrion Rivera.

C. Omar Carrion Rivera's Grossly Disrespectful and Intimidating Conduct was Intolerable and was Grounds for Discharge.

Carrion Rivera brazenly confronted Supervisor Padilla in a manner which directly challenged Padilla's authority. His tirade took place in a highly congested work area and caused up to 25 employees to stop working and become agitated. Numerous cases recognize that such misconduct is intolerable.

In *Volt Information Sciences, Inc.*, 274 NLRB 308 (1985), the discipline of an employee (Mulrain) who was admonished for making a lengthy personal phone call on a company telephone was upheld when he launched a shouting tirade which disrupted other workers and kept the other employees from doing their work.

In *Waste Management of Arizona*, an employee (Hoekstra) who believed his pay was shorted launched a profane outburst which was witnessed by several employees:

Several employees, including both unit employees and supervisors, witnessed Hoekstra's outburst, which occurred in an area of the Respondent's facility where employees gathered at the end of the workday to complete paperwork prior to clocking out and leaving work. The Respondent terminated Hoekstra 4 days later. ... His conduct was insubordinate, it disrupted the workplace, and undermined Rush's supervisory authority.

345 NLRB 1339, 1340-1341 (2005). Accord: *Decca Limited Partnership d/b/a Manor Care of Decatur*, 327 NLRB 980, 989 (1999) (“outburst” in front of 10 observers justified discharge); *Avondale Industries, Inc.* 329 NLRB 1064, 1224 (1999) (“challenging” supervisor in a manner calculated to “humiliate” him was grounds for discharge); *United States Postal Service*, 282 NLRB 686, 694 (1987) (employee’s obstreperous outburst had the effect of “interfering with employee work duties to the extent that they worked at a slower pace, or stopped work altogether to view the scene at Adam’s desk.”).

In addition to disrupting the deboning lines, Carrion Rivera’s tirade intimidated Supervisor Padilla and created the potential for violence. In the case of *Cellco Partnership d/b/a Verizon Wireless*, 349 NLRB 640 (2007), a female manager (Dianne Carter) asked an employee (Ferrante) not to park in spots reserved for visitors:

At that point, according to Carter, Ferrante, whose face was red, loudly and aggressively asked, “what does that mean? Are you going to mark me late for the day?” He began walking toward her ... causing Carter to back up to avoid contact with him. Carter testified that she was very frightened and felt threatened, believing that he was attempting to intimidate her....

349 NLRB 640, 651

Carter reported to her superior that she was “frightened, intimidated and felt unsafe.” *Id.*

At 652. The ALJ recommended dismissal of the §8(a)(3) charge saying:

This is not a situation which was contrived by the Respondent in order to retaliate against Ferrante for his union activities. It clearly was begun by Ferrante’s confrontation of Carter in an intimidating manner. ...

Id. At 654

Accord: *Tri-City Fabricating*, 316 NLRB 1096 (1995) (“**physical intimidation of a supervisor is most serious.**”).

In addition to intimidating Supervisor Padilla, Carrion Rivera’s tirade set in motion a chaotic situation which was ripe with the potential for violence. In the case of *International Baking Co. & Earthgrains*, 348 NLRB 1133 (2006), Felipe Serrano, a “high profile” union activist and shop steward, engaged in confrontational behavior toward a leadman which carried the potential for workplace violence. ALJ Lana H. Parke found that the employer’s discharge of

Serrano did not violate §8(a)(3) since her misconduct showed significant disrespect for employer authority and involved potential workplace violence, a legitimate employer concern.

The ALJ emphasized the fact that Carrion Rivera uttered no verbal threats and did not physically strike Supervisor Padilla. However, actual violence is not required. *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051 (D.C. Cir. 2001). Carrion Rivera's threatening and intimidating behavior was grounds for discharge.

D. Chuck McDaniel's Decision to Terminate Omar Carrion Rivera.

Acen interviewed Carrion Rivera and Lozada and caused human resources assistant Kimberly Clark to type her notes of the interviews (G.C. Exs. 14 and 15; Tr. 869-870). He then carried out McDaniel's directive to suspend Carrion Rivera and Lozada pending investigation (Tr. 95-96, 823-24). After suspending Carrion Rivera and Lozada, Acen obtained written statements from Padilla (R. Ex. 15), Cooper (Tr. Ex. 18), Ayala (R. Ex. 19) and trainer Otero (R. Ex. 20). Acen presented the four statements and the notes of the Carrion Rivera/Lozada interviews to McDaniel (Tr. 798-799, 829-831).

McDaniel reviewed the four eyewitness statements and the typewritten interviews with Carrion Rivera and Lozada (Tr. 798-799). He consulted with Case Farms' president, labor lawyer and corporate director of human resources (Tr. 794). It was not an easy decision:

Q. [Mr. Rooney] Tell us what went into your decision to terminate Mr. Rivera?

A. [Mr. McDaniel] Terminating Omar was a very difficult decision. Because number one, he was a Union committeeman, which I have always given special consideration to.

I also like Omar. Omar and I had a very good relationship. I have an open-door policy and Omar utilized that quite often.

And he was a good worker - - not a model worker, but certainly a good worker, and as far as Union committeeman goes ... he was very reasonable, much more reasonable than some of the others were. So it was a very difficult decision.

[Tr. 800]

The bottom line was that Carrion Rivera's misconduct was intolerable:

Q. [Mr. Rooney] What was most troubling to you about Omar Carrion Rivera's behavior?

A. [Mr. McDaniel] The most troubling thing for me was that it happened out there on the floor around hundreds of employees, and just the insubordination towards a supervisor in front of that many people that, you know, it was almost a riot situation out there. It was a very dangerous situation.

[Tr. 796]

* * *

As much as I hated to do it, I had to terminate him.

Q. And who wrote the words on that termination form?

A. Those are my words.

[Tr. 801]

E. The ALJ Erred in Finding that Carrion Rivera was Engaged in Protected Activity in His Confrontation with Supervisor Padilla.

Even if the credibility determination of the ALJ could be found not to have been made in error, his conclusion that Carrion Rivera was engaged in lawfully protected activity is unfounded. The ALJ found that Carrion Rivera was engaged in protected activity during the confrontation he initiated with Supervisor Padilla (ALJ Decision, p. 21, lines 32-33). However, Carrion Rivera charted a course with only one beneficiary in mind – Carrion Rivera. As such, his conduct is not protected by Section 7. Carrion Rivera was on a purely personal mission to shift more of the burden of training new hires onto the trainers on Lines 1-4 and retain more trained employees on Line 5. He admitted that it “bothered him when ‘Cubans’ were placed on Line 5 and trained workers were transferred from Line 5 to other lines.” (Tr. 243). Carrion Rivera expressed his purely personal complaint to Acen and asked Acen to do a “big favor to me” of reassigning some of the new hires (Tr. 193). When Acen did not solve his complaint, Carrion Rivera told the Plant Manager that he could not train all the new employees and asked for him to “do me the great favor” to distribute some of the new employees to other lines (Tr. 194). When the Plant Manager failed to fix his problem, Carrion Rivera petitioned McDaniel. While the situation initially improved following his meeting with McDaniel, approximately the middle of August, Carrion Rivera again experienced employees being taken from his line or replaced by new

employees. Carrion Rivera testified that the resumption of this practice upset him but rather than going back to management, he decided to fix the problem himself (Tr. 254, 255).

When he defied Supervisor Padilla on September 8, Carrion Rivera was still pursuing his personal mission to retain trained employees (like Lozada) and jettison new hires. He told Padilla “You can’t take this employee...because you supervisors come here, take employees and I – the only thing I have left are new employees.” (Tr. 214).

Lozada agreed that Carrion Rivera vocalized his **personal gripe** to Supervisor Padilla:

Q. [Mr. Rooney] During the conversation that Omar had with Supervisor Padilla ... you heard Mr. Rivera complain to Supervisor Padilla about taking trained people from Line 5 and leaving Omar with too many new people; is that correct?

A. [Mr. Lozada] Yes.

Q. And Mr. Rivera told Supervisor Padilla that it was hard for him to teach all the new people that were assigned to Line 5; is that correct?

A. Yes.

[Tr. 340]

When he was taken to Acen’s office following the confrontation, Carrion Rivera admitted that the **only** thing he had said to Supervisor Padilla during their confrontation was limited to his personal gripe (Tr. 261, 262).

Carrion Rivera’s testimony was consistent with his affidavit:

I had explained to the supervisor that I needed [Lozada] and that he was going to leave me with all new employees again. “What did you say in addition to that?” [Acen] asked me. “Nothing else,” I told him.

[R. Ex. 2, p. 7, line 13]

As evidenced by Carrion Rivera’s own testimony, his confrontation with Padilla was purely to keep trained employees on his line so he did not have to train more new employees. If he had been advocating on behalf of Lozada, he certainly would have mentioned that to Supervisor Padilla, HR Manager Acen and stated it in his affidavit. However, he did not do so.

Section 7 gives employees the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection. However, a personal gripe does not

qualify for protection. In *Media General Operations, Inc.*, 346 NLRB 369 (2006), a steward (Banos) shut down a pressline at the Tampa Tribune to make a repair. Night foreman, Jennifer Amstutz, counseled Banos not to shut down a pressline without a backup line running. Banos became loud and argumentative and profanely accused her of favoritism toward another operator to whom she was related. The Board found that Banos' "personal gripe" was not protected. See also, *Holling Press, Inc.*, 343 NLRB 301, 302 (2004) ("Fabozzi charted a course of action with only one person in mind - - Fabozzi herself.... Her goal was a purely individual one.")

The Sixth Circuit has strongly endorsed the view that "personal gripes" are unprotected. In *Manimark Corp. v. NLRB*, 7 F.3d 547, 548 (6th Cir. 1993), the Court explained:

This court has held that for an individual's complaints to constitute concerted action, they "must not have been made **solely on behalf of an individual employee**, but [they] must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action." *ARO, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979).

* * *

When Fields objected to the change in his commission, he was expressing a **purely personal complaint**.

Accord: *Media General Operations v. NLRB*, 394 F.3d 207, 212, 176 LRRM (BNA) 2385, 2388 (4th Cir. 2005) ("...**personal missions** are not the sort of concerted activity which the statute protects.").

As can clearly be seen from the foregoing, Carrion Rivera's confrontation with Supervisor Padilla was purely personal – he did not want to have Lozada transferred and have to train a new employee. The record evidence leads to the conclusion that Carrion Rivera was not engaged in protected activity.

F. The ALJ Erred in Finding that It Was Not Necessary to Analyze the Case under the Board's *Wright Line* Doctrine.

The ALJ erred in finding that Carrion Rivera was discharged for his conduct during his discussion with Padilla, during which he was involved in Section 7 activity and concluded it was

not necessary to analyze the case under the Board's *Wright Line* Doctrine (ALJ Decision, p. 25, lines 14-20). Respondent asserts that Carrion Rivera was not engaged in protected activities (See Paragraph G) but even if he were, a *Wright Line* analysis is appropriate. Under the *Wright Line* analysis, Carrion Rivera's confrontation was grounds for termination.

Under *Wright Line Div.*, 251 NLRB 1083, 105 LRRM 1168 (1980) enforced 662 F.2d 899, 108 LRRM 2513, 1st Cir. (1981) cert. denied 455 U.S. 989, 109 LRRM 2779 (1982), general counsel shoulders the burden of proof that the employer was actuated by *animus*. It is important to note however that general hostility does not suffice. General Counsel must show that the employer acted with *animus* towards the alleged discriminatee:

... general hostility toward the union does not itself supply the element of unlawful motive." *GSX Corp.*, 918 F.2d at 1357. Rather, the General Counsel had to offer proof that Carleton acted on that *animus* in refusing to extend Diekman's contract.

Carleton College v. NLRB, 230 F.3d 1075, 1078, 165 LRRM (BNA) 2670, 2673
(8th Cir. 2000)

Mr. McDaniel made the decision to discharge Carrion Rivera and there is no record evidence that McDaniel's decision was actuated by union *animus*.

The election at Case Farms occurred four years ago (June 2007) (Tr. 159). Carrion Rivera solicited authorization cards for Local 880 prior to the election (Tr. 159). He's a member of the Union bargaining committee and has attended all bargaining sessions (Tr. 162). He participated in a nine-month strike in 2008-2009 (during which Case Farms did **not** exercise its right to hire permanent replacements) (Tr. 162, 788). Carrion Rivera also acted as the *Weingarten* representative of bargaining unit employees (Tr. 173). In that role he dealt with general manager McDaniel who he called the "first boss" (Tr. 173). Yet the "first boss" testified that notwithstanding Carrion Rivera's activism on behalf of Local 880, he "liked Omar," that they had a "very good relationship," that Omar was "very reasonable" in his role as a Union committeeman; and that he "hated" to have to terminate Omar (Tr. 800-801). Carrion Rivera didn't disagree. Indeed, he agreed:

- Q. [Mr. Rooney] And during that [September 10] meeting Chuck McDaniel told you, and this is affidavit, Page 8, Line 7, quote, Omar, **I like you a lot**, end quote.
- A. [Mr. Carrion Rivera] Yes.
- Q. In fact, you had enjoyed a **very good and friendly relationship with Chuck McDaniel** prior to September 8; correct?
- A. Yes.
- Q. But Chuck McDaniel said that because of what happened on September 8, 2010, the Company had no choice but to terminate you; correct?
- A. Yes.

[Tr. 264]

If McDaniel wanted to terminate Carrion Rivera, he had ample opportunity to drop the axe not long after the June 2007 election. On December 10, 2007, Carrion Rivera received a two day suspension for punching his wife's and another employee's time cards (R. Ex. 5; Tr. 277-278). That was a terminable offense but Carrion Rivera was not terminated (Tr. 280, 802).

Instead of being terminated, Carrion Rivera was promoted to trainer in October, 2009 and given a significant wage increase (Tr. 280-281). Instead of hammering Union committeemen, McDaniel went out of his way to "cut them some slack." An example is Adolfo Jimenez who solicited authorization cards prior to the election; acted as Local 880's observer at the election; and has attended all bargaining sessions (Tr. 521-522, 524). Like Carrion Rivera, Jimenez has had meetings with McDaniel in his role as a *Weingarten* representative (Tr. 528). And like Carrion Rivera, McDaniel could easily have terminated Adolfo Jimenez. In August, 2007, Jimenez received a five day suspension for endangering another employee by driving a forklift under the other employee's forklift; lifting it off the floor; and then dropping it (R. Ex. 13; Tr. 563-565). The plant manager was "adamant" that Jimenez be fired but McDaniel "chose not to" (Tr. 802). There were several other instances where McDaniel "chose not to":

- Q. [Mr. Rooney] Okay. You say you give special consideration to Union committeemen. Have you given special consideration to any other Union committeemen?
- A. [Mr. McDaniel] Yes, I have.
- Q. And who is that?

A. Well there's been several. ... Luis Barrios and also Miguel Melendez.

Both of those individuals were incarcerated for a period of time to that point...where they exceeded their eight [attendance] points and they were subject to termination.

In both those instances, [Union attorney] Mark Rock called our attorney Dave Hiller and asked for special consideration. And I granted that special consideration in both those instances.

[Tr. 801]

In considering the *animus* issue, it is important to distinguish between McDaniel and Acen. General Counsel's witnesses made a number of accusations against Acen which will be analyzed in detail *infra*. **No one has accused McDaniel of anti-union *animus* and any such charge would be absurd.** That is critical because McDaniel was the person who decided to terminate Carrion Rivera and Lozada without obtaining any recommendation from Acen.

General Counsel called Acen as on cross-examination and proceeded to establish that Acen's role was purely reportorial. Acen testified without contradiction that his role was merely to investigate the incident and report to McDaniel. He made no recommendation to McDaniel (Tr. 103).

McDaniel confirmed that he made the discharge decision the morning of September 10 absent any recommendation from Acen (Tr. 795, 834).

McDaniel had an honest belief that Carrion Rivera engaged in disrespectful and intimidating conduct. Where an employee **is not engaged in protected activity** at the time of the alleged misconduct, an employer's honest belief that the employee engaged in the misconduct is a complete defense (even if that belief proves to be erroneous). In *United Artists Theatre Circuit*, 277 NLRB 1382 (1985), the employer based its good faith belief that the employee had engaged in misconduct (placing graffiti on the walls of elevators and restrooms) on eyewitness reports. The Board affirmed the decision of the ALJ that the employer had no reason to disbelieve the eyewitness reports; that such reports justified the employer's good faith belief that Mason was the culprit; and that the employer's good faith belief was therefore a *complete defense*.

Where, as here, misconduct is promptly reported by eyewitnesses and there is nothing to suggest that the eyewitnesses were unworthy of belief, the employer may rely upon the eyewitness reports. See *Patrick Media Group d/b/a Eller Media Co.*, 326 NLRB 1287, 1292 (1998) (“... it was not unreasonable to rely upon ... eyewitness accounts ... especially when said accounts ... were promptly reported and the witnesses were presumably worthy of belief.”); *Loredo Coca Cola Bottling Co.*, 258 NLRB 491, 497 (1981) (“...there is no evidence in the record to establish that Respondent should have questioned [eyewitness accounts] accuracy or reliability.”); and *J.J. Cassone Bakery*, 350 NLRB 86, 88 (2007) (“No reason has been shown why Cassone should not have believed Viegas’ account of the incident.”). As stated, Carrion Rivera was not engaged in protected activity at the time of the confrontation with Supervisor Padilla.

Where an employee **is engaged in protected activity** (such as participating in a strike or soliciting signatures on union cards) at the time of alleged misconduct and the employer has an honest belief that the employee engaged in the misconduct, the NLRB General Counsel must prove that the employer’s belief was erroneous (*i.e.*, that the employee did not, in fact, engage in the misconduct):

... the honest belief of an employer that ... employees have engaged in misconduct provides an adequate defense to a charge of discrimination ... unless it *affirmatively* appears that such misconduct did not in fact occur. We thus hold that *once such an honest belief is established, the General Counsel must go forward with evidence to prove that the employees did not, in fact, engage in such misconduct.* The employer then, of course, may rebut the General Counsel’s case with evidence that the unlawful conduct actually did occur. At all times, the burden of proving discrimination is that of the General Counsel.

Rubin Bros. Footwear, 99 NLRB 610, 611 (1952)(*emphasis added*)

Accord: *Farmers’ Cooperative Gin Ass’n*, 161 NLRB 887, 911-12 (1966) (“... “once such an honest belief is established, the General Counsel must go forward with evidence to prove that the employees did not, in fact, engage in such misconduct,”); and *Classe Ribbon*, 227 NLRB 406 n.1 (1976) (“As the General Counsel did not meet [its] burden of demonstrating the

misconduct did not in fact occur, it has not been proven that Respondent violated Sec. 8(a)(3) in Stanley's discharge."). Respondent submits that based on the record evidence, even if Carrion Rivera was engaged in protected activity, McDaniel had an honest belief that Carrion Rivera engaged in the misconduct and NLRB General Counsel has not proven that the Employer's belief as erroneous.

General Counsel may contend that Case Farms' investigation was imperfect and that more eyewitnesses could have been interviewed. But neither perfection nor interviewing every conceivable witness is the standard. See *Gruma Corp.*, 350 NLRB 336, 350 (2007) ("...while Laytong's investigation was less than perfect," its conclusions were essentially correct): and *International Baking Co.*, 348 NLRB 1133, 1154 (2006) ("While Ms. Elioff did not interview every potential witness, there is no evidence Respondent sought to shape or distort its inquiry or engaged in sham fact gathering."). Clearly, Case Farms' investigation was thorough and legally sufficient.

One of the General Counsel's witnesses, Melendez, testified on rebuttal that the employees who were shouting on September 8 were shouting "strike" (Tr. 1151). The ALJ made reference to this testimony in his Decision (p. 18, 8-11). However, this is not evidence of "concerted action." Assuming *arguendo* (and only *arguendo*) that the word "strike" was uttered (Otero specifically testified employees were not shouting "strike")(Tr. 779), it was a **reaction** to the Carrion Rivera/Padilla confrontation. There is no testimony or other **record evidence** that those who were shouting and banging their knives were doing anything other than availing themselves of a spontaneous opportunity to raise a commotion.

It would require a giant leap of faith to extend the protections of the Act to plainly insubordinate misconduct based upon the supposed utterance of one word. It was precisely such a leap of faith which drew the ire of the D.C. Circuit in the case of *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1103-1105, 168 LRRM (BNA) 2673 (D.C. Cir. 2001),

where two employees (Hasan and Borgs) sent their supervisor a memo proclaiming that his supervision of their project was no longer required:

On January 17, Hasan flatly asserted that he would not recognize the authority of his current supervisor, or any other supervisor for that matter. ... The memo contained no specific objections to any terms and conditions of employment, but, rather, simply rejected Berger's supervision. ... At oral argument, counsel for the Board suggested that Hasan and Borgs were **simply "inartful" in their objection to their working conditions**.... This position is wholly untenable. The January 17 memo admits of only one fair reading: Borgs and Hasan told their supervisor that they would not recognize his authority in connection with their work. That was insubordination, not protected concerted activity. Therefore, Hasan was properly reprimanded for this act of insubordination.

* * *

... Although the Board has considerable leeway in determining the exact scope of protected activity, see *Weingarten*, 420 U.S. at 266, **it has no authority to extend the protections of the Act to plainly insubordinate behavior unrelated to the terms and conditions of employment**. Because absolutely no evidence supports any nexus between the January 17 memo and any protected activity by Hasan concerning the terms and conditions of his employment, we reverse the NLRB's finding with regard to Hasan.

(emphasis added).

Two days **after** Carrion Rivera's tirade there was a walkout (presumably to protest his termination). A group action on September 10 cannot retroactively convert rank insubordination which occurred two days earlier into protected concerted activity. If the reverse were true, **any** misconduct could be retroactively converted by the simple expedient of orchestrating a work stoppage.

The conduct of Carrion Rivera on September 8 warranted a discharge. Thus, under the *Wright Line* analysis, Carrion Rivera was properly discharged.

G. The ALJ Erred in Finding that Carrion Rivera was Engaged in Protected Concerted Activities and that He Did Not, by His Opprobrious Conduct, Lose the Protection of the Act.

If the facts of this case could support the ALJ's conclusion that Carrion Rivera was engaged in protected activity (which it does not), Carrion Rivera's outburst lost the protection of the Act. The ALJ, however, erroneously found that Carrion Rivera's conduct did not remove him from the protection of the Act (ALJ Decision, p. 24, lines 41-46; p. 25, lines 1-12). *Atlantic Steel*,

245 NLRB 814 (1979), creates a framework for deciding whether an “employee who is engaged in **concerted** protected activity” has, by opprobrious conduct, lost the protection of the Act:

... the Board and the courts have recognized ... that even an employee **who is engaged in concerted protected activity** can, by opprobrious conduct, lose the protection of the Act.

The decision as to whether the employee has crossed that line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.

Even if Carrion Rivera had been engaged in concerted protected activity, his opprobrious conduct removes the protection of the Act under *Atlantic Steel’s* four-part test.

Factor 1 – The Place of the Discussion

The ALJ correctly found that factor one – the place of discussion, weighed against Carrion Rivera’s conduct being protected (ALJ Decision, p. 23, lines 17-22). However, the record evidence shows that the ALJ erred in finding that factors two and three weighed in favor of Carrion Rivera’s conduct being protected and that factor four was neutral (ALJ Decision, p. 23, lines 24-38; p. 24, lines 5-40). Factors two, three and four will be discussed below.

Factor 2 – Subject Matter of the Discussion

The ALJ found that the discussion between Padilla and Rivera involved the transfer of Lozada and the staffing of lines, both of which are clearly terms and conditions of employment and that Rivera had a vested interest in representing employees regarding what he perceived to be detrimental changes in terms and conditions of employment (ALJ Decision, p. 23, lines 24-30). However, Carrion Rivera made clear in his testimony cited above that he was not representing Lozada regarding what he perceived to be a detrimental change in terms and conditions of employment – he was clearly furthering his own personal interest not to train new employees. See, *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051 (D.C. Cir. 2001)(Employee’s assertion of a collectively-bargaining right to be paid a night shift differential was protected activity); *Media General, supra* (Employee’s comment about the status of ongoing contract

negotiations constitutes protected activity). In contrast, there was no nexus between Carrion Rivera's defiant words and any **collective** dispute over working conditions. Thus, factor two weighs against Carrion Rivera's conduct being protected.

Factor 3 – The Nature of the Outburst

The ALJ found that while “it is undisputed that Rivera did not assault Rivera [Padilla], make any threats, or use profanity” (ALJ Decision, p. 23, lines 33, 34), he did find that “Rivera did challenge Padilla's directive that Lozada returned to Line 2 on a permanent basis.” (ALJ Decision, p. 23, line 38; p. 24, line 5). The ALJ also found that disruption of production lasted three to five minutes (ALJ Decision, p. 24, lines 5-8).

To lose the protection of the Act, the nature of the outburst does not have to be in the nature of an assault, threat or profanity, but it is enough that it is a direct challenge to a supervisor's authority or that it undermines employee discipline. *Media General*, 560 F.3d 181, 187, 188 (BNA) 3377, 3381. Here, Carrion Rivera acted in direct defiance of his supervisor. Furthermore, it undermined employee discipline by sending a message that by confronting Padilla and causing an uproar among employees, management may not follow through on a legitimate transfer of an employee.

Carrion Rivera' intimidation of his supervisor is similar to the facts in *Daimlerchrysler, Corp.*, 344 NLRB 1324 (2005) where an employee approached his supervisor in an intimidating manner in front of quite a few other employees and launched a profane outburst. The Board found that the outburst “would reasonably tend to affect workplace discipline by undermining the authority of the supervisor subject to this vituperative attack.” Here, the very nature of Carrion Rivera's outburst was to undermine Padilla's authority and to affect workplace discipline. This removes his conduct from the protection of the Act.

Factor 4 – Provocation by Unfair Labor Practices

The ALJ found that while “Respondent committed contemporaneous unfair labor practices, there is no evidence that the unfair labor practices are related to or provoked Rivera

to interject himself into the discussion between Lozada and Padilla and thus the fourth *Atlantic Steel* factor is neutral in this case.” (ALJ Decision, p. 24, lines 37-40). The lawfulness of Padilla’s directive weighs against extending protection to opprobrious misconduct:

This was not a spontaneous outburst in response to an **illegal** threat

* * *

Thus, the fourth factor of the *Atlantic Steel* test weighs more than slightly against extending the Act’s protection. See J.A. at 396. The lawfulness of the employer’s actions also distinguishes this case from others in which the **Board has extended much greater latitude to employees who are reacting to patently unlawful actions by their employers.** See *Care Initiatives*, 321 NLRB at 152 (“[A]n employer may not rely on employee conduct that it has **unlawfully** provoked as a basis for disciplining an employee.” (quoting *NLRB v. Sw. Bell Tel. Co.*, 694 F.2d 974, 978 (5th Cir. 1982)); see also *Stanford N.Y.*, 344 NLRB at 559 (brief profanity was protected where it was a “direct and temporally immediate response” to **unlawful** threats by a supervisor).

* * *

The Act’s protections are not limitless ... and where they do not reach, **employers cannot be compelled to tolerate language or behavior that undermines workplace discipline.** *Trus Joist Macmillan*, 341 NLRB at 371 (“Employers and employees have a shared interest in maintaining order in the workplace).

Media General Operations, Inc. v. NLRB, 560 F.3d 181, 188-193, 185 LRRM (BNA) 3377, 3381-82 (4th Cir. 2009)

In finding that Lozada was insubordinate in refusing to return to Line 2 on September 8, the ALJ found that Padilla’s directive to return to Line 2 was clearly lawful. Carrion Rivera’s outburst was not in response to an illegal threat or an unlawful action by Padilla. Thus, factor four weighs against Carrion Rivera’s conduct being protected.

For the foregoing reasons, Respondent submits that all four *Atlantic Steel* factors weigh against Carrion Rivera’s conduct being protected and that the Board should dismiss the Section 8(a)(1) and (3) allegations with respect to Carrion Rivera’s suspension and discharge in the Complaint.

II. **THE ALJ ERRED IN FINDING THAT THERE EXISTED SUFFICIENT EVIDENCE TO SUPPORT THE ALLEGATIONS THAT MEDERO LEDESMA MET PRIVATELY WITH ACEN TWO TO THREE TIMES PER WEEK AND THAT RESPONDENT VIOLATED §8(A)(1) OF THE ACT BY TELLING EMPLOYEES NOT TO LIVE IN DOVER/NEW PHILADELPHIA.**

The ALJ erred, in finding upon consideration of the evidence, that private meetings took place between the General Counsel's key witness, Yerima Medero Ledesma ("Medero Ledesma") and Manager Acen. (ALJ Decision, p. 8, lines 8-12). Because the evidence demonstrates that the private meetings between Medero Ledesma and Acen never occurred, the allegations that Respondent violated §8(a)(1) through the threatening and coercive statements of Acen occurring at these meetings is baseless. Moreover, even if the record could support the conclusion that Medero Ledesma and Acen met privately (which it does not), Board precedent precludes the ALJ's §8(a)(1) conclusions based on the allegations contained in Paragraph 9(B) of the Complaint as a matter of law.

A. **In Order To Conclude That Medero Ledesma Met Privately With Acen The ALJ Assumed Facts Not In Evidence And Relied On Erroneous Conclusions Of Fact.**

In support of his conclusions that Respondent violated §8(a)(1) as alleged in Paragraphs 9(A) and 9(B)⁴ of the Complaint, the General Counsel relied exclusively on the testimony of Medero Ledesma to establish that the alleged private meetings, during which the alleged unlawful statements, occurred:

Q. [Ms. Webber] How often did you meet with Mr. Acen?

⁴ Paragraphs 9(A) & 9(B) allege:

9. Respondent, by Human Resources Manager Abel Acen:

(A) On or about August 11, 2010, in the Human Resources Manager's office, told an employee that little by little he was going to get rid of employees who participate in strikes at the Respondent's facility.

(B) In or about the beginning of August 2010, the exact date being unknown, in the Human Resources Manager's office, coercively told an employee that he did not want the new employees to live in either Dover or New Philadelphia because supported of the Charging Union lived in those cities and they might convince the new employees to be Union Supporters.

- A. [Ms. Ledesma] With Abel?
- Q. Yes.
- A. Just about every day, daily.
- Q. And you worked for Case Farms for about three months; correct?
- A. Almost four months.
- Q. How many days a week were you working?
- A. No, I worked everyday from Monday to Saturday.
- Q. So six days a weeks?
- A. Six days.
- Q. And where these meetings in Able Acen's office?
- A. Yes.

[Tr. 447]

The legitimacy of this testimony, however, is in direct contradiction to the testimony of Case Farms Human Resources Representative, Stephanie Ajanel ("Ajanel"):

- Q. [Ms. Webber] What is the HR Department's practice for meeting with employees?
- A. [Ms. Ajanel] We always have someone with us, another HR representative with us.
- Q. When did this become an HR practice?
- A. When Abel Acen was hired.
- Q. Do you remember when approximately that was?
- A. February 2010.
- Q. From your observations and participation in hourly employee meetings, does Mr. Acen follow this practice when he meets with employees?
- A. Yes.
- Q. Have you personally ever observed Mr. Acen meeting with an hourly employee alone?
- A. No.

* * *

- Q. In 2010 if a person were to go to Mr. Acen's office, would that person have to pass by the HR office?
- A. Yes.
- Q. Is there an alternate route to Mr. Acen's office?
- A. No.

* * *

Q. In the Summer and Fall of 2010, how many HR representatives were employed by Case Farms?

A. Two.

Q. If you, let's say left your office for lunch or a break, or to go to a meeting, would another HR representative be in that office?

A. Yes.

* * *

Q. If an employee wanted to see Mr. Acen, what is the normal process that employee would follow?

A. The employee would have to stop by the HR office first and then we would call in to Abel's office to see if he could – had time for the employee.

Q. Your best recollection, how many times between July 2010, when Ms. Medero Ledesma was hired and November 2010, did you see her pass the HR window?

A. No.

Q. **Did you ever personally observe Mr. Acen meeting with Ms. Medero Ledesma alone in his office?**

A. **No.**

[Tr. 892, 897-899 (emphasis added)]

Notwithstanding this contradictory testimony, the ALJ, assuming evidence not present in the record, concluded that these meetings could have secretly taken place without the knowledge of the Human Resources Representatives:

Both Ajanel and the other Human Resources Representative, Kimberly Clark, testified that employees going to Acen's office in the summer and fall of 2010 would have to go by their desk to go to Acen's office. A diagram prepared of the Human Resources office, as it was configured in 2010 (GC Exh. 27), shows that there is a door leading from the main employee lunch room to the Human Resources office that was located on the left side of the diagram. If an employee entered that door, he or she would be in the Human Resources office. Acen's office was located on the right side of the diagram. To go to his office through the Human Resources, one would have to pass by the desks of Ajanel and Clark. Ajanel also testified, however, that there is another door to Acen's office. This door is also reflected on the side of the diagram. This door is located in the hallway that goes past the Human Resources office. There are windows in the Human Resources office by the desks of Ajanel and Clark that overlook this hallway. **If an employee went down this hallway, he or she would go past the Human Resources office and arrive at the second door to Acen's office. Importantly, past the second door to Acen's office to the right, as one looks at the door, is the "training room" or "supervisor's lunch room" where Diaz, Ledesma, and some other employees took their lunch hour and**

breaks. Thus, if an employee was in the training room and went to Acen's office through the door from the hallway, the employee would not be observed by Clark or Ajanel.

(ALJ Decision, p. 7, lines 23-24)(emphasis added).

The ALJ's conclusion lacks any evidential support. First, Medero Ledesma readily admitted that the **only path** she took to and from Acen's office was the path in front of the Human Resources Representative window – the path beginning with the Human Resources door passing the Human Resources window and ending at Acen's door:

- Q. [Ms. Webber] On any day when you went to Mr. Acen's office, the only way to get there was in front of the HR window; correct?
- A. [Ms. Ledesma] There is a window in Human Resources, but it was not necessary.⁵
- Q. Can you tell me what path you took to Mr. Acen's office?
- A. **The same path. This is the door for Human Resources, and this is the door for his office.**

[Tr. 445-446 (*emphasis added*)]

The ALJ's conclusion that Medero Ledesma utilized an alternative path to arrive at Acen's office is simply unfounded. See, GC Exh. 27.

Second, the ALJ's understanding of the layout at the Case Farms facility is incorrect. The General Counsel's Exhibit 27, to which the ALJ referred and based his finding, **does not** designate the area to the right of Acen's office as the "supervisor's lunch room" or "training room." See, GC Exh. 27. This is because there is no access from Acen's office to that lunch room. There is no evidence or testimony in the record that support's the ALJ's configuration of the building.

⁵ Medero Ledesma's testimony infers that there is an alternative route to Acen's office. While this is technically correct, the only other route would require a person to actually walk through the Human Resources office. See, GC Exh. 27.

Based upon the foregoing, not only is there no evidence in the record to corroborate Medero Ledesma's allegations that she privately met in Acen's office, the evidence suggests that no meeting ever took place. To conclude otherwise it would have to be assumed that Medero Ledesma, for a period of approximately four months, walked directly past and in plain view of the Human Resources Representatives two to three times per week completely undetected. This conclusion is contradicted by Ajanel and Clark and defies logic.

The ALJ's finding that Case Farms violated §8(a)(1) when: (1) Acen told her that he was going to get rid of employees who participated in strikes (Complaint Paragraph 9(A)) and (2) that he did not want new employees to live in either Dover or New Philadelphia (Complaint Paragraph 9(B)) cannot be affirmed. The ALJ cannot credit the testimony of Medero Ledesma over that of Acen regarding the conversations at these private meetings where the wealth of the evidence suggests **that no meeting ever took place**. Therefore, the conclusions of the ALJ that Case Farms violated the Act as specified in Paragraphs 9(A) and 9(B) of the Complaint were reached in error and should be dismissed.

B. The ALJ Erred In Finding That The Alleged Statement That Employees Should Not Live In Dover/New Philadelphia (Allegation 9(B) Of The Complaint) Is Not Threatening Or Coercive.

Even if the evidence in this case could support the conclusion that Medero Ledesma conferred in secret with Acen over a period of several months (which it does not), the mere fact that Acen stated to Medero Ledesma that she should not live in the neighborhoods of Dover and/or New Philadelphia does not establish a violation of §8(a)(1) of the Act.

The standard for determining whether an employer's conduct violates §8(a)(1) is whether the statements made to employees reasonably tend to interfere with the free exercise of employee rights under the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). This standard is an objective one that considers only whether the statement has a "reasonable

tendency to coerce the employee or interfere with Section 7 rights, rather than the intent of the speaker.” *Flying Foods*, 345 NLRB 101, 105 (2005) (quoting *Smithfield Packing Co.*, 344 NLRB No. 1, slip op. at 2 (2004) (employer statements must be viewed in context and not in isolation to determine if they have the reasonable tendency proscribed by §8(a)(1)).

In addition, §8(a)(1) of the Act must be considered with §8(c), which provides that expressions of views that “contain no threat of reprisal” do not constitute the requisite coercion. 29 U.S.C. §158(c). Employees cannot reasonably fear reprisals unless the employer’s statement actually contains an explicit or implicit threat of reprisal. See, *Quantum Electric, Inc.*, 341 NLRB 1270, 1277 (2004)(“There was nothing in Mr. Vaccaro’s statement to suggest Respondent would take any unfavorable action toward employees.”) The significant difference between statements that violate §8(a)(1) and those protected under §8(c) is illustrated in *Poly-America, Inc.*, where a foreman told employees the union was “no good”:

It is well settled that Section 8(c) of the Act gives employers the right to express their views about unionization or a particular union as long as those communications **do not threaten reprisals** or promise benefits. Here, Wichter was merely sharing with the employees his own negative views about the union. Because these particular comments by Wichter contained no threats or promises, we shall reverse the judge’s finding that they violated Section 8(a)(1).

328 NLRB 667, 669 (1999)(internal citations omitted)(*emphasis added*).

While Acen testified that he did not personally help Medero Ledesma find housing in any city (Tr. 895, 972), Medero Ledesma testified that Acen gave her a suggestion about where to live:

- Q. [Ms. Webber] Okay. Let’s shift gears and change topics. After a few weeks of living in the hotel in Massillon, you wanted to look for a permanent residence; correct?
- A. Yes.
- Q. And Mr. Acen suggested that you not look in New Philadelphia or Dover; correct?
- A. Yes.

* * *

- Q. Was it a friendly conversation?
A. Yes.
Q. He wasn't angry with you, was he?
A. No, not at all,....

[Tr. 423, 424]

Medero Ledesma was clear that Acen's recommendation did not contain a threat:

- Q. [Ms. Webber] I'll restate – I'll repeat the question. **He didn't tell you that if you chose to live in Dover or New Philadelphia that he would fire or terminate your employment**, did he?
A. [Ms. Ledesma] **No**, he did not say that.

[Tr. 424 (emphasis added)]

Accordingly, Medero Ledesma's testimony that Acen merely "suggested" she not live in those areas and that he did not threaten any adverse consequence if she did not heed his suggestion, (Tr. 423-424), lacks the requisite threat of reprisal and cannot be violative of §8(a)(1). By ignoring the innocuous nature of the alleged statement and by failing to address the record evidence confirming the same, the ALJ's §8(a)(1) conclusion with regard to the allegations in Paragraph 9(B) of the Complaint is in error and should be dismissed.

C. THE ALJ ERRED IN FINDING THAT ACEN CREATED THE IMPRESSION OF SURVEILLANCE, THREATENED THAT HE WAS GOING TO GET RID OF THE UNION'S SUPPORTERS, AND THREATENED AN EMPLOYEE WITH TERMINATION.

Similarly, even if the evidence could support the finding that Medero Ledesma and Acen met privately, the ALJ's conclusion that violations of §8(a)(1) occurred when Acen "created the impression of surveillance by telling [Medero Ledesma] that he had a list of union supporters;" "threatened that he was going to get rid of the union supporters;" and "threatened [Medero

Ledesma] with termination is [she] continued to request a transfer to Paws department”⁶ are erroneous. (ALJ Decision, p. 14, lines 46-48).

There is no objective evidence in the record that supports these §8(a)(1) allegations – the ALJ had no basis to label Medero Ledesma’s otherwise unreliable testimony as “credible” and base his legal conclusions solely on this testimony. However, the ALJ in an attempt to support his finding, inexplicably based his conclusion solely on the testimony of Medero Ledesma who the ALJ frequently described as unreliable throughout his decision. Because Medero Ledesma is clearly an unreliable witness, a *de novo* review of the facts surrounding the alleged §8(a)(1) violations reveal that the ALJ’s findings based on the allegations contained in Paragraphs 9(G); 9(H); and 9(I) were reached in error.

1. A Preponderance Of Evidence Demonstrates That The ALJ’s Credibility Determination Of Medero Ledesma Was Reached In Error.

The National Labor Relations Act specifically authorizes the Board to independently make findings of facts and draw conclusions from the record. See, 29 U.S.C. §160(c). Accordingly, the Board is authorized to review the Administrative Law Judge’s decision *de novo* as to findings of fact. See, e.g., *NLRB v. Duquesne Electric & Mfg. Co.*, 518 F.2d 701, 704-705 (3rd Cir. 1975). The Board’s authority to review *de novo* includes the findings concerning credibility of witnesses. *Id.* Before exercising *de novo* review over credibility decisions, however, the Board generally requires that the preponderance of the evidence suggest that an ALJ’s credible conclusions are incorrect. See, *Standard Drywall Products, Inc.*, 91 NLRB 544, Enforced, 188 F.2d 362 (3rd Cir. 1951). In this case, the preponderance of the evidence in the record demonstrates that the ALJ’s credibility determinations of Medero Ledesma are incorrect.

In finding violations of the Act as alleged in Paragraphs 9(G); 9(H); 9(I) of the Complaint, the ALJ relied solely on the testimony of Medero Ledesma. (ALJ Decision, p. 13). Specifically, the ALJ explained:

⁶ These allegations are found in the Complaint at Paragraphs 9(G); 9(H); and 9(I), respectively.

“According to Ledesma, in late September, 2010, she approached Acen and explained that she would like to transfer to the Paws Department so that she could work the same hours as her brother. Acen stated that he would not transfer her to that shift because those employees “belong to the Union.” Acen further stated that he was going to remove them “one by one” and asked her if she also wanted to be fired. Ledesma replied, “no” and said she would wait for a transfer. (Tr. 408).

(ALJ Decision, p. 14, lines 8-13). Based primarily on this evidence, the ALJ concluded “[t]he inherent probabilities of the situation convince me that Ledesma testified accurately regarding this issue and I credit her testimony on this point...based on the foregoing, I find that the Respondent, through Acen, violated Section 8(a)(1) of the Act as alleged in paragraphs 9(G), 9(H), and 9(I) of the complaint.” (ALJ Decision, p. 14, lines 46-48).

Because the ALJ relied exclusively on the testimony of Ledesma, and cited no objective evidence to support her allegations,⁷ it follows that the issue of her overall credibility is instrumental in assessing the legitimacy of the ALJ’s finding. The ALJ’s opinion, however, is riddled with statements denouncing Medero Ledesma as an unreliable witness. *See, e.g. ALJ Decision*, p. 4 (“I find...Ledesma [not] to be entirely credible as [she] had deficiencies as a witness. Ledesma had a tendency to exaggerate and was prone to generalize at times.”); *ALJ Decision*, p. 8 (“I do not find, however, that Acen and Ledesma met daily, as Ledesma claimed in her trial testimony.”); *ALJ Decision*, p. 13, fn 13 (“...because I find Ledesma’s testimony regarding the events of September 10 to be unreliable, I also do not credit her testimony regarding her suspension on September 9.”); *ALJ Decision*, p. 13 (“when I consider other

⁷ The only other evidence cited by the ALJ in support of Medero Ledesma’s testimony is the testimony of Edwin Diaz and William Sanchez. (ALJ Decision, p. 14). Diaz testified that Acen told him he was going to transfer to the Live Hang department to train other employees to do the job because Acen feared “if the employees in the live hang department went on strike, they could stop all production at the plant.” (ALJ Decision, p. 14). Sanchez’ testimony only confirmed that Medero Ledesma was seeking a transfer. *Id.* None of this evidence, however, supports the allegations of violations of §8(a)(1) as alleged in Paragraphs 9(G); 9(H); and 9(I) of the Complaint.

relevant factors, I find that Ledesma's testimony regarding the events of September 9 and 10 is not sufficiently reliable to support findings of unfair labor practices.”).

Notwithstanding his clear issue with the credibility of Medero Ledesma, the ALJ nonetheless unequivocally deferred to her word over that of Acen; citing her “demeanor” as a significant factor in his conclusion. In resolving issues involving conflicting testimony, however, the resolution “rests not only on the demeanor of the witnesses, but also on the weight of the evidence,” the “established or admitted facts,” and the “reasonable inferences drawn from the record as a whole.” *Northridge Knitting Mills, Inc.*, 223 NLRB 230, 235 (1976); *see also V & W Castings*, 231 NLRB 912, 913 (1977). In this case, there is no objective evidence outside of Medero Ledesma's testimony to support threatening or coercive statements alleged in Paragraphs 9(G), 9(H) and 9(I) of the Complaint. Taking this lack of evidence into account with the overall unreliability of Medero Ledesma, the preponderance of the evidence in this case clearly demonstrates that the ALJ's conclusion that Respondent violated §8(a)(1) as alleged in Paragraphs 9(G), 9(H), and 9(I), was reached in error. *See, E.S. Sutton Realty, Co.*, 336 NLRB 405, 405 (2001)(holding that the ALJ's credibility determinations were erroneous where the “judge did not fully address all of the inconsistencies in the record, relying instead on witnesses whose testimony...she herself described as inaccurate and incomplete.”).

2. Inasmuch As Medero Ledesma's Testimony Is Not Credible The ALJ Erred In Finding that Acen Did Not Threaten to Terminate Union Supporters in the Paws and Live Hang Departments and Did Not Threaten Medero Ledesma for Requesting a Transfer to Paws.

In the underlying hearing the ALJ concluded that in late September Acen threatened Medero Ledesma with termination if she continued to request a transfer to Paws and said he was getting rid of the union supporters in Paws and Live Hang. (ALJ Decision, p. 14, lines 44-46). These allegations, made in Paragraphs 9(H) and 9(I) of the Complaint, are not only unsupported but do not make sense.

First, it does not make sense that Acen would seek to fire all four employees in the Paws Department and then refuse to transfer Medero Ledesma, Acen's alleged "agent," to Paws. Someone would have to work in Paws and, under the General Counsel's theory, it makes sense that Acen would want to populate it with people who are his agents.

Second, Acen does not have authority to transfer employees and denies that Medero Ledesma asked him for a transfer to Paws (Tr. 602-603, 990). Medero Ledesma asked Supervisor Sanchez for a transfer to Paws sometime in September and Sanchez, who had no authority to authorize the transfer, told her to speak with Department Manager Cooper (Tr. 878). While Medero Ledesma admitted Cooper was the "boss of the supervisors," she never asked Cooper for a transfer (Tr. 434, 749). These facts are supported by the testimony of Acen, Sanchez **and** Cooper (Tr. 602-603, 634, 749, 990).

Third, Acen denies telling anyone that he was going to fire the employees in the Paws or Live Hang Departments (Tr. 85-87, 990-991). Acen's testimony is corroborated by Armando Diaz who said that while Acen told Diaz he was transferring a trainer (Jose Angel Carrera [Otero]) to learn the jobs in Live Hang in case there was a strike, Acen did **not** say that he was going to fire those employees (Tr. 508-509). Indeed, the fact that Acen was planning to cover the work for the strikers in Live Hang supports that he had no plans to fire them. Medero Ledesma's claim that Acen said he was going to fire all of the employees in Paws not only is uncorroborated, but Acen took no action to rid the Company of the employees in Paws. In September, four employees were employed in Paws and in February 2011 when the Complaint was filed, all four employees were still employed by Case Farms (Tr. 996).

For all of these reasons, the ALJ's conclusion that Case Farms violated §8(a)(1) as alleged in Paragraphs 9(H) and 9(I) of the Complaint was reached in error and should be dismissed.

3. Even If Medero Ledesma's Testimony Is Sufficiently Credible To Support The ALJ's Finding (Which It Is Not) The Allegations Of Creating An Impression Of Surveillance Is Insufficient As A Matter Of Law.

In determining whether unlawful surveillance has occurred, the appropriate question under the §8(a)(1) standard is whether a reasonable employee would conclude from the alleged statement that the employer gained knowledge of the identity of the union supporters by spying, as opposed to observation of open and notorious in-plant behavior. *Bridgestone Firestone S.C.*, 350 NLRB 526, 527 (2007). Where the source of information could be **either** spying or lawful observation/listening, the Board will not presume that the information was obtained by spying. *SKD Jonesville Div. L.P.*, 340 NLRB 101, 102 (2003); *Intermet Stevensville*, 350 NLRB 1349, 1354, n.16 (2007); *Professional Medical Transport, Inc.*, 346 NLRB 1290, 1292 (2006).

In this case, it was not reasonable for Medero Ledesma to assume Acen acquired the identity of Union supporters in Paws and Live Hang by spying because their identity was a matter of common knowledge. Case Farms and the Union have been bargaining for nearly four years. Case Farms has had ample opportunity to observe its employees, who admittedly are fairly outspoken with regard to their support or lack of support for the Union:

- Q. [Mr. Wilson] Ok. Employees at Case Farms are very vocal about their views regarding the Union; correct?
- A. [Mr. Acen] Yes.
- Q. Ok. And so it's - - for anyone who works there, it's no secret, for the most part, on which side of the line, if you will, employees fall; correct?
- A. Yes. Some employees they have expressed their point of view.

[Tr. 1044]

Also Respondent had endured a nine-month strike and four work stoppages wherein the identity of the strikers was obvious (Tr. 162-163, 1044). Anyone working at the plant on the days in which a strike or a walkout occurred could determine who was supporting the Union and who was supporting the Company by observing who left and who stayed (Tr. 434, 989). And

before each walkout, the strikers gathered in the lunchroom, prior to walking off the job, where anyone in the plant could see them.

Based on the foregoing, the ALJ erred when it concluded that the General Counsel met its burden to establish that Acen unlawfully created an impression of surveillance and Paragraph 9(G) should be dismissed.

III. **THE ALJ ERRED IN FINDING VIOLATIONS OF §8(a)(1) OF THE ACT AS ALLEGED IN PARAGRAPHS 10(A) OF THE COMPLAINT AS THE RECORD EVIDENCE CONCLUSIVELY ESTABLISHED MEDERO LEDESMA WAS NOT AN AGENT OF RESPONDENT (AS ALLEGED IN 9(C) OF THE COMPLAINT) AS A MATTER OF LAW.**

The ALJ concluded that Medero Ledesma acted as an agent of Case Farms when she told employees that: (1) the union did not do anything for the employees and that strikes were not effective so employees should not go out on strike; and (2) there would not be a raise until the union was no longer their representative (Complaint Paragraph 10(A)). (ALJ Decision, p. 10, lines 41-44). Because Medero Ledesma could not be an agent, as defined under the Act, the ALJ's unfair labor practice findings are erroneous.

An "agent" is defined in §2(13), 29 U.S.C. §152(13), of the Act. §2(13) provides:

In determining whether any persons acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board has made clear that the determination of whether a person acts as an agent of another is determined under the common law principles of agency. *Dr. Rico Perez Products and Retail*, 353 NLRB 453, 463 (2008). Under the common law rules of agency, an agency relationship can be established in one of two ways: (1) vesting an agent with actual authority, or (2) vesting an agent with apparent authority.

A. Actual Authority.

“Actual authority derives from an act specifically mentioned to be done in a written or oral communication.” *NLRB v. District Council of Iron Workers of the State of California*, 124 F.3d 1094 (9th Cir. 1997). As mentioned earlier, the ALJ erred when it found that Medero Ledesma and Acen met privately in Acen’s office. Inasmuch as actual authority requires a Principal to actually communicate to the Agent the specific act they are to take; and there is no evidence supporting that any meeting where such agency status was conferred to Medero Ledesma occurred, the ALJ’s conclusion that the General Counsel established the existence of an actual agency relationship was a clear error. See, *Pan-Osten Co.*, 336 NLRB 305, 306 (2001)(holding that the party asserting that an individual acts as an agent must establish the existence of the agency relationship).

B. Apparent Authority.

Because there is no legitimate evidence to establish that actual authority was conferred to Medero Ledesma, the only remaining avenue to demonstrate agency is the doctrine of apparent agency. The Board’s test for determining whether an employee is an apparent agent of an employer is whether, under all of the circumstances, employees will reasonably believe that the employee in question was reflecting company policy in speaking and acting for management. *Waterbed World*, 286 NLRB 425, 426-427 (1987)(internal citations omitted). In making this determination, the Board considers the position and duties of the employee in question in addition to the context in which the behavior occurred. *Jules V. Lane, D.D.S.*, 262 NLRB 118, (1982). And, just as it is with actual authority, it is the burden of the party asserting that an individual has act over the apparent authority to establish the agency relationship. *Millard Processing Services*, 304 NLRB 770, 771 (1991), *enf’d* 2 F.3d 258 (8th Cir. 1993).

In his decision, the ALJ failed to address the Company’s apparent authority arguments, holding instead that actual authority was conferred to the purported agent. If he had gone

through the requisite analysis, the ALJ would have found that no apparent authority was vested into Medero Ledesma.

Medero Ledesma was not in a position from which an employee could reasonably believe she was reflecting Case Farms' policy and speaking and acting for management. Medero Ledesma did not perform any supervisory duties, was not a trainer, and did not present orientation information on behalf of the Company to new employees (Tr. 367, 884, 979-80, 948). Indeed, she was a probationary employee herself. Medero Ledesma does not claim that she told any employee that she was speaking or doing anything on behalf of Acen or Case Farms. Without specifically claiming that she was speaking on behalf of Case Farms, or that she was privy to any Company policy to which other employees were not, employees had no basis upon which they could reasonably conclude that Medero Ledesma was speaking on behalf of management. *See, Waterbed World, infra*, 286 NLRB at 427 ("In this case, no evidence was adduced that at the time of the alleged unlawful statements... Respondent had held Torres out as being privy to management decisions or speaking with managements voice about these alleged unlawful matters or the employees perceived him as having such a role. Therefore, we find that Torres was not an agent of Respondent, and that his alleged remarks are not imputable to the Respondent.").

For all of these reasons, Medero Ledesma was not an agent of Respondent, and her comments or actions in August and September, as alleged in Paragraphs 9(C) and 10(A) of the Compliant, are personal views and are not imputable to Case Farms. *Zach Co.*, 278 NLRB 958 (1986); *Abby Island Park Manor*, 267 NLRB 163, 165-166 (1983). Expressions of personal opinions by rank-and-file employees cannot be attributed to their employers. *Conolon Corp. v. NLRB*, 431 F.2d 324 (9th Cir. 1970)(clerical worker who told another employee that if he wanted a raise, all he had to do was talk to the CEO was merely expressing her "personal views" and had no expressed or implied authority to ensure anyone a wage increase or withdrawal of

benefits); *see also, Manimark Corp.*, 307 NLRB 1059, 1061 (1992)(comments not imputed to employer where nonsupervisory employee told coworker that he would be terminated if employer learned he was a union supporter).

Accordingly, the ALJ erred in finding that Medero Ledesma was an “agent” within the meaning of §2(13) of the Act. The ALJ’s conclusion that Medero Ledesma was an agent is not supported by the record and should be overturned.

IV. THE ALJ ERRED IN HOLDING THAT THE RESPONDENT VIOLATED 8(A)(1) OF THE ACT BECAUSE STATEMENTS REGARDING WHEN AN EMPLOYEE COULD VISIT THE HUMAN RESOURCES OFFICE DO NOT VIOLATE THE ACT AS A MATTER OF LAW AND EVEN IF THE STATEMENT COULD BE CONSTRUED AS COERCIVE UNDER THE LAW THE RESPONDENT SUFFICIENTLY REPUDIATED THE CONDUCT.

The ALJ found that Case Farms violated §8(a)(1) of the Act, as alleged in Paragraph 11(A)⁸ of the Complaint, when a manager told an employee that he could not visit the human resources office on his break and he had to be in a break room during his breaks. (ALJ Decision, p. 28, lines 32-36). Application of the objective standard for §8(a)(1) violations reveals, however, that the facts alleged here cannot support the ALJ’s conclusion that the alleged conduct runs afoul §8(a)(1) of the Act.

The case law is clear that the §8(a)(1) test is objective:

It is well settled (and the judge himself quickly pointed out) that the basic test for evaluating whether there has been a violation of Section 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have the tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

Multi-Add Services, Inc., 331 NLRB 1226, 1227-28 (2000). In this case, the statements of Cooper can hardly be said, when viewed objectively, to effectively coerce an employee. In fact,

⁸ The ALJ mistakenly cited Paragraph 12(H) for this particular §8(a)(1) violation. The allegations concerning this interaction between Cooper and Jimenez are contained in Paragraph 11(A).

as the ALJ himself noted, the statement was a benign misstatement that was immediately corrected:

Cooper opened the door and asked [Jimenez] what he was doing there. Jimenez responded that he had a message for Acen. Cooper told him that he had no right to be there during his break and he should return to the break room. At that point Acen arrived and Jimenez told him what Cooper had said. Acen told him that it was “okay” to come to his office during breaks but that he did not have time to see him and that he could back on his lunch or break. Jimenez did not return that day but on a later day returned to Acen’s office to speak with him.

(ALJ Decision, p. 29). It is difficult to imagine how, in this scenario, these statements could be deemed to have had a coercive effect on Jimenez. This is particularly true where, in almost the same breath of the alleged unlawful statement, Acen corrected Cooper’s misstatement and Jimenez ultimately returned to Acen’s office.

Notwithstanding the patently innocuous nature of this statement, the ALJ found that “It [was] entirely plausible that at a time of heightened tension in the plant after a series of short strikes... that Cooper would react in the manner described by Jimenez arrived at Acen’s office.” (ALJ Decision, p. 29, lines 23-26). However, merely finding that a scenario is “plausible” hardly suffices to demonstrate that the General Counsel met his burden in establishing a §8(a)(1) violation. *O’Neil’s Markets v. NLRB*, 95 F.3d 733, 788 (8th Cir. 1996)(“violations of section 8 may be adjudicated only ‘upon the preponderance of the testimony’ taken by the Board.”), citing 29 U.S.C. §160(c); *Tradesmen Int’l*, 351 NLRB 399, 409 (2007)(*Battista*, dissent)(“... even if such an inference is plausible, such an inference alone would not satisfy the General Counsel’s burden of establishing, by a preponderance of the evidence, that the respondent knew or suspected that Bramlett was a union member.”)

Even if there was sufficient evidence to conclude that an unfair labor practice had occurred during the exchange between Jimenez and Cooper, Acen clearly repudiated any violation of the Act when he immediately corrected Cooper and told Jimenez that it was “okay” to come into his office during breaks. The NLRB has recognized that in certain circumstances an employer can repudiate its conduct to avoid a finding that has violated the Act. In *Meijer, Inc.*

v. NLRB, 463 F.3d 534 (6th Cir. 2006), the court reiterated its approval of the NLRB's longstanding test in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-39 (1978) that the employer's repudiation of a legal conduct serves to forstall a charge of unfair labor practices where the repudiation is timely, unambiguous, specific in nature to the course of conduct, free from other prescribed legal conduct, adequately publicized to the employee involved and accompanied by assurances that the employer will not interfere the employee's statutory rights.

In rejecting the Respondent's repudiation defense, the ALJ rigidly applied *Passavant*, finding that Acen's statement did not "comport" with the repudiation requirements. (ALJ Decision, p. 29, lines 49-51). The Board has recognized, however, that the repudiation standard should not be applied in a highly technical or mechanical manner. *The Broyhill Co.*, 260 NLRB 1366 (1982). Rather, the mandate to the Board is to look at whether the employer **substantially satisfies** the *Passavant* requirements. *The Broyhill Co., supra*. In this case, Acen's repudiation, as testified to by Jimenez and recognized as fact by the ALJ, occurred contemporaneously with Jimenez' conversation with Cooper. This immediate and unequivocal correction of Cooper's misstatement constitutes a valid repudiation – the repudiation substantially satisfied the *Passavant* requirement because it was timely, unambiguous, specifically stated that Jimenez was free to come to the Human Resources offices on his break or lunch, was free from other prescribed illegal conduct, was adequately publicized to the only employee involved (Jimenez), and including assurances. *See also, Sam's Club v. NLRB*, 141 F.3d 653 (6th Cir. 1998). Accordingly, even if the alleged statements of Cooper could be construed a unlawfully coercive, the immediate repudiation of Acen precludes a §8(a)(1) violation. The ALJ's finding of a violation as alleged in Paragraph 11(A) of the Complaint is without merit.

V. **THE ALJ'S CONCLUSION THAT RESPONDENT'S MANAGER COERCIVELY TOLD AN EMPLOYEE THROUGH RESPONDENT'S SUPERVISOR, AGENT AND TRANSLATOR THAT THE EMPLOYEE COULD NOT TIME THE PRODUCTION LINE AND THAT HE HAD TO BE IN THE BREAK ROOM DURING HIS BREAKS AND THREATENED THE EMPLOYEE WITH UNSPECIFIED EMPLOYMENT ACTION IF HE PROTESTED NOT BEING ALLOWED TO TIME THE PRODUCTION LINES VIOLATES §8(A)(1) WAS REACHED IN ERROR.**

The ALJ found that Respondent's Manager Cooper, through a translator, violated §8(a)(1) of the Act as alleged in Paragraph 11(B)⁹ of the Complaint, "[b]y restricting [employee] Jimenez from timing the line and ordering him to the break room...." (ALJ Decision, p. 34, lines 43-46). In so holding, the ALJ relied primarily on testimony of Jimenez; discrediting Respondent's witnesses. This finding is not supported by Board Law as it ignores the appropriate application of the Board's repudiation doctrine. Similarly, the ALJ erred when he found that a vague and ambiguous statement, as alleged in Paragraph 11(C), constituted a threat in violation of §8(a)(1) of the Act. (ALJ Decision, p. 34, lines 46-48).

A. **Timing The Time During Breaks.**

Employees at Case Farms facility "time the lines" to determine the rate per minute at which the unprocessed chickens are pass through the processing line. (Tr. 541-42). If the rate is above 30 chickens/minute the employees will alert management and have the line speed lowered.¹⁰ (Tr. 736). This process has been endorsed by the union and permitted by the Respondent.

Assuming, without agreeing with the ALJ's factual conclusion that Cooper did tell Jimenez that he could not time the lines, the Company subsequently effectively repudiated these statements on two occasions.

⁹ In the Opinion, the ALJ also erroneously stated that the allegations contained in Paragraphs 11(B) and 11(C) could be found in Paragraphs 11(A) and 11(B), respectively. The allegations are properly cited in this brief.

¹⁰ For further explanation of the policy reasons behind timing the line see, *ALJ Decision*, fn. 31.

The first occasion was when Cooper himself, who in a subsequent meeting with Jimenez specifically told Jimenez that he was allowed to time the lines and went further to say that if Jimenez felt there was an issue with the lines, he could let Cooper know and Cooper could time the line with Jimenez and make any necessary corrections (Tr. 865). Administrative law judges have found that these repudiations made in close proximity to the alleged §8(a)(1) violation are grounds alone for a finding of no violation of the NLRA. See, *Atlas Metal Parts Co., Inc.*, 252 NLRB 205 (1980).

A second repudiation occurred in late October or early November 2010. Jimenez acknowledges that at a bargaining session in October 2010, Tim Mullins raised the problem of employees being able to time the lines on their breaks (Tr. 552). And at the bargaining session, the Company agreed that Jimenez and another member of the Union committee, Carmen Beltran, would both be trained on how to time the line speeds, would be provided stopwatches, and given additional breaks before and after lunch to check the line speeds (Tr. 553). After October 2010, Jimenez testified that he and Beltran were both given two extra breaks each day to time the lines and that Jimenez did so until transferred to Live Hang in December 2010 (Tr. 553-554). Furthermore, McDaniel testified that he directed Cooper to give the stopwatches to Jimenez and Beltran. While the Company disputed that employees were not allowed to time the lines, McDaniel did not want this perception to go any further because the Company had absolutely nothing to hide on line speeds (Tr. 814). So he arranged to have two employees receive stopwatches, training and two extra breaks a day in order to time the line (Tr. 814).

Notwithstanding these facts, the ALJ, applied the repudiation doctrine of *Passavant* improperly by applying the standard strictly. Board law clearly requires only substantial compliance with *Passavant* – strict compliance is not necessary. *The Broyhill Co., supra*. Here, Respondent substantially complied with the repudiation doctrine. The ALJ even noted that the Respondent's reparatory actions were "salutary" – only to reject the repudiation efforts because Case Farms did not "comply fully" with *Passavant*. (ALJ Decision, p. 35, lines 12-14).

Because this repudiation was effective, timely, unambiguous, specific in nature as to the alleged course of conduct, free from other proscribed illegal conduct, adequately publicized to the employee(s) involved, and accompanied by assurances that the employer will not interfere with the employee's statutory rights, see, *Passavant Memorial Hospital.*, *supra*; *Meijer, Inc.*, *supra*; *Sam's Club*, *supra*, the §8(a)(1) violation, as alleged in Paragraph 11(B) of the Complaint, found by the ALJ is meritless and should be dismissed.

B. Alleged Threat Of Unspecified Employment Action Is Too Vague To Support A Finding Of A Threat.

In conjunction with the allegation that Respondent violated the Act when Cooper allegedly refused Jimenez the ability to time the times; the also ALJ concluded that the ambiguous statements of Cooper also violated §8(a)(1) of the Act as alleged in Paragraph 11(C) of the Complaint. (ALJ Decision, p. 34, lines 46-48). In reaching his decision, the ALJ credited the testimony of Jimenez regarding a conversation he allegedly had with Cooper:

- Q. [Ms. Bordelois] What happened then?
- A. [Mr. Jimenez] Then I went to check Line 1. And then Bernard appeared. Then Bernard told me that I didn't have no right checking the line.
- Q. Did you respond to him?
- A. I told him that I had the right, and what - - but what he went and did was call Supervisor Carlos.
- Q. What happened then?
- A. And Supervisor Carlos said that I cannot check, and one more word from me and he doesn't know what was going to happen.

[Tr. 544, 545]

Based on this evidence, the ALJ concluded that the ambiguous statement "and one more word from me and he doesn't know what was going to happen" constitutes a threat in violation of §8(a)(1) of the Act. (ALJ Decision, p. 34, line 46-48). Respondent asserts that the ALJ's conclusion is erroneous as this statement is too vague to support the finding of a threat. See, *Baker Concrete Construction, Inc.*, 341 NLRB 598 (2004).

In *Baker Concrete* the company superintendent [Kelly] called an employee [DeLeon], cursed the union, and told DeLeon she should “stay away all these people, because if you no stay away these people, you have trouble.” The Board, adopting the ALJ’s findings, held that there was no evidence of reprisal against DeLeon and that the statement was much too vague to support the finding of a threat. Here, the alleged statement that “he doesn’t know what was going to happen” also does not indicate that retaliatory action would be taken is no more threatening than the statements in *Baker Concrete*. The statement is too vague to constitute a threat.

Accordingly, the conclusion of the ALJ that Cooper’s statement violates the Act as alleged in Paragraph 11(C) of the Complaint was reached in error and should be dismissed.

CONCLUSION

For all the forgoing reasons, Respondent respectfully requests that the Board reserve the ALJ’s decision regarding the exceptions and dismiss the Complaint in its entirety, and find that Respondent did not violate the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on October 14, 2011, a copy of the foregoing *Brief in Support of Respondent's Exceptions to Administrative Law Judge's Decision*, was filed with the NLRB's electronic filing system. Notice of filing will be sent to all Parties by operation of the NLRB's electronic filing system where the Parties then may access this filing.

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