

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**LM Waste Service, Corp. and Union de Tronquistas de Puerto Rico, Local 901, IBT and Marvin J. Cardona and DS Employment Agency, Inc., Party in Interest.** Cases 24-CA-10837 and 24-CA-10894

December 31, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

On October 22, 2010, Administrative Law Judge Keltner W. Locke issued the attached supplemental decision on remand.<sup>1</sup> The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed exceptions and a supporting brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>2</sup> findings,<sup>3</sup> and conclusions,<sup>4</sup> and to adopt the recommended Order as modified and set forth in full below.<sup>5</sup>

<sup>1</sup> On June 10, 2009, the judge issued his original decision in this matter. On May 11, 2010, the Board remanded this case to the judge to reconsider certain issues specifically discussed therein. The Board held in abeyance all remaining issues pending the judge's supplemental decision on remand. This decision thus addresses findings in both judge's decisions.

We note that the judge relied on *Gelita USA Inc.*, 352 NLRB 406 (2008), in his original decision and *Food & Commercial Workers Local 4 (Safeway, Inc.)*, 353 NLRB 469 (2008), in his supplemental decision on remand. These cases were considered by three-member panels of the Board which reached the same outcomes, see 356 NLRB No. 70 (2011), and 355 NLRB No. 133 (2010), respectively.

<sup>2</sup> The Respondent contends that some of the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

In analyzing the discharge of Raphael Maldonado, the judge rejected the Acting General Counsel's exhibits consisting of the Respondent's attorney's statements submitted to the Region during the investigation of the charges. The Acting General Counsel excepted to the judge's rejection of these exhibits. We find it unnecessary to pass on this issue in light of the judge's finding, which we adopt, that the Respondent discharged Maldonado unlawfully.

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

<sup>4</sup> There were no exceptions to the judge's dismissal of 8(a)(1) allegations that: Operations Manager Armando Ramos interrogated employ-

ees and solicited them to get rid of the Union on January 11, 2008; Operations Coordinator Lilliam Curret surveilled employees' union activities on January 13, 2008; and Supervisor Jose Santiago interrogated Rafael Cruz on January 15, 2008. In addition, there were no exceptions to the judge's finding that DS Employment Agency, Inc. (DS) and the Respondent were joint employers and that DS President Dinelia Santiago was the Respondent's agent.

<sup>5</sup> We shall modify the judge's recommended Order and substitute a new notice to accord with traditional remedial language for the violations found. In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. Also, we shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

<sup>6</sup> Chairman Pearce and Member Becker; Member Hayes dissenting.

<sup>7</sup> *Wright Line* does not include a fourth element, set forth by the judge, that the General Counsel establish a link or nexus between the employee's protected activity and the adverse employment action. *Id.*

<sup>8</sup> Member Hayes would find that the Respondent lawfully discharged Felipe Espada. Espada was hired as a driver, but his driver's license was suspended in June 2007. Thereafter, the Respondent transferred him to a helper position but warned Espada that he must obtain a category eight or nine license within 6 months or face discharge. Espada acknowledged that his helper position was temporary; that he failed to obtain the required license in the 6-month period, and that the Respondent informed him at the time of his January 14, 2008 discharge, that he was discharged "because [he] did not have the proper license to drive a truck." The Respondent thus followed a consistent and clearly forewarned procedure of allowing Espada a 6-month grace period to rectify his lack of a license, and discharging him when he failed to do so. Under these circumstances, Member Hayes would find that the lack of a license was a legitimate motivating factor for the discharge and that the Respondent met its *Wright Line* rebuttal burden of proving it would

With respect to Marvin Cardona's discharge, the judge found, and we<sup>9</sup> agree, that the Respondent lawfully discharged Cardona. Assuming the judge correctly found that the Acting General Counsel met his initial *Wright Line* burden, we do not agree with our dissenting colleague that there was a "strong prima facie showing of discrimination." We note particularly that Cardona did not engage in union activity; that the Respondent discharged Cardona approximately 2 months after union activity commenced at the facility and without concurrently discharging other employees; and that while Supervisor Santiago made statements about union activity to Cardona both at the time of the discharge of employees Maldonado, Espada, Cruz, and Santiago, and 2 months later, immediately after Cardona's discharge, there is no direct evidence concerning either Supervisor Santiago's involvement in the Respondent's decision to discharge Cardona or Santiago's knowledge of the reason for Cardona's discharge.

Finally, we agree with the judge that the Respondent met its rebuttal burden of showing that it had legitimate reasons and would have discharged Cardona even absent any belief that he engaged in union activity. We particularly note that at this time, Cardona's temporary DS contract had expired, subject to possible renewal. Under these circumstances, we find, contrary to the dissent, that it was appropriate for the Respondent to review Cardona's entire employment history and to assess any misconduct which might have occurred, even if it had not occasioned contemporaneous discipline, or had occurred some time ago. The Respondent's supervisor, Julio Torres, who was credited by the judge, testified that he discharged Cardona because of his poor job performance. Torres' citation of job performance as his reason for discharging Cardona included Cardona's unauthorized deviation from his established routes. As relied on by the judge, Cardona admitted to this misconduct and also admitted that he had thrown water on a customer's dog. Moreover, customers had complained to the Respondent about these incidents. Under these circumstances, we agree with the judge that the Respondent would have taken the same action based on Cardona's misconduct even without reference to any protected concerted activity. See, e.g., *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1300-1301 (2001), enfd. 334 F.3d 99 (D.C. Cir. 2003) (employer's discipline lawful where em-

---

have taken the same action in reliance on Espada's failure to meet an essential requirement of his permanent job even in the absence of any protected, concerted activities. See *Hospital Dr. Susoni, Inc.*, 337 NLRB 537, 537-540 (2002) (no violation where employer terminated employee because he failed to renew his professional license).

<sup>9</sup> Members Becker and Hayes; Chairman Pearce dissenting.

ployee's misconduct undisputed). Thus, we adopt the judge's dismissal of the 8(a)(3) allegation concerning Cardona.<sup>10</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, LM Waste Service, Corp., Juana Diaz, Puerto Rico, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Creating the impression among employees that their union activities are under surveillance.

(b) Threatening employees with discharge if they continue their support for the Union.

(c) Informing employees that they are discharged because of their activities on behalf of the Union.

(d) Discharging employees because they formed, joined, or assisted a union or encouraged support for any labor organization.

---

<sup>10</sup> Contrary to his colleagues, Chairman Pearce would reverse the judge and find that the Respondent violated Sec. 8(a)(3) and (1) by discharging DS employee Marvin Cardona. Chairman Pearce agrees with the judge that the Acting General Counsel met his initial *Wright Line* burden of proving unlawful motivation for the discharge. There is ample evidence of the Respondent's union animus and its belief that Cardona had engaged in union activity. On January 14, 2008, the day that the Respondent unlawfully discharged employees Maldonado, Espada, Cruz, and Reinaldo Santiago, Cardona received an unexpected visit from his supervisor, Jose Santiago. Santiago told Cardona about the discharge of the four employees and stated that "[Maldonado] was the leader. He's the one who brought the union movement to the [Respondent]." Santiago then asked Cardona if he had attended the union meetings. When Cardona replied that he had not, Santiago said he needed proof of Cardona's nonattendance. Further, after Cardona was informed of his discharge on March 17, 2008, Supervisor Santiago told him that he had been discharged for the same reason as Maldonado and Espada—because he was participating in the Union. The judge rejected, as "implausible," testimony that Santiago had no role in the discharge.

In light of this strong prima facie showing of discrimination, Chairman Pearce would find, contrary to the judge and his colleagues, that the Respondent did not meet its rebuttal burden of showing that it would have discharged Cardona even absent its belief that he engaged in union activity. Although the Respondent asserts two grounds for the discharge: (1) Cardona's deviation from assigned trash collection routes; and (2) an incident in which he threw water on a customer's dog, the Respondent knew of these incidents 2 and 10 months respectively, before the discharge, and had never counseled or disciplined him for either. Nor did the Respondent present any evidence of prior consistent discipline. The fact that DS had assigned Cardona to drive the truck under a temporary contract is immaterial. As the Respondent's joint employer, DS did not merely permit this contract to expire by its terms, but affirmatively discharged Cardona from further employment with it and the Respondent.

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

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

(a) Within 14 days from the date of this Order, offer Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge’s decision as amended in this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Juana Diaz, Puerto Rico, copies of the attached notice marked “Appendix”<sup>11</sup> in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps

shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 11, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 24 a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 31, 2011

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

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT threaten you with discharge if you continue your support for the Union.

<sup>11</sup> If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

WE WILL NOT inform you that you are discharged because of your activities on behalf of the Union.

WE WILL NOT discharge you because you formed, joined, or assisted a union or to discourage membership in any labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

LM WASTE SERVICE CORP.

*Ayesha K. Villegas Estrada, Esq.* and *Maria M. Fernandez, Esq.*, for the General Counsel.

*Carlos George, Esq. (O'Neill & Borges)*, for the Respondent.

*Jose Budet*, for the Charging Party.

#### SUPPLEMENTAL DECISION

KELTNER W. LOCKE, Administrative Law Judge. On June 10, 2009, I issued a decision in this matter. By Order dated May 11, 2010, the Board remanded the case for further findings and conclusions.

#### Complaint Paragraph 7

The Board remanded for further explanation the interrogation and solicitation allegations raised in paragraphs 7(a) and (b) of the amended complaint (the complaint). Paragraph 7(a) alleges that Respondent engaged in an unlawful interrogation of employees and solicited their support to get rid of the Union. Paragraph 7(b), alleges that Respondent threatened its employees with discharge if they continued with their support for the Union.

The Board's remand Order stated, in part, "based on [employees'] testimony, the judge stated that the Respondent violated Section 8(a)(1) by creating the impres-

sion of surveillance, but *made no express finding* with respect to the unlawful interrogation and solicitation violation alleged in the Complaint." (Emphasis added.)

My initial decision stated, "I conclude that Respondent violated Section 8(a)(1) by the conduct alleged in Complaint paragraph 7(a), but it did not violate the Act as alleged in Complaint paragraph 7(b) because it did not engage in that conduct." *LM Waste Service, Corp.*, JD(ATL)-13-09, slip op. at 7, lines 11-13. Here, I revisit and revise those conclusions.

Although the decision included an express finding with respect to complaint paragraph 7(a), it failed to analyze the evidence in accordance with Board precedent governing the analysis of interrogation and solicitation violations. Instead, because the allegedly unlawful statements did not sound like questions, I applied the standards used to analyze another type of 8(a)(1) violation, the creation of an unlawful impression of surveillance, even though Section 7(a) did not allege such a violation.

As already noted, complaint paragraph 7(a) alleges that on January 11, 2008, Respondent, by its operations manager, Armando Ramos, violated Section 8(a)(1) of the Act by interrogating certain employees and soliciting their support to get rid of the Union. Complaint paragraph 7(b) alleges that, on this same day, Ramos threatened employees with discharge if they continued to support the Union. The complaint identified these employees as Reinaldo Santiago, Felipe Espada, and Rafael Maldonado. Both clarity and brevity may be served by discussing first the threat allegation raised in complaint paragraph 7(b) and then returning to the interrogation and solicitation allegations in paragraph 7(a). Therefore, I will begin with complaint paragraph 7(b).

Santiago, whose full name is Reinaldo Santiago Rodriguez, testified that on January 11, 2008, he was working in the shop area when Operations Manager Ramos called him in to Ramos' office. According to Santiago, Ramos "told me that he had received information from a trustworthy source, that I was helping the guys with the syndicated movement." (The term "syndicated movement" refers to the union organizing efforts.)

Santiago replied he was not doing anything illegal. According to Santiago, Ramos then told him "to give it thought, that work—that jobs were scarce these days, to think about my family, and that if I had any doubts or any situation or anything that I was concerned with, to come to him and tell him. After that, he told me to think about it and then he shook my hand."

Based on my observations of the witnesses, and for the reasons discussed in my initial decision, I credit Santiago's testimony. Therefore, I find that Ramos did make the statements which Santiago attributed to him.

According to employee Rafael Maldonado Leon (Maldonado), Ramos called him and another employee, Felipe Espada, into Ramos' office on January 11, 2008. Maldonado testified "he had received information from a good source, that I was making efforts to coordinate something with the union, and he wanted to know if I was clear with what I was doing, because this was a Puerto Rican company that was beginning and that the union did—and what the union did was actually to annoy small companies like that." (Maldonado testified in Spanish. The interpreter stated that the Spanish word rendered above as "annoy" also could be translated as "hassle.")

Maldonado further testified that Ramos said "to please help him and that if I continued on with the syndicated effort, that I could end up without a job." The term "syndicated effort" referred to the union organizing campaign.

The other employee present, Felipe Espada, corroborated part of Maldonado's testimony. According to Espada, "Ramos asked [Maldonado] that he had a good source informing him that he was involved in conversations with the union." Although Espada used the verb "asked," the testimony otherwise does not indicate that Ramos posed to Maldonado any specific question. Espada does not corroborate Maldonado's testimony that Ramos "wanted to know if I was clear with what I was doing."

Espada also does not corroborate Maldonado's testimony that Ramos said Maldonado could "end up without a job" if he continued with the union organizing effort. In my initial decision, I discussed a credibility problem with this part of Maldonado's testimony but did not explicitly state that I rejected this testimony. For the reasons stated in the initial decision, I do reject it.

Espada testified that he had become "really nervous" when Ramos began talking about the union campaign. In the initial decision, I reasoned that this anxiety made it more likely that Espada would remember a threat if Ramos had made one: "Considering that Espada already was apprehensive, a threat to discharge another employee would resonate on existing fears and be difficult to forget." *LM Waste Service, Corp.*, JD(ATL)-13-09, slip op. at 6, lines 30-31.

Also in the initial decision, I noted that Maldonado had some reason to exaggerate his testimony because he was an alleged discriminatee. If proven, the threat which Maldonado attributed to Ramos would provide evidence that Maldonado's discharge had been unlawful.

Additionally, Ramos clearly denied making the threat. Thus, the testimony of only one of the three participants in the meeting supported the allegation that Ramos had

made an unlawful threat.

For these reasons, I concluded that Maldonado's uncorroborated testimony about the alleged threat should not be credited, even though I did credit that portion of his testimony corroborated by Espada. The Board has long held that failure to credit one part of a witness' testimony does not preclude crediting other parts of the testimony. *Service Employees Local 1877 (American Building Maintenance)*, 345 NLRB 161 fn. 3 (2005).

Although the initial decision explained the reasons for not crediting part of Maldonado's testimony, it did not explicitly state that I was rejecting the testimony. Instead, it leapfrogged to the ultimate conclusion that Respondent "did not violate the Act as alleged in Complaint paragraph 7(b) because it did not engage in that alleged conduct." That conclusion, however, is erroneous. Although the government could not establish this allegation through the testimony of Maldonado, which I did not credit, it did through the credited testimony of Santiago.

Specifically, as discussed above, in a January 11, 2008 conversation with Santiago, Ramos brought up the subject of the union organizing campaign and then said "to give it thought, that work—that jobs were scarce these days, to think about my family, and that if I had any doubts or any situation or anything that I was concerned with, to come to him and tell him."

Even though this statement is somewhat vague, and does not specifically equate union activity with job loss, still it interferes with, restrains, and coerces an employee in the exercise of Section 7 rights. The Board has held that similarly oblique comments amounted to unlawful threats. Thus, in *L.W.D., Inc.*, 335 NLRB 241, 242 (2001), the Board found violative a statement that on the day of the representation election, the employees should "vote as if your job depends on it." In *Clinton Electronics Corp.*, 332 NLRB 479 (2000), a supervisor told an employee that "it's my opinion that we could all be looking for a job." The Board held that the comment violated Section 8(a)(1) of the Act.

In the present case, the supervisor went further than merely stating that jobs were scarce. He also urged Santiago to think about his family. In that context, the "jobs were scarce" comment cannot be considered merely a casual remark about the unemployment rate. When Ramos added that Santiago should think about his family, he personalized the matter and made clear that Santiago could endanger his employment by engaging in union activity.

Accordingly, I conclude that the Government has proven the allegation raised in complaint paragraph 7(b). Further, I conclude that Respondent thereby violated Section 8(a)(1) of the Act.

Now, I will return to complaint paragraph 7(a), which alleges that about January 11, 2010, Respondent “interrogated its employees about their Union activities and solicited their support to get rid of the Union.” The credited testimony offered to support this allegation comes from witnesses Santiago, Maldonado, and Espada, and has been quoted above.

Santiago’s testimony establishes that Ramos told Santiago that Ramos “had received information from a trustworthy source, that I was helping the guys” with the union organizing effort. This comment by Ramos, although coercive, does not fall comfortably within the definition of interrogation because it doesn’t ask a question. However, the statement does, I believe, create an unlawful impression of surveillance. In particular, Ramos’ reference to a “trustworthy source” implies that management had a spy in the Union’s camp.

The credited testimony of Maldonado and Espada establishes that Ramos made a similar statement in their presence. (One difference is that Ramos told Maldonado and Espada that he had received information about Maldonado’s union activity from a “good source” rather than a “trustworthy source.” This change of adjective, of course, does not alter the character of the statement or the effect it reasonably would have on employees’ willingness to exercise their Sec. 7 rights.)

Maldonado also testified that Ramos asked Maldonado “to please help him and that if I continued on with the syndicated effort, that I could end up without a job.” However, Espada does not corroborate this portion of Maldonado’s testimony. For the reasons discussed above, I do not credit it.

Accordingly, for the Government to prove that Ramos solicited an employee’s support to “get rid of the Union,” it must rely on Santiago’s testimony, discussed above. That testimony only establishes that Ramos asked Santiago to tell him if Santiago had any doubts or concerns. Santiago did not testify that Ramos made any request for Santiago’s assistance in defeating the Union. Therefore, I must conclude that credited evidence does not establish that Respondent solicited employees’ support to “get rid of the Union,” as complaint paragraph 7(a) alleges.

Because I have difficulty finding a question in Ramos’ statements, I do not recommend that the Board find the interrogation violation alleged in Complaint paragraph 7(a) but instead recommend that the Board conclude that Respondent violated the Act by creating an unlawful impression of surveillance. However, as already noted, complaint paragraph 7(a) does not allege that Ramos’ January 11, 2008 remarks created an impression of surveillance. The Board’s remand Order directs me to address the issues raised by my finding this unalleged vio-

lation.

The words Ramos spoke—that he had received information from a “trustworthy source” that Santiago was helping with the union organizing effort and that he had received information from a “good source” that Maldonado was involved in that effort—form the basis for the interrogation allegation in complaint paragraph 7. Because Ramos’ remark did not ask a specific question, characterizing it as interrogation did not appear to be appropriate. At the same time, Ramos’ words predictably would have a chilling effect on employees’ willingness to exercise their Section 7 rights because they conveyed that Respondent was observing their union activities.

It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989); *Letter Carriers, Local 3825 (Postal Service)*, 333 NLRB 343 fn. 2 (2001); *Garage Management Corp.*, 334 NLRB 940–941 (2001); and *Earthgrains Co.*, 351 NLRB 733, 737 (2007). Each prong of this test will be discussed separately.

To prove that Respondent violated Section 8(a)(1) by conducting an unlawful interrogation, the General Counsel relied on the same words which, in my view, violated Section 8(a)(1) by creating an unlawful impression of surveillance. This identity militates in favor of a finding that the unalleged violation was closely connected to the subject matter of the complaint.

Moreover, the violation found involved the same section of the Act as the violation alleged. That, too, weighs in favor of finding that the unalleged violation was closely connected to the subject matter of the complaint.

In *Food & Commercial Workers Local 4 (Safeway, Inc.)*, 353 NLRB 469 (2008), the complaint alleged that the respondent local union had violated Section 8(b)(1)(A) by failing to provide a bargaining unit employee with an adequate explanation of the discrepancy between the international union’s total amount for chargeable expenses and the local union’s total amount for chargeable expenses. At the hearing, however, much of the parties’ testimony and arguments focused on whether the expenditure information provided by the local union was verified sufficiently to satisfy the Board’s standards under *California Saw & Knife Works*, 320 NLRB 224 (1995); and *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474 (1999), reconsideration denied 327 NLRB 802 (1999). The judge analyzed the facts under the latter theory. Although the Board disagreed with the judge’s conclusion on the merits, it held

that the judge properly addressed the unalleged issue.

In *Airborne Freight Corp.*, 343 NLRB 580, 581 (2004), the complaint alleged that the respondent violated Section 8(a)(1) by telling an employee that he was not being allowed to transfer to a different route because of union activity, and violated Section 8(a)(3) of the Act by preventing the employee from changing his route. At hearing, the evidence established that a supervisor also had told the employee that he was not being allowed to transfer because he had filed unfair labor practice charges with the Board. The complaint only had alleged discrimination because of union activities, in violation of Section 8(a)(3), and not discrimination because of filing charges, in violation of Section 8(a)(4). Nonetheless, the judge found that the respondent had violated Section 8(a)(4) as well as Section 8(a)(3), and the Board upheld this finding.

In *Park 'N Fly, Inc.*, 349 NLRB 132, 133 (2007), the Board held that a supervisor's statement to an employee that the respondent probably would go broke was closely connected to other comments, in the same conversation and alleged in the complaint, that employees would get less money if the union came in and that the respondent's owner would not go for a union.

The unalleged violation in the present case bears at least as close a connection to the alleged violation as those in *Food & Commercial Workers Local 4 (Safeway, Inc.)*, *Airborne Freight Corp.* and *Park 'N Fly*. Moreover, the connectedness of the two allegations becomes even more apparent from the General Counsel's closing argument. Specifically, the General Counsel stated:

The interrogation of employees about the union activities and solicitation of support to get rid of the union through the discharge—employees' union activities, *created an impression among its employees that their union activities are under surveillance*, and informing employees that the discharge was due to employees' union activities. On January 11th, 2008, in the midst of the employees' organizing drive, Respondent's operation[s] manager, Armando Ramos, interrogated employees Santiago, Maldonado and Espada about their union activities and solicited their support to get rid of the union. [Emphasis added.]

In effect, the General Counsel argues that the words which constituted the alleged unlawful interrogation also created the impression of surveillance.

In sum, the unalleged violation bears a close connection to that alleged in the complaint. Accordingly, I conclude that the first prong of the *Pergament* test has been satisfied.

To satisfy the second prong, the unalleged violation must have been fully litigated. That determination rests in part on whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made. *Pergament*, above, 296 NLRB at 335.

Here, the same words constitute the unalleged violation and the violation alleged in the complaint. Respondent denied that Ramos was a supervisor and also presented essentially an alibi defense, eliciting testimony from Ramos that he was somewhere else on January 11, 2008, the date he supposedly made the "trustworthy source" and "good source" statements to Santiago and Maldonado. Thus, Respondent's defenses would not change because the words were found violative under an "impression of surveillance" theory rather than an interrogation theory.

However, the Board applies somewhat different tests in determining whether a statement constitutes an unlawful interrogation and whether it creates an unlawful impression of surveillance. Therefore, I must consider whether Respondent would have made different legal arguments if the complaint had alleged that Ramos' statement violated the Act by creating an unlawful impression of surveillance.

In analyzing allegations of unlawful interrogation, the Board asks whether, "under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." See *Rossmore House*, 269 NLRB 1176 (1984). The Board's test for determining whether an employer has created an impression of surveillance is whether employees would reasonably assume from the statement that their union activities had been placed under surveillance. *Park 'N Fly, Inc.*, above at 133, citing *Register Guard*, 344 NLRB 1142, 1145 (2005), *Flexsteel Industries*, 311 NLRB 257 (1993).

These tests appear to be quite similar. In both, the Board applies an objective standard to determine whether the words in question reasonably would chill the exercise of Section 7 rights. However, the Board has established a separate framework, under *Rossmore House*, to take into account how the circumstances surrounding the interrogation affected its coercive impact. The Board considers whether there is a history of employer hostility and discrimination, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the questioned employee's reply. The Board does not apply this framework to impression of surveillance allegations.

If this case involved the exact opposite situation, that

is, if the violation *not* alleged in the complaint concerned unlawful interrogation, Respondent might argue that it had not been placed on notice of the need to argue that the Government's evidence failed to satisfy the *Rossmore House* criteria. However, the unalleged violation does not require evaluation under the *Rossmore House* standards.

In *Dilling Mechanical Contractors*, 348 NLRB 98, 105 (2006), the Board, citing *Piqua Steel Co.*, 329 NLRB 704 fn. 4 (1999), held that the presentation of evidence associated with an alleged claim was insufficient to put the parties on notice that another unalleged claim (for which that evidence might also be probative) is being litigated, especially when the two claims relied on different theories of liability. However, I conclude that the facts in *Dilling Mechanical Contractors* distinguish it from the present case.

In *Dilling Mechanical Contractors*, the judge had found that the respondent violated Section 8(a)(3) by failing to hire certain job applicants, even though the complaint did not allege such a violation. The General Counsel had presented evidence about this matter because the complaint had alleged that the respondent had breached a non-Board settlement agreement and thereby violated Section 8(a)(1). Because the Government had a reason to present this evidence to establish the 8(a)(1) violation, doing so would not signify to the respondent that it had to defend against an 8(a)(3) refusal-to-hire allegation.

Moreover, the defenses relevant to the unalleged 8(a)(3) violation went beyond what would be relevant to the 8(a)(1) allegation. The respondent, not knowing that it needed to present these additional defenses, suffered prejudice. Therefore, the matter could not be considered fully and fairly litigated.

In the present case, the General Counsel's evidence clearly placed Respondent on notice of the words that allegedly violated Section 8(a)(1). Respondent defended by asserting that Ramos had not spoken those words and by denying his supervisory status. Alleging that these words created an impression of surveillance would not require Respondent to present any evidence or argument that would not be relevant to the allegation that the words constituted unlawful interrogation. Therefore, distinguishing *Dilling Mechanical Contractors*, I conclude that the issue was fully and fairly litigated. See *Airborne Freight Corp.*, above, 343 NLRB at 581; *Park 'N Fly, Inc.*, above, 349 NLRB at 133.

Accordingly, I recommend that the Board find that Ramos' statements to Santiago and Maldonado, discussed above, created an unlawful impression of surveillance in violation of Section 8(a)(1) of the Act. As already noted,

I do not find that the conduct alleged in complaint paragraph 7(a) constituted unlawful interrogation or solicitation. Additionally, for the reasons discussed above, I conclude that I erred in recommending the dismissal of complaint paragraph 7(b). Instead, I recommend that the Board find the violation alleged.

#### Allegations of Unlawful Conduct By Supervisor Santiago

In its remand Order, the Board directed me to "make an express finding as to the credibility of [employee Rafael] Cruz's testimony, and, if credited, whether [supervisor José] Santiago violated Section 8(a)(1) by stating that employees were discharged because of their union activities."

To comply fully with the Board's instruction to "make an express finding as to the credibility of Cruz's testimony," I first must consider how the credibility determination in the initial decision was insufficient. The initial decision discussed Cruz' credibility for three paragraphs—noting both some concerns and that his testimony was uncontradicted—and then concluded as follows:

My doubts about Cruz' testimony, however, do not outweigh the fact that it is uncontradicted. Accordingly, I credit it.

*LM Waste Service Corp.*, JD(ATL)–13–09, slip op. at 10, lines 5–6.

The remand Order did not indicate in what way the Board concluded that this discussion was not an "express finding" as to the credibility of Cruz' testimony or state how the Board wished me to expand on it. Perhaps the Board wishes me to explain why the uncontradicted nature of the testimony outweighed, in my mind, my doubts about it.

The Board has, on occasion, rejected uncontradicted testimony. See *Sioux City Foundry Co.*, 323 NLRB 1071 (1997). In this instance, however, I believe that doing so would be inappropriate.

During the hearing, Respondent stipulated that José Santiago was its supervisor within the meaning of Section 2(11) of the Act and its agent within the meaning of Section 2(13) of the Act. In the absence of evidence to the contrary, it may be presumed that Respondent has control over its own supervisors and can direct them to appear at the hearing. Moreover, Respondent has the power to subpoena witnesses, including its supervisors. Therefore, in the absence of a showing of unavailability, it is logical to infer from Respondent's failure to call Santiago that his testimony would have corroborated rather than contradicted Cruz' testimony. *DMI Distribu-*

*tion of Delaware*, 334 NLRB 409, 412 (2001).

Whether to draw such an inference lies within the judge's sound discretion. *Tom Rice Buick, Pontiac & GMC Truck*, 334 NLRB 785, 786 (2001). The present record does not suggest that Supervisor Santiago, had he taken the witness stand, would have contradicted Cruz' testimony. Accordingly, I conclude that it is appropriate to credit Cruz' testimony.

In the event I credited Cruz' testimony, which I did, the Board's remand Order directed me to make a finding as to "whether [supervisor José] Santiago violated Section 8(a)(1) by stating that employees were discharged because of their union activities." The initial decision, in paragraph 3 of its Conclusions of Law, stated as follows:

3. Respondent violated Section 8(a)(1) of the Act by the following conduct: Interrogating employees about their Union activities and soliciting their support to get rid of the Union; creating the impression among its employees that their union activities were under surveillance; *informing employees that they were discharged because of their activities on behalf of the Union*; and discharging its employees Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago.

*LM Waste Service, Corp.*, JD(ATL)-13-09, slip op. at 27, lines 22-27 (emphasis added). The italicized portion pertains both to Supervisor Santiago's statement to Cruz that the discharged employees had brought it upon themselves because they decided to unionize, alleged in complaint paragraph 9(a), and also to the conduct alleged in complaint paragraph 9(c), that about March 17, 2008, the Respondent, by José Santiago, informed an employee that Respondent had discharged another employee because of his union activities. In its remand Order, the Board specifically indicated that this latter allegation is not part of the remand.

My initial decision did not, in the section discussing the violations alleged in complaint paragraph 9(a), include a specific finding that Supervisor Santiago's January 15, 2008 statement to Cruz, that the discharged employees had brought it upon themselves because they decided to unionize, violated Section 8(a)(1). Here, I correct that error.

Crediting Cruz' testimony, I find that on or about January 15, 2008, Supervisor José Santiago told Cruz that Cruz and other discharged employees had brought it on themselves because they had decided to unionize, which is tantamount to saying that the Respondent had discharged the employees because of their union activities. Accordingly, I conclude that Supervisor Santiago

did inform an employee that the employees had been discharged because of their activities on behalf of the Union, as alleged in complaint paragraph 9(a)(ii). It may be noted that although Cruz had been discharged at the time Supervisor Santiago made the statement, the discharge was unlawful and did not terminate Cruz' employee status for purposes of the Act. Therefore, these statements interfered with, coerced and restrained an employee in the exercise of Section 7 rights.

In sum, I conclude that the Government has proven the allegations raised in paragraph 9(a) of the complaint, and that Respondent thereby violated Section 8(a)(1) of the Act.

#### Allegations of Unlawful Discharge

In its Order, the Board remanded the allegations raised in complaint paragraph 11 that Respondent violated Section 8(a)(3) by discharging employees Maldonado, Cruz, Espada, Santiago, and Cardona. The Board directed that I assess whether my further analysis of the 8(a)(1) allegations requires clarification or modification of my analysis of the discharge allegations. Further, the Board instructed that, with respect to the discharge of Maldonado, I should further "determine the credibility of Joel Cruz's testimony and whether that testimony, if credible, has an impact on the analysis of the allegation that Maldonado's discharge violated Section 8(a)(3) of the Act."

#### Effect of 8(a)(1) Allegations

The further analysis of the 8(a)(1) allegations, discussed above, does not affect my conclusion that Respondent's discharge of Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago violated Section 8(a)(3) and (1) of the Act. For the reasons stated below, it also does not affect my conclusion that Respondent did not violate the Act by causing the termination of employment of Marvin J. Cardona, an employee of DS Employment Agency, Inc., as had been alleged in complaint paragraph 11(b).

Because of this further analysis, I concluded above that my initial decision erred by recommending that the Board dismiss the allegation raised by complaint paragraph 7(b). Additionally, in this supplemental decision, I have found specifically that Supervisor Santiago violated the Act by telling an employee that he and other employees had been discharged because of their union activities, as alleged in complaint paragraph 9(a)(ii). Thus, this further analysis has increased the number of 8(a)(1) violations.

If anything, the addition of 8(a)(1) violations would strengthen rather than weaken the General Counsel's case. Moreover, my conclusion that the statements alleged in complaint paragraph 7(a) should be considered

as creating an unlawful impression of surveillance, rather than an unlawful interrogation and solicitation, does not lessen the significance of these statements as evidence of animus. Accordingly, I adhere to the conclusions in the initial decision that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Maldonado, Cruz, Espada, and Santiago.

*Discharges of Maldonado, Cruz, Espada,  
and Santiago*

In its remand Order, the Board directed me to consider further whether Respondent had met its rebuttal burden of demonstrating that it would have discharged Maldonado even absent his union activities. This further analysis does not affect my conclusion that Respondent also violated the Act by discharging Cruz and Espada, but it does affect my reasoning in reaching that conclusion. In the original decision, I had found that the reasons Respondent gave for discharging Santiago were pretextual. Here, I conclude that Respondent's asserted reasons for discharging Maldonado, Cruz, and Espada also were pretextual.

The Board's remand Order noted that Maldonado's former helper, Joel Cruz Velasquez, testified that he saw Maldonado make unauthorized trash pickups and collect payment for this service and that Maldonado threatened him with physical harm when he would not accept any of the money. (For clarity, I will refer to Joel Cruz Velasquez as "Cruz Valasquez" to distinguish him from Rafael Cruz Cruz, referred to above simply as "Cruz.")

The remand Order directed that "the judge shall determine the credibility" of Joel Cruz Valesquez' testimony and "whether that testimony, if credible, has an impact on the analysis of the allegation that Maldonado's discharge violated Section 8(a)(3) of the Act."

Cruz Velasquez testified that from June 2006 until June 2007, he worked as a helper on the truck driven by Rafael Maldonado. From some time in June 2007 until October 2007 he was on leave. When he returned to work, he became a residential driver.

According to Cruz Velasquez, while he was working as Maldonado's helper, Maldonado would make him pick up garbage cans "from clients that were not listed in the route, while he would go inside the business of the Pomales Market and get some money and put it in his pocket. He would offer me some of it, but I always told him that I never accept presents from people."

Even though Cruz Velasquez stopped being Maldonado's helper in June 2007, he did not tell management about Maldonado's conduct until January 2008. Cruz Velasquez testified that "Maldonado kept me under a threat. He wanted to keep Pomales Market and get

some money and put it me with my mouth shut. He had me intimidated and to the point that, upon my talking out, he would give me four blows wherever could grab me."

Respondent discharged Maldonado. (The asserted reasons for the discharge will be discussed below.) Cruz Velasquez testified that after Maldonado's discharge, Maldonado telephoned him "threatening me, saying that I had been the rat who talked and that he was going—whenever he caught with me, he was going to give me four blows."

Cruz Velasquez took the witness stand after Maldonado, who was not recalled as a rebuttal witness. Cruz Velasquez' testimony about Maldonado's conduct is un rebutted. However, I have some concerns about it which lessen its probative value.

Cruz Velasquez stopped working with Maldonado in June 2007 but did not report Maldonado's activities to management until January 2008. When asked about the half-year delay, Cruz Velasquez explained that he "could no longer take the humiliation and the threats." That testimony would be more plausible if Maldonado and Cruz Velasquez had been working together, but it makes little sense considering that the two had different assignments.

After the change in Cruz Velasquez' assignment, Maldonado had little opportunity to threaten him, but even more significantly, Maldonado would have had scant motivation to do so. Cruz Velasquez no longer was in a position to observe Maldonado's activities, so Maldonado would have had no immediate reason to threaten him into silence.

Arguably, Maldonado might have continued to seek out Cruz Velasquez and might have made threats to keep Cruz Velasquez silent about the conduct he had observed before June 2007. However, when asked on cross-examination, Cruz Velasquez did not identify even a single specific instance when Maldonado made such a threat before his discharge. He only recounted the January 14, 2008 telephone conversation which took place after Maldonado had been fired.

If Cruz Velasquez really "could no longer take the humiliation and the threats," he should have been able to point to at least one specific occasion, after June 2007 but before Maldonado's discharge, when Maldonado humiliated or threatened him. However, Cruz Velasquez did not. The generality of Cruz Velasquez' testimony may well mask blatant exaggeration. Accordingly, I give little weight to his testimony, even though it is uncontradicted.

The Board has established a framework for evaluating discharges in which more than one motive prompted the decision to terminate employment. See *Wright Line*, 251

NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under this framework, the General Counsel bears the burden of establishing certain elements by a preponderance of the evidence. If the Government proves these elements, the burden of proceeding shifts to the respondent to show that it would have taken the same action even in the absence of protected activity.<sup>1</sup>

The initial decision concluded that, with respect to Maldonado's discharge, the General Counsel had established the initial elements, shifting the burden of proceeding to Respondent. Nothing here changes that conclusion. If my assessment of Cruz Velasquez' credibility has any effect, it will concern whether Respondent has met its rebuttal burden.

Although I give little weight to Cruz Velasquez' testimony, I do not doubt that, in January 2008, he made statements to management about Maldonado similar to his testimony at the hearing. In other words, he told management that Maldonado had picked up trash from

---

<sup>1</sup> In fn. 3 of the remand Order, the Board stated, "We note that the judge described the General Counsel's initial burden in terms of four evidentiary elements, rather than the Board's traditional description of three elements: union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer."

However, the four-element framework in my initial decision mirrors, essentially verbatim, the Board's language in *American Garden Management Co.*, 338 NLRB 644, 645 (2002), which in turn cites *Tracker Marine*, 337 NLRB 644, 646 (2002). (The language in my initial decision differs from that in *American Garden Management Co.* in two ways: The word "government" sometimes is used instead of "General Counsel," and my initial decision simply refers to a "link" rather than a "motivational link.")

See also *Mid-Mountain Foods*, 332 NLRB 229 fn. 1 (2000), in which the judge followed the same four-element framework used in the initial decision herein. In a footnote, the Board stated, in part, as follows: "The General Counsel excepts to the manner in which the judge articulated the burden borne by the General Counsel in cases involving alleged violations of Sec. 8(a)(3) of the Act. We believe that the judge's formulation does not depart substantively from Board doctrine. In any event, we have reviewed these matters under the standard articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983), and we reach the same results reached by the judge." The Board's subsequent use of the four-element test in *American Garden Management Co.*, above, suggests that the Board endorsed this framework or at least found it acceptable.

If the Board prefers a three-element test I will, of course, use it. However, I believe the four-element test the Board applied in *American Garden Management Co.* provides a more precise measure. It includes the requirement that the General Counsel prove that there has been an "adverse employment action." Sometimes, that fact is in dispute. See *Leiser Construction, LLC*, 349 NLRB 413, 415-416 (2007), citing *Nations Rent, Inc.*, 342 NLRB 179 (2004). Also, reference to a "link" rather than a "showing of antiunion animus" recognizes that animus manifested by a supervisor not involved in the discipline decision may not be probative of the employer's motivation in making that decision.

businesses that were not Respondent's customers, had received money, presumably for the pickups, and that he had threatened Cruz Velasquez.

In the initial decision, I concluded that "Respondent has not presented evidence showing that it has discharged other employees in circumstances similar to those in Maldonado's case." *LM Waste Service, Corp.*, JD(ATL)-13-09, slip op. at 15, lines 34-35. A second evaluation of the evidence does not change my conclusion that Respondent has not met its rebuttal burden, but I reach that conclusion along a somewhat different path.

The initial decision concluded that Respondent's discharge of Reinaldo Santiago was 20 pretextual. Further evaluation of the evidence now causes me to reach the same conclusion with respect to the discharges of Maldonado, Cruz, and Espada.

The discharge letter which Respondent gave to Maldonado did not state any reason for the termination, so it is not helpful in determining what the decision makers considered. However, the three supervisors who participated in the discharge decision testified about it. They were Human Resources Manager Maria Montalvo, General Operations Manager Armando Ramos, and Residential Routes Supervisor Julio Torres Torres.

Human Resources Manager Montalvo testified that Respondent discharged Maldonado in 30 part because "some audits were carried out" regarding Maldonado's route that that "some deficiencies" were found. Montalvo further testified that Maldonado "was administering, for his own profit, the pickup service of a person that was not one of LM's clients." However, Montalvo made no mention of Maldonado threatening Cruz Velasquez.

General Operations Manager Ramos also participated in the discharge decision. His testimony suggested that Maldonado's threat to Cruz Velasquez was a significant, and perhaps decisive, factor in the decision to terminate Maldonado's employment: "We cannot allow to have an employee with a high risk against his safety and health, an employee that feels intimidated. And, on the other hand, it's a company policy and you can find it in the employees' manual, that that sort of irregularity is to be sanctioned at the first of those irregularities."

Like Montalvo, but unlike Ramos, the third supervisor involved in the decision to discharge Maldonado, Julio Torres, did not refer to the threat when he testified. If the managers who decided to discharge Maldonado had based their decision on his supposed threat to Cruz Velasquez, almost certainly Human Resources Director Montalvo and Supervisor Torres would have mentioned it in their testimony. Workplace safety is highly important and a threat is so dramatic it likely would be remem-

bered. The disparity between the reasons offered by Montalvo and Torres, on the one hand, and Ramos, on the other, suggests pretext.

In addition to the differences in testimony regarding the reason for the discharge, other evidence persuades me that the asserted reasons were pretextual. Although Respondent's witnesses denied knowing about the union organizing campaign at the time of this decision, I have not credited that testimony.

The initial decision found that on January 11, 2008, Ramos told employee Reinaldo Santiago Rodriguez that he had received information from a "trustworthy source" that the employee was helping with the union organizing effort. That same day, Ramos made a similar statement to Maldonado. Three days later, Respondent discharged both of these employees.

The timing of the discharge decision, so soon after Respondent revealed both its knowledge that specific employees were involved in a union organizing effort and its hostility to that effort, strongly suggests a connection. Respondent manifested this hostility through the coercive statements of its manager, Ramos, who also participated in the discharge decision.

Ramos testified that one reason they decided to discharge Maldonado concerned threats made to Cruz Velasquez. However, I have discredited Ramos' testimony and have found that he was not telling the truth when he denied having knowledge of the union organizing campaign on January 11, 2008. Likewise, I conclude that he lacked candor when he testified that the decision to discharge Maldonado rested, in part, on the belief that Maldonado had threatened Cruz Valasquez. Because Ramos offered a specious reason, I infer that the real reason was unlawful.

Stated another way, the untrue reason was pretextual. A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. *Rood Trucking Co.*, 342 NLRB 895, 898 (2004), citing *Golden State Foods Corp.*, 340 NLRB 382 (2003). Accordingly, Respondent has not met its rebuttal burden of showing that it would have discharged Maldonado even in the absence of protected activities.

Respondent discharged Cruz and Espada the same day it terminated the employment of Santiago and Maldonado. The initial decision discussed the reasons Respondent gave to discharging these two employees and why I concluded that Respondent had failed to meet its rebuttal burden. Were I again to examine these asserted reasons in light of the credited evidence, I would adhere to my original determination that Respondent had not rebutted the General Counsel's case. However, in

view of the timing of these discharges, and for reasons similar to those discussed above in the case of Maldonado's termination, I now conclude that Respondent's ostensible reasons for firing Cruz and Espada were pretextual as well. As discussed above, a finding of pretext results in the conclusion that Respondent has not carried its rebuttal burden.

In the case of Rafael Cruz, I also considered it significant that Respondent had tolerated and accommodated this employee's lack of a "Category 8" commercial driver's license for some time. Only after Respondent learned of Cruz' union activity did the absence of this license become, supposedly, so important that it necessitated his prompt discharge. Moreover, the day after Cruz' termination, the person who had been his immediate supervisor told him that union activities had been the reason Respondent discharged Cruz and the other three employees who had been terminated at the same time. Considering these circumstances, I conclude that Respondent's asserted reasons for Cruz' discharge were pretextual.

Similar reasons apply to Respondent's discharge of Felipe Espada. When the Department of Transportation and Public Works suspended Spade's "Category 6" driver's license, Respondent assigned him to work as a helper rather than as a driver. Respondent accommodated Espada until the union organizing effort. I conclude that Respondent's asserted reasons for Spade's discharge were pretextual.

#### Discharge of Marvin J. Cardona

The Board's remand Order instructed me to consider whether my further analysis of the 8(a)(1) allegations requires me to clarify or modify my analysis of the allegations that Respondent unlawfully discharged Maldonado, Cruz, Espada, Santiago, and *Cardona*. In the initial decision, I had concluded that the General Counsel had established the required *Wright Line* elements with respect to Marvin J. Cardona's discharge, thus shifting the burden of proceeding to the Respondent, but that the Respondent had met its rebuttal burden. The analysis above does not change this conclusion.

Cardona worked for DS Employment Agency. Complaint paragraph 11(b) alleged that Respondent had caused the termination of Cardona's employment with this agency on about March 17, 2008, which was 2 months after Respondent had discharged Maldonado, Cruz, Espada, and Santiago on the same day. In the case of these latter four employees, not only were the discharges simultaneous, they also occurred just 3 days after Respondent had revealed its knowledge of, and hostility to, the union organizing effort.

Unlike the other four alleged discriminatees, all of whom were discharged on the same day, Cardona's discharge stands alone and somewhat distant in time. Cardona credibly testified that some time in January 2008, Supervisor Santiago told him that the Respondent had discharged Maldonado, Espada, and two other employees and identified Maldonado as responsible for the union organizing campaign. Santiago also asked Cardona if he had attended union meetings, which Cardona denied.

Cardona had not engaged in union activity. However, after Cardona's discharge, Supervisor Santiago told him that he had been fired "because you were participating in the Teamsters Union." Based on Cardona's credited testimony, I concluded that Supervisor Santiago's statement satisfied both the *Wright Line* requirement of employer knowledge and the requirement that the Government must establish a link between the protected activity (or in this case, Respondent's belief that Cardona had engaged in protected activity) and the discharge.

Credited evidence of animus does not compel the conclusion that an employer's asserted reason for a discharge was pretextual. Indeed, if evidence of animus automatically resulted in a finding of pretext, then an employer would have no opportunity to rebut the General Counsel's case. Considering that a finding of pretext precludes an employer from raising a defense, making such a finding is a consequential matter.

Persuasive evidence—the timing of the other four discharges, which took place on the same date and soon after Respondent manifested its hostility to the union organizing effort, and my conclusion that Ramos was not telling the truth about the reasons for Maldonado's termination—convinced me that Respondent's asserted reasons for discharging Maldonado, Cruz, Espada, and Santiago were pretextual. Similar circumstances did not exist in the case of Cardona's discharge. Accordingly, I conclude that a finding of pretext is unwarranted and that Respondent's rebuttal evidence should be considered. Further, I conclude, for the reasons explained in the initial decision, that Respondent met its rebuttal burden. Therefore, I continue to recommend that the Board dismiss the allegation that Respondent, by causing the discharge of Cardona, violated the Act.

Although the Board's remand Order did not include all issues decided in the original decision, to avoid the possible confusion that might result from having to refer to two separate documents, the conclusions of law below will repeat the conclusions of law set forth in the initial decision, modified as necessary by this supplemental decision. A similar practice will be followed with respect to the recommended Order. The Board's remand

Order did not direct me to include a proposed remedy in the supplemental decision. I have modified the proposed notice to employees to comport with the findings herein.

#### CONCLUSIONS OF LAW

1. The Respondent, LM Waste Service, Corp., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Union de Tronquistas de Puerto Rico, Local 901, IBT is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by the following conduct: Creating the impression among its employees that their union activities were under surveillance; informing employees that they were discharged because of their activities on behalf of the Union; and discharging its employees Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago.

4. Respondent violated Section 8(a)(3) of the Act by discharging its employees Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago.

5. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. Respondent did not violate the Act in any other way alleged in the complaint.

On these findings of fact and conclusions of law set forth in the initial decision as modified herein, and on the entire record in this case, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, LM Waste Service, Corp., Juana Diaz, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression among employees that their union activities are under surveillance; informing employees that they are discharged because of their activities on behalf of the Union; and discharging employees because of their union activities or to encourage support for any labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in

<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Offer Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago immediate and full reinstatement to their former positions, or to substantially equivalent positions, and make them whole, with interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), for all losses they suffered because Respondent discharged them unlawfully.

(b) Within 14 days after service by the Region, post at its facilities in Juana Diaz, Puerto Rico, copies of the attached notice marked "Appendix A" in both English and Spanish.<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 11, 2008.

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

Dated Washington, D.C., October 22, 2010.

#### APPENDIX

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

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT create among our employees the impression that their union activities are under surveillance.

WE WILL NOT inform employees that they have been discharged because of their union activities.

WE WILL NOT discharge our employees because they formed, joined or assisted a union or to discourage membership in any labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago immediate and full reinstatement to their former positions or to substantially equivalent positions if their former positions are not available.

WE WILL make Rafael Maldonado, Rafael Cruz, Felipe Espada, and Reinaldo Santiago whole, with interest, for all losses they suffered because of our unlawful discrimination against them.

LM WASTE SERVICE, CORP.

<sup>3</sup> If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."