

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN RECLAMATION, INC.

and

Cases 31-CA-067258
31-CA-067259
31-CA-067262
31-CA-067263
31-CA-067265
31-CA-068671
31-CA-070330
31-CA-070331
31-CA-070334
31-CA-072357
31-CA-074588

PACKAGE AND GENERAL UTILITY DRIVERS,
TEAMSTERS LOCAL UNION NO. 396

Juan Carlos Ochoa Diaz and J. Carlos Gonzalez, Esqs., for the General Counsel.
Michael W. Droke and Jennifer C. Berry, Esqs. (Dorsey & Whitney, LLP), of Seattle,
Washington, for the Respondent.
Ricardo Hidalgo, International Organizer, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on July 24–27 and July 30–31, 2012. The Package and General Utility Drivers, Teamsters Local Union No. 396 (the Union) filed the first charge on October 19, 2011,¹ and the General Counsel issued the consolidated complaint on April 30, 2012. The complaint alleges that American Reclamation, Inc. (Respondent) violated Section 8(a)(1) threatening employees with termination for engaging in protected concerted activity, threatening employees with termination to prevent them from engaging in union activity, including but not limited to

¹ All dates are in 2011 and January 2012 unless otherwise indicated.

participating in a union organized employee delegation, threatening to terminate employees who participated in a union organized delegation, creating the impression among its employees that their union activities were under surveillance by maintaining a list of union supporters, threatening to close or sell its facility if employees selected the Union, soliciting employee complaints and grievances and promising employees improved working conditions to discourage employees from supporting the Union, promising employees improved working conditions—including but limited to, building changing rooms for employees, improving the employee lunch/break room, buying microwaves for the employee lunch/break room, and buying better safety glasses and masks for employees—to discourage their support for the Union, and finally by improving working conditions by, among other things, buying new microwaves for the employees break/lunchroom, making other improvements to the employee lunch/break room, and building changing rooms for the employees to discourage their support for the Union. The complaint alleges that Respondent also violated Section 8(a)(1) by discharging Karla Campos because Campos engaged in protected, concerted activity by photographing hazardous materials in the trash that employees worked with and encouraging employee to voice their concerns about the hazardous materials to Respondent. Lastly, the complaint also alleges that Respondent violated Section 8(a)(3) by laying off Santos Orellana and Magdeleno Sanchez because they engaged in union activity.

Respondent filed a timely answer that admitted the allegations in the complaint concerning the filing of the charges,² interstate commerce and jurisdiction, and the supervisory and agency status of John Gasparian, Respondent's owner and president, and Nain DeLeon, Respondent's operations manager. At the hearing Respondent stipulated to the union labor organization status. Respondent denied that Margarita Urquia was its agent and it also denied having committed any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has been engaged in providing rubbish hauling and recycling services at its facility in Los Angeles, California, where it annually provides services valued in excess of \$50,000 to enterprises located within the State of California that are directly engaged in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

² Service of those charges is established by the proofs of service in the formal papers.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

5 Respondent operates a facility where it recycles waste material. The recyclable products are brought to the facility by Respondent's drivers. The trash is then placed on large conveyer belts where employees sort it by category such as plastic bottles, cardboard, etc. The sorted products are then compacted and bound. Most recently Respondent has also been involved in recycling construction waste materials. Another aspect of Respondent's business involves
10 rubbish removal; Respondent's drivers pick up rubbish from certain locations and haul it to landfills where the rubbish is dumped. Respondent employs about 80 employees.

The drivers drive several types of vehicles. A front loader truck has two prongs that lift up containers of trash and dump the trash into the truck; drivers of this truck work with an
15 assistant who helps in the process of lifting the containers. Roll-off trucks pull container of trash onto the truck and haul the container away. The semi-truck is used to pull a box or container. When there is not enough work for the drivers they will work in the yard and assist in sorting.

Respondent had a contract with the City of Irwindale for the removal of waste materials for commercial and industrial enterprises. On November 30, 2010, the city advised Respondent that it was extending that contract on a month-to-month basis through May 31, 2011; on that date the contract ended and Respondent lost that business. Driver Alberto Huerta did that route; he was not laid off. In fact DeLeon conceded that after Respondent lost the Irwindale contract he adjusted the routes of the drivers to redistribute the workload and no one was laid off at that
25 time.

The following information is necessary to fully understand Respondent's explanation for the timing of some events in this case. On May 16 Gasparian's father was involved in a car accident that resulted in his hospitalization until his death on August 1. During that time period
30 Gasparian drastically cut back on his presence at the facility in order to spend time with his father and family. In the process Gasparian became less aware of the every day happenings at the facility.

B. Union Activity

35 Ricardo Hidalgo is an international organizer for the Union. The organizing effort began in January 2011 and meetings with employees began the following month. The Union began collecting authorization cards from employees at meetings on August 28 and September 11. The Union filed a petition for an election on October 7. On October 11 the Union again met with
40 employees and additional authorization cards were signed. About 26 employees signed authorization cards; the Union, however, advised employees to keep quiet about the union activities so that Respondent would not learn of the organizing campaign.

I now describe the union activity of two of the alleged discriminatees. In February
45 Santos Orellana met with an organizer from the Union and about 2 weeks later he attended a union meeting with other employees. About a month before he was laid off Orellana attended a third union meeting; he and other employees signed authorization cards at this meeting. After

that Orellana attended yet another union meeting; at this meeting the Union advised the employees what would be happening now that a number of employees had signed authorization cards. Magdeleno Sanchez began supporting the Union in July when he met a union organizer at a fast food restaurant. About 2 weeks later he and a number of other employees again met with union organizers. He too attended the union meetings about a month before and a week or so before his layoff. Finally on September 26 he and a coworker met with Hidalgo and signed authorization cards.

Estefania Lopez works in the scale house as a weigh master. The scale house has a small office where she and Margarita Urquia work and where Nain DeLeon has a desk area. One early morning in late September, while Lopez was in the office, DeLeon approached her and said that he wanted to talk to her. DeLeon asked Lopez if she knew about the rumors that were going around. Lopez replied no, that she did not. DeLeon then asked Lopez if she belonged to the Union and Lopez answered that she did not. DeLeon continued, asking if her husband, Wilfredo, who also works for Respondent, was involved in the Union. Lopez answered no, he was not.³ These facts are based on Lopez' testimony. Lopez' demeanor was convincing and I note that she is still employed by Respondent. I deal with DeLeon's credibility in detail later in this decision.

C. Layoffs

Paragraph 11 of the complaint alleges that Respondent laid off Santos Orellana and Magdeleno Sanchez on October 6 because they supported the Union; Respondent contends they were laid off because of lack of work. Orellana started working for Respondent in June 2006; he later stopped working there for about a year for health reasons. He was rehired in 2010 and drove a semi-truck. In the months preceding his layoff Orellana typically started work at 6 a.m. and usually worked until 6 p.m. or later, 5 days per week and sometimes also on Saturdays. He was paid \$14 per hour and \$21 per hour for the considerable overtime work he did each week.

Sanchez work for Respondent as a front load truck driver from early 2006 until his layoff on October 6. He was paid \$15 per hour and \$22.50 per hour for overtime work. Sanchez worked a regular schedule starting at 5 a.m. and ending between 4-5:30 p.m. He too worked 5 days per week and sometimes a sixth day on Thursdays, his scheduled day off. Sanchez worked 6 days a week during the entire month of September—the month preceding his layoff. Indeed, he was working overtime on Thursday, October 6, the day of his layoff.

Sanchez was involved in several vehicle accidents while working for Respondent; Respondent's relies on this accident record as an explanation of why it selected Sanchez for layoff. A document in evidence shows that Sanchez was involved in five accidents since early 2006, the most recent being on February 23, over 6 months before his layoff. The first page of the document appears to be a summary of other documents; that page indicates that Sanchez was at fault in each of the accidents. But what appear to be original documents used to support the summary are inconsistent with that summary. Nonetheless, the summary was received into evidence without objection by the General Counsel; even I pointed out some concerns about the document the General Counsel persisted in his belief that the summary was an accurate reflection of the underlying records. So I conclude that Respondent determined that Sanchez was at fault

³ This incident is not alleged to be a violation in the complaint.

for each of the accidents. In any event, Sanchez reported the accidents to DeLeon and was not disciplined in any way for them.

5 On October 4 Gasparian requested a hasty uniform inventory for Sanchez, Orellana, Karla Campos, and Maritza Cerritos. Respondent computed how much would be owed if those employees did not return their uniforms. Obviously, Respondent was contemplating terminating those four employees. Respondent even prepared a check for Campos. That check was voided and indicated that she was not laid off. It turns out, as described below, Orellana and Sanchez were laid off 2 days later but Campos was no fired until January 6 and Cerritos continues to work
10 for Respondent.

Lopez credibly testified that around 11 a.m. on October 6 she was in the office and observed DeLeon talking on the telephone. He left the area, came back and instructed Urquia to call Sanchez and Orellana. Urquia then called Orellana at about noon while he was in the middle
15 of his route and told him to return to the yard. He returned to the facility where he waited outside the scale house for about 2 hours until DeLeon arrived. While Orellana was waiting outside DeLeon returned to the scale house. Urquia informed DeLeon of Orellana's presence and DeLeon angrily replied to let the son-of-a-bitch just wait. As he was sitting at his desk DeLeon angrily commented to Urquia that "Those two are in it."⁴ DeLeon then told Orellana that that he did not want Orellana there anymore, that the work was finished, there was no more work. DeLeon gestured as he did so, indicating that Orellana was to leave. DeLeon and Orellana then went to the office area where Orellana was handed his paychecks and again told that there was no more work for him. DeLeon also said that Gasparian said that the cost was too high. Sanchez too received a call in mid-day of October 6; he was instructed to drive his truck to a location where two drivers were waiting, one to replace him on the truck and the other to drive
25 him back to the yard. Sanchez then encountered DeLeon at the scale house. They then went to Gasparian's office where DeLeon told Sanchez that he was terminated. DeLeon said that Sanchez had to sign some papers but Sanchez refused to do so, explaining that he would not do so without knowing why he was terminated. Sanchez said that he would return the next morning when he was calmer. The facts in the preceding paragraph are based on a composite of the credible testimony of Orellana, Sanchez, and Lopez.
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Records indicated that for the week ending April 2, Respondent's drivers worked a total of 1101 hours. That number fluctuated but slowly increased so that by the week ending October
35 1, the total hours worked by the drivers was 1214.⁵ The week ending October 8, the week during which Respondent laid off Sanchez and Orellana for lack of work, the weekly total increased to 1238. For the 4 weeks that followed the numbers shot up to 1284, 1325, 1300, and 1294. To summarize, Respondent's drivers were slowly working more and more hours prior to the layoff and even more after the layoff. Finally, on September 29, less that a week before the layoffs,
40 Respondent hired Cristian Leiva as a "scout driver."

⁴ The complaint does not allege that this incident violated the Act.

⁵ Suspiciously missing from Respondent's document are the hours worked for the weeks ending July 16 and 23.

Respondent points to records indicating that there was declining tonnage of materials, but Gasparian admitted that those tonnage reports did not include the work done by the semi-truck drivers.

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Analysis

I apply the shifting burden analysis required by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to determine whether the General Counsel has met his initial burden of showing that Sanchez and Orellana were laid off because of the union activities. See also *T & J Trucking Co.*, 316 NLRB 771 (1995). I have described above how both employees engaged in union activities. In late September Respondent was aware of union activities among its employees when DeLeon questioned Lopez whether she and her husband were involved with the Union. On the day of the layoffs DeLeon angrily commented that Sanchez and Orellana were “in it.” In context, and in light of DeLeon earlier questioning of Lopez concerning whether she husband was “in it” I infer that DeLeon was referring to the Union. Other factors support the inference of knowledge. The layoffs occurred in the middle of the workweek and in the middle of the workday. This hurried activity occurred 1 day before the Union filed its representation petition; I conclude this was not a coincidence. After all, there was widespread participation among the employees in support of the Union, the Union was in the process of obtaining authorization cards from the employees, and the Union had informed the employees of the election process. Respondent’s hostility towards those union activities is fully revealed by the questioning of Lopez by DeLeon, the anger exhibited by DeLeon in the process of laying off the employees, and by list of unfair labor practices that began shortly after the lay offs, as described below. I conclude that the General Counsel has met his initial burden.

I have discredited the testimony that Respondent relies on to explain the legality of its decision to lay off Sanchez and Orellana. Indeed, the specious nature of those assertions to wit: the loss of the Irwindale contract that occurred months earlier, the alleged loss of business a time when drivers were working large amounts of overtime and Respondent was hiring more employees, and the totally fabricated reasons for the selection of Sanchez and Orellana for layoff, only serve to strengthen the General Counsel’s case. By laying off Magdeleno Sanchez and Santos Orellana because they engaged in union activity, Respondent violated Section 8(a)(3) and (1).

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D. The 8(a)(1) Allegations

Paragraph 6(a) of the complaint alleges that Respondent threatened employees with termination for engaging in protected, concerted activities. The next day, October 7, Orellana and Sanchez returned to the facility at the start of the workday and talked to a number of employees about the events of the preceding day. They noticed DeLeon getting coffee from a food truck outside the facility. So Sanchez, Orellana, Jose Perez, and about five or six other workers approached DeLeon. They asked why the two had been laid off; DeLeon said only Gasparian could answer that question and that he had nothing to say. Then DeLeon pointed with his index finger at each of the other employees there and they were going to be the next persons to lose their jobs. The facts in this paragraph are based on a composite of the credible testimony of Orellana, Sanchez, and Perez. I note that Perez was still employed by Respondent at the time

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he gave this testimony. . DeLeon then entered the facility while the employees remained outside. DeLeon claims but Orellana, Sanchez, and Perez credibly denied that Orellana pushed DeLeon; again I will deal with DeLeon's credibility later in this decision.

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Analysis

I have described above how the employees gathered together to challenge DeLeon concerning the layoffs of Sanchez and Orellana. This is classic concerted activity that is protected by Section 7 of the Act. *Meyers Industries*, 281 NLRB 882, 885 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1986), cert. denied 487 U.S. 1205 (1988). DeLeon threatened to discharge the employees because of that. It is unlawful for an employer to threaten to discharge employees for such activity. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57, slip op. at 22 (2011). By threatening to discharge employees because they engaged in concerted activity that is protected by the Act, Respondent violated Section 8(a)(1).

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By the time DeLeon left the employees at the food truck and entered the facility it was about 5:25 a.m. Orellana then called Gasparian at home. Orellana told Gasparian that they were having an emergency and that they needed Gasparian to come to the facility. At about 8 a.m. Gasparian arrived; Orellana, Sanchez and several other employees were waiting for him. Orellana asked Gasparian why he had taken the jobs from them; Gasparian replied that there no more work. After more conversation the other employees went inside and started work; Orellana and Sanchez remained outside the facility Gasparian returned with DeLeon and told them that they should be grateful that he gave them papers so they could get unemployment compensation; they shook hands and left. Orellana's exit interview form indicated that he was laid off for lack of work. It also indicated, however, the layoff was permanent and that he would *not* be recommended for rehire.

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Paragraphs 8(b), (c), and (d) and 9 of the complaint allege that Respondent threatening to close or sell its facility if employees selected the Union, soliciting employee complaints and grievances and promising employees improved working conditions to discourage employees from supporting the Union, promising employees improved working conditions – including but limited to, building changing rooms for employees, improving the employee lunch/break room, buying microwaves for the employee lunch/break room, and buying better safety glasses and masks for employees – to discourage their support for the Union, and finally by improving working conditions by, among other things, buying new microwaves for the employees break/lunchroom, making other improvements to the employee lunch/break room, and building changing rooms for the employees to discourage their support for the Union.. On October 11, 4 days after Respondent received a copy of the petition the Union had filed, Respondent held a meeting with the yard employees to persuade them to vote against the Union. Gasparian led the meeting; DeLeon was also present. Gasparian spoke in English and had other workers translate his comments in Spanish. Gasparian said that the Union was attempting to introduce itself and make changes at the company. Gasparian said that he was the owner and only he had the right to make the changes. Gasparian said that he was not in a position to allow the Union in the Company because the Company was going through a crisis, that it was indebted for some trucks that it had purchased and because of the poor economy. Gasparian said that the Union only wanted their money and that the Union was no good for them. Gasparian told the employees that he was not going to allow the Union to come in and tell him how to do things and that if the

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Union came in he would be forced to sell the Company or shut it down or if not, that a bigger company would come over and it was going to purchase the contracts that Respondent had and the employees would be out of work. . Gasparian said that he wanted the employees to work as a family; that they were all a family and had worked like this for many years and that the workers would always have a job. Gasparian asked the employees what was going on at the Company, what were the problems. He said to let him know what the problems are and what we needed to change. After the employees remained silent for a while Gasparian said that he thought everything must be okay then. At that point Ricardo Hidalgo, union international organizer, entered the area and interrupted the meeting, shouting out that now Gasparian wanted to treat the employees as a family and ask them what was going on. Gasparian and Hidalgo exchanged words and finally Hidalgo was escorted out of the facility. In the meantime the employees started talking among themselves. Then the employees told Gasparian that they needed more masks and gloves, that DeLeon yelled at them, that they needed more microwaves, that the lunch area needed to be cleaner, and they wanted rooms to use to change their clothes. Other employees asked for insurance and wage increases. Gasparian said that he was going to work on those matter; he even mentioned installing a suggestion box by the punch clock. Gasparian said that he would fix up the eating area and build changing rooms. These facts are based on a composite of the credible testimony of Karla Campos, Maritza Cerritos, and Margarita Castro. There testimony was detailed and corroborative; their demeanor was convincing. Cerritos and Castro were employed by Respondent at the time they gave their testimony. And I questioned Campos again about what Gasparian said during a portion of the meeting. Her response to me appeared to be truthful.⁶

The next day more microwaves were placed in the eating area and later changing rooms were built near the eating area and a separation wall was constructed between the eating area and the loading dock.

Analysis

I have described above how Gasparian threatened to sell the company or shut it down or indicating that the employees would be out of work if the Union became their bargaining representative. Such threats are unlawful. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969). By threatening to sell the Company or shut it down or otherwise indicating that employees will be out of work if the Union became their bargaining representative, Respondent violated Section 8(a)(1).

I have described above how Gasparian invited the employees to express their concerns about working conditions; this was done in the context of seeking to discourage employees from supporting the Union. Respondent does not have a practice of soliciting employment issues from

⁶ In doing so I have considered Respondent's argument, made at the hearing and again in its brief, that Campos' testimony should be discredit because after Campos' discharge, described below, she received money from LAANE, a non-profit organization that allied itself with the Union's organizing effort. But Campos provided affidavits to the Board during the investigation of the charges in this case, Respondent was given those affidavits, Respondent failed to point out any inconsistencies in those affidavits as compared to Carlos' testimony at the hearing, and there is no evidence that at the time Campos gave those affidavits she knew she would be receiving money from LAANE.

its employees. Gasparian also promised to address some concerns such as the changing rooms, more microwaves, and an improved eating area for the employees. By soliciting employee workplace concerns and promising to address those concerns in order to undermine support for the Union, Respondent violated Section 8(a)(1). *Kmart Corp.*, 316 NLRB 1175, 1177 (1995).

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I have described above how in the days and weeks following this meeting Respondent kept its promise and improved the working conditions of the employees by adding microwaves to the eating area, constructing changing rooms, and creating a dividing wall separating the eating area from the dock area. By improving the working conditions of employees in order to

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undermine their support for the Union, Respondent violated Section 8(a)(1). *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992).

Paragraph 8(a) of the complaint alleges that at a meeting with drivers and helpers Respondent threatened to close or sell its facility if employees selected the Union as their bargaining representative. On October 12 Gasparian met with the drivers and helpers. Gasparian said that he wanted to discuss the Union coming in. He said the Company was too small for a union and that he did not have the money to cover the benefits the Union was asking for. He explained that the Company was not like Waste Management. Gasparian said that they were like a family and that he knew how to run the Company. Gasparian said that he would be forced to close the Company or sell it if the Union came in. Duan Draper asked why he had not received a raise in the last 3 years. Gasparian answered that he did not know that and he would look into the matter. These facts are based on a composite of the testimony of Duan Draper, who worked for Respondent as a front load truck driver from the summer in 2009 until the spring of 2012, and Jose Maria Perez who has worked for Respondent since August 2005; he currently works as a front load truck driver. Their testimony was corroborative and their demeanor was convincing. I especially note that Perez is a relatively long-term employee who was still employed by Respondent at the time he testified.

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Analysis

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By again threatening to close the Company or sell it if the Union became the bargaining representative of the employees, Respondent violated Section 8(a)(1).

Next, paragraph 6(b) of the complaint alleges that on about October 17 DeLeon threatened employees with termination to prevent them from engaging in union activity, including but not limited to a Union organized employee delegation. On October 17 a group gathered and then entered Respondent's facility. The group included persons from the Los Federations, UCLA, Sierra Club, and Los Angeles Alliance for a New Economy (LAANE), Pacoima Beautiful, the Union, and Sanchez and Orellano. A number of employees, including Karla Campos, gathered at the scale house and the outside group entered the facility and joined then there. This occurred during the employees' lunch break. The group then walked to Gasparian's office. Alfredo Hernandez worked for the Union as an organizer; he participated in the demonstration that occurred on October 17. Before the demonstration began Hernandez entered the facility and invited an employee, Vicente Aquino, to go outside and join the group that was assembling for the demonstration. As Hernandez was doing so DeLeon arrived and said "What are you doing there? You want a job right? Okay. Then don't get involved in this nonsense and go back to work." The foregoing facts are based on Hernandez's credible

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testimony and Aquino's pretrial affidavit. In his testimony at the trial Aquino indicated that DeLeon told him to go to work in the back area and to return to the project he was working on later. But in his pretrial affidavit Aquino stated that "if I wanted a job, it was best to go in the back with my other co-workers. At no time did he threaten my job when he spoke to me."⁷ I conclude that Aquino may have subjectively not viewed DeLeon's comments as a threat; but the test is an objective one. Aquino's demeanor at trial was not convincing; it appeared he was unwillingly to say things against the interests of his employer.

Analysis

I have described how DeLeon told Aquino that if he wanted a job he should not get involved in the Union sponsored demonstration. This was at the time when Aquino was being solicited by Hernandez to join that demonstration. By threatening to discharge an employee if he engaged in union activity, Respondent violated Section 8(a)(1).

Paragraph 6 (c) of the complaint alleges that Respondent unlawfully threatened to terminate employees who participated in a union sponsored employee delegation; paragraph 6(d) alleges that Respondent unlawfully created the impression among its employees that their union activities were under surveillance. On October 17 Lopez saw the delegation pass the scale house. About 2 hours later DeLeon came to the scale house and said that the people in the delegation had all lost their jobs. He asked Urquia if she had seen all the employees who participated in the delegation and instructed her to tell him the names of the employees involved. Urquia identified those employees and then DeLeon made a list of the employees that Urquia had identified. Still later DeLeon kept two folders on the computer in the scales house; one folder contained a list of the employees who were supporting the Union and the other folder had a list of those who were supporting Respondent. In the process DeLeon would make comments such as that he had some employees who had been for the Union but now they were supporting him. The facts in the preceding paragraph are based on Lopez's credible testimony. Her testimony was rich in details and her demeanor was convincing.

Analysis

DeLeon indicated that the employees who were involved in the Union sponsored demonstration had lost their jobs. By threatening to discharge employees because they engaged in union activity, Respondent violated Section 8(a)(1). I have described how DeLeon made a list of the employees who had participated in the demonstration, how he kept a list of employees who were supporting the Union and another list of those who were supporting the Respondent. He made comments indicating that he had persuaded some supporters of the Union to come over to Respondent's side. Taken together, this unlawfully created the impression that Respondent was spying on the union activity of its employees. By creating the impression that the union activities of employees are under surveillance, Respondent violated Section 8(a)(1). *Flexsteel Industries*, 311 NLRB 257 (1993).

⁷ Respondent objected to the translation of the affidavit. The words in the affidavit that are at issue are "si quise trabajo." I conclude the translation described above is correct. Respondent's suggested translation – "if I wanted to go to work" – simply cannot be read from those words.

Paragraph 7 of the complaint alleges that Respondent, through Margarita Urquia, threatened to call immigration because employees were supporting the Union. Respondent denies that Urquia is its agent. Urquia works as a weigh master in the scale house where trucks are weighed upon entering and then leaving the facility. The scale house has a small office where Stepania Lopez, also a weigh master, works and where Nain DeLeon has a desk area. Urquia has worked for Respondent for 17 years. Urquia weighs the materials brought into the facility, takes care of customer service, and does some dispatching work. In this regard customers call to arrange for a pickup and Urquia will do the necessary paperwork. She regularly communicates with the drivers, including informing them of any changes in the schedule of the routes they are driving. For example, according to the credible testimony of Duan Draper, a former driver, Urquia called him on a weekly basis and would ask him if he could do an extra pickup. This came about when a customer finally paid an overdue bill or requested additional service. Draper admitted that Urquia was either relaying a request from a customer or transmitting a message from a supervisor. DeLeon has told the yard employees that in his absence the employees must follow the direction given to them by Urquia. Urquia assists the yard employees in resolving routine issues that have when DeLeon is not available. The foregoing facts are based on a composite of the credible testimony of Lopez, Santos Orellana, Karla Campos, and Margarita Castro. I do not credit the testimony of Urquia to the extent that it is inconsistent with the facts described above; she seemed eager to diminish her authority.

In mid-October Urquia told Lopez that those people that were with the Union did not stop and think about what the Union would be taking from their paychecks weekly or monthly and that they did not stop and think that they were illegal and undocumented. Urquia continued, saying that on the day the employees could least expect it immigration could show up and that she would let Lopez and some others know the day that immigration was going to get there. This conversation occurred in the office area in the scales house at about 2 p.m.

Analysis

I must first determine whether Urquia acted as an agent for Respondent in making the comments to Lopez. I have noted above how Urquia transmits work instruction to employees that emanate from DeLeon. Employees have also been instructed to obey Urquia's directions when DeLeon is unavailable. But under the fact pattern here I conclude that the General Counsel has failed to establish agency. The General Counsel relies on case such as *Dentech Corp.*, 294 NLRB 924, 925 (1989), to support its argument, but the fact pattern is not congruous with the fact pattern here. Here Urquia's authority concerning work instructions was entirely unrelated to the topic of conversation with Lopez, immigration. Moreover, Lopez was not even a driver or yard workers for whom Urquia acted as a conduit for DeLeon. Nor was the message conveyed by Urquia a reiteration of comments made by Respondent. Finally as described below I issue a broad order against Respondent. That order will effectively remedy any unlawful conduct covered by this matter. For these reasons I dismiss this allegation of the complaint.

In late October DeLeon told Lopez that Gasparian did not have to go through the headaches that the Union was provoking, that Gasparian was a multimillionaire, and that

Gasparian could sell the Company whenever he wanted to and that “we were all going to be out.”⁸

Analysis

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E. Discharge

10 Paragraph 10 of the complaint alleges that Respondent violated Section 8(a)(1) and (3) by discharging Karla Campos because Campos engaged in protected, concerted activity by photographing hazardous materials in the trash that employees worked with and encouraging employee to voice their concerns about the hazardous materials to Respondent and because Campos supported the Union.

15 Campos began worker as a sorter for Respondent beginning in June 2011. Campos heard about the Union from two coworkers; she then attended several union meetings along with other employees and signed an authorization card. At one of the meetings she, coworkers, and union officials discussed filing a complaint about working conditions with OSHA. In November Campos and other employees went to OSHA’s office and file that complaint. In early or mid-December, OSHA officials visited Respondent’s facility. During that visit Campos approached those officials and openly spoke to them about safety concerns. Campos showed them a dirty hole where the employees had to go into. She complained that the employees lacked adequate equipment to handle material such as syringes and dead animals that passed through the conveyor belt. She mentioned the cockroaches and rats that were omnipresent in the yard, including in the eating areas and bathrooms. Campos’ discussion with the OSHA officials lasted about 30 minutes. Gasparian and DeLeon observed Campos’ interaction with OSHA officials from distances ranging from 5–7 feet to 10–15 feet. The OSHA officials spoke with several other employees as well.

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30 At some point Campos began meeting with union officials almost every day after work; other employees were often present. She also spoke to about 10 coworkers, encouraging them to join the Union; these conversations occurred at the facility during break and lunchtimes. After the Union filed its representation petition Campos attended the hearing on behalf of the Union; Gasparian also was present. At the trial Gasparian admitted he knew that Campos was a supporter of the Union at the time he fired her.

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40 Raymundo Bravo has worked for Respondent for about 7 years; he works as a baler. On January 5 Bravo was working close to the conveyer belt when he discovered a plastic bin containing used syringes. He also saw about 10 syringes lying on the ground near the container. Bravo showed the syringes to Margarita Castro; Bravo then left the area to take a break. Castro, in turn, told Campos that Bravo found a container and some syringes. Campos went to the area and saw a large, open, rectangular, red plastic container. In the container were many used syringes. Using her mobile phone, Campos took pictures of the container and syringes; she did so that she could provide OSHA with evidence that employees had to deal with used syringes at the workplace. As she was doing so DeLeon approached. As he did so Campos placed the red container on top of the trash that had accumulated in very large metal bin that was nearby; the

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⁸ The complaint does not allege this comment is a violation of the Act.

top of the red container remained visible. Campos then waited for DeLeon to reach her there. DeLeon asked Campos what it was; Campos answered that DeLeon could obviously see what it was for himself, a container with syringes. DeLeon asked where it came from and Campos told him that it came from the material that had been sorted. DeLeon retorted that there was no way that it could have come from there because the Company does not pick up waste materials from hospitals or laboratories. Another employee, Maritza Cerritos, joined the conversation. DeLeon asked her too where the syringes came from; Cerritos said that they came from the sorting area and DeLeon should go to that area and ask those employees. DeLeon repeated that the syringes could not have come from the sorting area. Cerritos asked if DeLeon was saying that someone had brought the syringes there; DeLeon answered yes.

DeLeon left the area only to return shortly thereafter. He summoned the employees to the conveyer belt area. While they were gathering there a coworker asked Campos what was going on and Campos told him about the syringes. DeLeon saw them talking and sent the coworker to a different area, telling Campos the he did not want her to be talking about OSHA. DeLeon announced that someone tried to hide syringes and Campos protested that DeLeon should talk to the employees and learn the truth. Campos told the assembled workers that she had found a container of syringes, that she did not try and hide it but simply put it on top of the bin, and that DeLeon was trying to say that employees brought the syringes to the Company. DeLeon told her to shut up, that she could not talk and that she should write a report of what had occurred. DeLeon also instructed the employees to write reports of what had happened.

Campos' report read:

I saw some needles in the plastic we sort normally. It is not the first time we find them in the working area. I moved them from the area to show the supervisor and at the time he walk (sic) and saw where I put them and he grabbed them.

Bravo, who was the first person to see the syringes, wrote:

I saw the syringes in the basket and Margarita (Castro) placed them by the bale but I did not see when she pulled it out and then Karla (Campos) then grabbed them. I was by the machine.⁹

Castro wrote:

I, Margarita Castro, while I was working saw that a bucket containing various syringes was found while I was working with plastic.

Later that day DeLeon told Campos and Castro that he had coworkers look through a bale of trash and search for syringes but none were found. Campos replied what made DeLeon think he would find syringes there; the employees had already picked them. DeLeon announced that there would be an investigation to find out how the syringes got there; Campos agreed that there should be such an investigation. Campos urged other workers who were present to speak and asked them whether they see syringes in the waste. She said, "Speak up, speak up. That is why

⁹ I have corrected the translation.

[DeLeon] does whatever he does to us, is because you remain silent. You don't speak up." Finally an employee said that she had seen syringes before. According to Campos, prior to January 5, she had seen syringes on the conveyer belt in DeLeon presence "many times" yet DeLeon did not stop the conveyer belt and simply exhorted the works to keep working. Bravo also testified that he saw syringes at the yard "all the time." Castro also had seen syringes before on the conveyer belt. The foregoing facts are based on a composite of the credible testimony of Campos, Castro, Cerritos, and Bravo. They corroborated each other and their demeanor while testifying convinced me that they were making every effort to relate the facts as they understood them. I note that Cerritos, Bravo, and Castro were still employed by Respondent at the time they testified.

The next day, January 6, at about 6:15 a.m. Bravo informed DeLeon that it was he who had found the syringes. Bravo asked if he would be disciplined for failing to say that in the statement he gave the day before. DeLeon answered no, that everything was okay, that Bravo should not say anything and just leave it like that and go back to work.¹⁰ Later that day DeLeon fired Campos. Campos asked why she was being fired and DeLeon referred to what had happened the day before. Campos protested that they were trying to blame her for the syringes, but DeLeon said that the decision had already been made and she should leave.

On December 21 DeLeon held a safety meeting with all employees, including Campos. Respondent's minutes of that meeting disclosed several matters were raised including the following:

Some of you are complaining that sometimes there are syringes coming along with the trash. Although we are not handling these types of businesses, we still need to be very careful when we are sorting. If you see any syringes stop the conveyer and immediately and (sic) report to your supervisor. Do not touch or handle them at all. These precautions apply to all workers in the yard.

Campos denied receiving any training concerning how to handle syringes if they were found in the trash. She, Castro, and Cerritos all denied that DeLeon made the comments indicated in the minutes. Bravo confirmed that it was only after the events of January 5 that the employees were told that if they see syringes on the conveyer belt they should immediately stop the belt and report it to a supervisor. I have already voiced my concerns about the documents produced by Respondent concerning Orellana's accident record. Below I express additional concerns regarding the authenticity of photographs produced by Respondent. No employee ever saw those minutes. I conclude they were simply created by Respondent in an effort to strengthen its case against Campos. And by doing so, Respondent actually undermines its case.

Respondent has a written progressive disciplinary policy for violations of safety procedures. It provides for first a verbal warning with documentation, then a written warning with possible suspension, then disciplinary action up to and including discharge, and for a fourth violation, discharge.

¹⁰ In reaching this conclusion I have considered the fact that in his pretrial affidavit Bravo stated that he had the discussion with DeLeon *after* someone told him that Campos had been fired; but at the trial Bravo appeared certain that it occurred in the early morning.

Analysis

I again apply *Wright Line* in assessing the legality of Campos' discharge. Campos was among the leading supporters of the Union. She attended meetings, signed an authorization card, encouraged employees to join the Union, attended the preelection hearing on the representation hearing, and participated in the Union sponsored demonstration. Indeed, Gasparian admitted that he knew Campos was a supporter of the Union. Tied in with her union activity was other concerted activity that was protected by the Act. She, with other employees, filed the OSHA complaint complaining about working conditions at Respondent's facility and she and other employees participated in the OSHA inspection of the facility that followed. As part of this effort, when other employees found the container with syringes they passed the container to Campos and she took photographs to document the existence of their dangerous presence at the workplace. She encouraged employees, in the presence of DeLeon, to not be fearful and to speak up about their working conditions. All this conduct is protected by the Act. *Meyers Industries*, supra. Respondent's animus toward the exercise of the rights of its employees that are protected by law is convincingly demonstrated by the list unfair labor practices it committed as described above. And Respondent earlier contemplated getting rid of Campos as part of its unlawful layoff of Sanchez and Orellana. I conclude that the General Counsel has presented a strong case in meeting his burden under *Wright Line*. Where the General Counsel makes a strong showing of discriminatory motivation, an employer's rebuttal burden is substantial. See *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991); see also *Van Vlerah Mechanical*, 320 NLRB 739, 744 (1996).

Respondent asserts that it fired Campos because she violated a policy that requires employees not to handle unsafe material such as syringes, but to instead call a supervisor. But first of all, to be precise, there is no evidence that Campos directly handled the syringes; rather she and other employees handled the container with the syringes. This may still be unsafe, but it is not as unsafe as directly handling syringes. Moreover, I have concluded above that Respondent's specific policy concerning syringes was not announced to employees until after Campos' discharge. Although common sense would dictate to employees that they not directly touch syringes, at least some employees felt they could simply allow the syringes to pass through the conveyer belt into the waste materials. The necessary element needed to support Respondent's position is that employees *immediately* call a supervisor when they discover syringes. This is why DeLeon allegedly stood around watching Campos in plain sight; he was allegedly waiting to see if she would report the syringes to a supervisor. But I have not credited the evidence necessary to support that element. To the contrary, I have not even credited DeLeon's testimony that he stood there waiting to see if Campos would tell him about the syringes. Continuing, even if such a policy had been enunciated to employees, Respondent knew as a result of its own investigation that other employees had seen and handled the container of syringes and had neither stopped work nor reported it immediately to their supervisors; no one was disciplined for this alleged breach other than Campos. Bravo admitted to DeLeon that he had discovered and handled the container; he was told, in effect, to shut up and go away. Finally, Respondent has a progressive disciplinary process and Campos never received any discipline before her abrupt discharge. I conclude that the reasons given for Campos' discharge were simply a pretext offered in an attempt to disguise the unlawful motive. By discharging Campos because she engaged in union and other protected concerted activity, Respondent has independently violated both Section 8(a)(1) and (3).

F. Credibility Findings

I have explained above the reasons why I have credited the testimony of the witnesses produced by the General Counsel. I now explain in detail why I have not credited the testimony of Respondent's witness.

For example, I have considered Gasparian's testimony that during the summer prior to the layoff it was reported to him that there were "drivers here that are sitting around and really not doing anything, they're not driving." This testimony strikes me as exaggerated if not totally fabricated. It is belied by Respondent's own records that the drivers continued to work 10- and 12-hour days and that the number of hours the drivers worked was slowly, albeit erratically, increasing during the summer. I have considered Gasparian's testimony that the loss of the Irwindale contract and consequent loss of business contributed the layoffs of Orellana and Sanchez. I reject that testimony. The loss of that contract occurred months before the layoff and Gasparian had notice of that eventuality even months earlier. Yet Gasparian took no action until the Union showed up. Gasparian testified that in selecting Sanchez for ff "our No. 1 in our plant is safety and performance." Yet in doing so Gasparian explained, "We judge not how bad the accident was, but how frequently." Because Sanchez was involved in a number of accidents, Gasparian concluded that Sanchez "was an irresponsible driver and we were looking for a larger accident to happen" But the obvious yet unanswered question is why did Respondent continue to allow such an irresponsible and unsafe driver to continue to drive for months after his latest accident? And then Gasparian testified that he selected Orellana because he was the least senior. But what happened to "our No. 1?" Why was the next most accident prone driver not selected? I conclude that Gasparian scoured the records of the Sanchez and Orellana after the fact to come up with whatever convenient reasons he could find to disguise the unlawful reasons. On cross-examination the General Counsel asked Gasparian when he first discussed the downward trend in business with DeLeon; he answered about 6 months prior to the May.16 accident of his father. Gasparian explained, "I was hoping that we – I was giving our sales time to try to re-group and go after new business." Observing Gasparian's demeanor as he answered, it seemed to me that he was making up his testimony as needed in an attempt to conceal its implausible nature. And this despite his testimony that each month during this time period he reviewed the monthly tonnage reports that he testified indicated to him a decline in business. And why after viewing months of declining business did Respondent abruptly layoff Orellana and Sanchez in the middle of a workday in the middle of the week? Gasparian explained that DeLeon was not promptly execute his command to lay them off, so he finally put his foot down and directed DeLeon to do so at once. Give me a break! Gasparian admitted that at the October 11 meeting employees asked to have changing rooms built for them. He testified that he told the employees "The changing rooms you see behind me are in construction. It's something we're in the process of doing" But this defies common sense. Why would employees be requesting that changing rooms be built when they could see them being built right in front of their eyes? There are many, many more reasons why I reject Gasparian's testimony to the extent it is inconsistent with the facts described in this decision. I invite the reader to review the General Counsel's cross-examination of Gasparian to discover some of them.

I have considered DeLeon's testimony; he has worked for Respondent for 20 years. DeLeon also testified that although he had spoken to Gasparian about the decline in business

beginning in late 2010, he explained that in July he spoke to Gasparian about constructing the changing rooms because they had just hired additional sorters most of whom were women. In any event Gasparian and DeLeon claim that they then embarked upon a months-long process of gathering wood and other material and began construction of the changing rooms on about
 5 October 5. The General Counsel skillfully laid bare the contradiction during questioning as follows:

Q. So if you knew that there wasn't going to be enough work for a particular driver, you would let him work in the yard so that he could earn his wage, correct?

10 A. Yes.

Q. Instead of giving him the day off, right?

A. We were hoping that they were going to be covering phone calls.

Q. But even if there were no calls, they would work in the yard, right?

A. Yes.

15 Q. At that time, there was plenty of work in the yard, right?

MR. DROKE: Object to the form, vague as to time, and also misstates his testimony.

JUDGE KOCOL: Overruled. Please answer.

A. Can you repeat the question please?

20 Q. So during the -- say during the summer of 2011 when there was -- there was enough in the yard, correct? There was something for the drivers to do if they couldn't be out driving, right?

A. No, not necessarily.

Q. Why did you have to hire yard employees during the summer?

A. We're not having drivers work in the yard.

25 Q. That wasn't my question. My question was, if you had the driver come into work and there were no calls for him to tend to, there was work for him to do in the yard, correct?

A. Yes.

Q. So he didn't sit around all day and get paid eight hours -- or ten hours?

30 A. I need you to rephrase the question.

Q. When a driver came in on a day that no calls came that he had to attend to during the summer of 2011, that driver actually worked in the yard and he actually did work, not just sit around?

A. Yes, that's correct.

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This examination is an example of DeLeon testifying in a manner that is evasive and both self-contradictory and contradicting the testimony of Gasparian, who testified that he was told that there were drivers in the yard not working during that time. And adding insult to injury, this testimony belies that of Gasparian that the tonnage reports that he was reviewing on a monthly
 40 basis showed a troubling decline of business that lead to the layoffs. Why would he have noticed the increased hiring of female yard workers such to trigger him to order DeLeon to construct the changing rooms, yet at the same time be troubled by the drop in tonnage? There is no credible explanation for that enigma. I stop by inviting the reader to review the General Counsel's cross-examination of DeLeon for a veritable treasure trove of examples of why I have not chosen to
 45 credit DeLeon's testimony to the extent that it is inconsistent with the facts described earlier in this decision.

Laura Ramirez had worked as a sorter for Respondent; 3 months before the trial she became “in charge of the shop” making reports for the drivers. She has worked for Respondent for about 1 year. Ramirez testified that she assisted in the construction of the changing rooms that was just beginning on October 5. Coincidentally, she testified that she took several pictures of the changing rooms as they were being constructed; she claimed all the pictures were taken before the October 11 meeting. She identified 11 photographs as pictures that she took of the construction of the changing rooms, five of which bore the date of October 5. I required Respondent to produce the photographs to the General Counsel in their original format. After a weekend break, I allowed Respondent to recall Ramirez. She then testified that when she looked at the photographs saved in her mobile phone she discovered “that I had only one photo on the 5th and that the other ones had different dates.” And what possessed Ramirez to take so many photographs of the various stages of the drab, dull, changing-room project; did someone ask her to take the photographs? No, she took them because “it was the first project that I had ever done.” Yet apparently, according to her own testimony, she assisted in the project only to the extent that she took measurements. I note that Respondent present testimony from Maria Dressel, its office manager, concerning the construction of the changing rooms. Her testimony was that by the October 11 meeting, construction was already underway. I asked Dressel what stage the construction was in by October 11, she answered;

It was the beginning of the construction. . . . Just like – things were being moved around, and laying wood or something down. . . . Yeah, maybe like a frame.”

That explains why Respondent did not show Dressel the photographs that Ramirez described; the October 5 photographs shows walls had already been hung. Respondent never explained how the photographs became dated, inaccurately, as having been taken on October 5. In the absence of any credible I conclude that the dates on the photographs were manufactured to make it appear that they were taken earlier than they actually were. From this I easily infer that Respondent was trying to hide the actual dates that the construction work began. Ramirez also gave testimony concerning the October 11 meeting, but her testimony was in response to leading questions and her demeanor was unconvincing. It reaffirmed my sense that she was simply trying to please her employer as opposed to testifying fully and accurately. And still another one of Respondent’s witnesses contradicted Ramirez and the photographs. Arturo Avila has worked in several positions for Respondent. Respondent’s counsel asked him if he saw any construction underway around the eating area as of the October 11; his reply, “I don’t remember very well.” After an objection to a leading question was sustained, Respondent’s counsel asked Avila what he saw in the eating area around that time. Avila’s response was “Nothing, everything was normal.”

I have considered Aquino’s testimony that in the summer DeLeon asked him to start collecting wood from the trash to construct changing rooms for the employees and that he began constructing the changing rooms before the October 11 meeting. I do not credit that testimony; it was given in response to leading questions and his demeanor was entirely unconvincing. In addition, he was shown photographs of the changing rooms with dates that, as I describe above, were misleading. I conclude that Aquino was trying to loyally support his employer’s legal position rather than giving an accurate description of the facts.

According to John Carlo, he began working for Respondent in “July/August” 2011; he works with supervisors on special projects for new renovations and changes. Carlo knew

Gasparian before that time as Gasparian helped Carlo get into the business. According to Carlo, Gasparian:

5 [E] xpressed the ides of isolating or renovating the current warehouse loading area, isolating the break room, dressing rooms and whatnot. I came out and took some measurements and proposed an idea and we proceeded to put the materials together and develop it.

10 So sometime in January or February 2011, Carlo came to the facility and took measurements. Remember, Ramirez too claimed she took measurements for this project, but much later. Carlo also took photographs, none of which were produced, but Carlo then had his brother-in-law create a drawing of the changing rooms and separating wall. The drawing is dated May 17, 2011. I pause at this point to point out that although Gasparian testified at the hearing for almost an entire day, he never mentioned the drawing. And none of any of the other witnesses who helped in the construction of the changing rooms ever testify that they used, over even saw the drawing. So anyway, Carlo's brother-in-law told him the type of materials that would be needed for the construction and Carlo then told Gasparian to "Have your guys start saving this type of material up." So *after* he started working for Respondent. Carlo noticed "a pallet of lumber, plywood, things like that I assumed, okay, good, we've got some wood now." Respondent's counsel then asked "So after the collection of the materials began, *before* you started working for American Reclamation?" (emphasis added). Carlo answered: "Yeah." So was it before or after July/August that he saw the materials being collected? Carlo then identified copies of a number of receipts from Home Depot and Lowe's; a number of check marks and other markings appeared on the receipts. Carlo testified that he was "almost sure" that he purchased some of the material on the receipts for Respondent for the construction of the changing walls. For example, there is a receipt dated July 7, 2011, indicating the purchase of:

- PNTRS CAULK \$7.85
- JT COMPOUND \$30.72
- 30 • PRIMER \$25.96
- INT PAINT \$114.00
- PREMIX \$11.95
- 3 PC PERF SET \$13.97
- 2 IN. MASK TP \$7.96

35 The purchase for the primer had a check mark next to it that indicated, according to Carlo, that he was reimbursed for that purchase by Respondent. But Carlo admitted that he was working on a several projects at the time unrelated to Respondent including a project for his mother, and most of the supplies on that receipt were purchased for his mother. And looking at the entire receipt, it seems logical, doesn't it, that he would be purchasing the primer with the paint and other supplies for his mother's project? And should I believe that on July7 he purchased \$25.96 worth of primer for a project for Respondent that had not yet even begun? The record reflects that Carlo's testimony was so hesitant that I finally expressed, "You seem hesitant." Carlo answered:

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I'm just looking at the items because I can tell that some of this was actually for my mom's house too. I don't want to confuse which ones they were, so I'm hesitant.

5 Later Carlo claimed that he also purchased the interior paint and the joint compound indicated on the receipt for Respondent also, but those items did not have a check mark next to them. Was he not reimbursed for those purchases? And had the colors of the walls been selected before the construction even began? Also, much of Carlo's testimony was elicited from leading, and even misleading questions. For example:

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Q. Why did you receive petty cash in the amount of \$11.14 on September 2nd, 2011?

A. I don't recall what specifically that was for.

Q. It says wood dressing room on that document

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A. I don't think it was wood, unless it was one particular piece of wood that I had to buy by myself, which I don't recall.

Q. Okay. Would there be any reason to mark dressing room there if it was not for –

A. No, I would –

Q. the dressing room?

A. I would write the specific area it's being applied to.

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JUDGE KOCOL: Do we have the originals for these documents?

MS. BERRY: This is what I have, Your Honor.

JUDGE KOCOL: But do we have originals? You must've copied this out of something.

MS. BERRY: I received copies.

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JUDGE KOCOL: I'll ask again, do we have originals?

MS. BERRY: Not that I know of, not in my possession, no.

30 Carlo was continuously uncertain exactly when he started working for Respondent; when I asked Respondent for some documentation such an employment application or like to pin down the date, none was provided. And the General Counsel pointed out that Carlo's name was not listed on the list of employees that he had subpoenaed. The reader is invited to read Carlo's testimony in its entirety. I conclude that Carlo's testimony concerning the timing of his involvement, if any, with the construction project was entirely fabricated.

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Joe Pimentel is Respondent's manager of customer service. He testified that he saw drivers standing around in the yard and he told this to Gasparian. There is no explanation as to why he would not tell this first to DeLeon, who is the drivers' supervisor; this is especially so when, according to Pimentel, he reported this to Gasparian during the period of time when Gasparian was grieving the loss of his father and was at the facility on a very limited basis. I asked Pimentel whether Gasparian mentioned at the meetings with employees in October that unions were for big companies, not like American Reclamation; Pimentel answered "No, he didn't mention that." These factors and as well as his demeanor convince me that Pimentel was not attempting to give the facts as best he could.

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Maria Dressel is Respondent's office manager. She attended an October 11 meeting and testified as to what Gasparian said at her meeting. Her testimony concerning what Gasparian said at that meeting is exactly three sentences long and does not even indicate that Gasparian

mentioned the Union; something that every other witness agrees was the topic of the meeting! Dressel seemed prompted to supply testimony that suited Respondent's theory rather than attempting to accurately give the facts.

5 Oscar Flores works as a mechanic for Respondent. Respondent elicited testimony from him designed to show that the increase in hours that the drivers worked was because they were stalling and creating problems. Flores testified on six occasions Draper called in to report that his truck was not working but when Flores arrived at the scene the truck was in fact working fine. This also happened about three times with driver Rene Cotto and twice with driver Jose
10 Perez. Each incident caused about 2–3 hours of down time for the drivers. But there is no evidence that Respondent disciplined these drivers. Indeed, according to Flores, DeLeon chastised him because so many trucks needed repair; it was only then that Flores apparently blamed the matter on those drivers. Flores also testified that on about four occasions he found magnets on Draper's truck that were placed in such a so as to disable a critical function of the
15 truck. According to Flores, after the first time he told Draper not to put the magnets there, that Draper would say okay, but then Draper would do it again. This testimony strikes me as incredible on its face and unbelievable when matched against the record as a whole. In addition, Flores was entirely unconvincing. In any event, the down time caused by these incidents represents a tiny fraction of the hours worked by the drivers during that period. And even then
20 there are no records or credible testimony to show how much down time occurred prior to the lay offs so as to show any net increase in down time.

Juan Martinez works for Respondent as a truckdriver; he has worked there for almost 13 years. His testimony concerning the October 11 was simply denials that Gasparian made the threats alleged in the complaint; he gave no testimony concerning the details of the meeting.
25 Martinez gave testimony concerning the October 7 incident by the food truck with DeLeon Sanchez, Orellana, and others; but he admitted he was merely walking by the food truck to enter the facility to punch in. Arturo Avila has worked in several positions for Respondent. Respondent presented him as a witness concerning the October 11 meeting, but he gave only sketchy details. I asked Avila if he remembered that meeting; his reply was "a little bit." Did
30 Gasparian mention the Union at that meeting; "No." Did Gasparian mention the fact that dressing rooms for the men and women were being constructed"; "Not that I remember." Did Gasparian say what the purpose of the meeting was; "He did say what was the purpose of the meeting, but I don't remember what it was he said." Octavio Martinez has worked for
35 Respondent for about 7 years; he provided testimony concerning the October meeting about the Union, but his testimony was hesitant and his demeanor unconvincing. Craig Doerr works as regional manager and customer service for Respondent; he has worked there since 2003. He presented testimony concerning the October 7 incident but he arrived after the incident involving DeLeon and DeLeon did not tell him any of the details that had occurred earlier. He
40 corroborated the fact that Respondent lost the Irwindale contract in May and gave his estimates concerning its impact on Respondent's business, but it was obvious that he had first hand knowledge only concerning certain portions of that business and no business records were produced to corroborate those estimates. James Rials has worked for Respondent for over 20 years; he works as truckdriver. His testimony suffered from many of the flaws I have described
45 above. In addition, I note he was eager to supply information helpful to Respondent concerning something about which he knew nothing. To wit:

Q. Did you have an opportunity to observe the length of time that the drivers were working their routes in 2011?

A. The drivers kind of slowed the exit down, like –

5 Q. I'm asking you a different question. The question is simply did you have a chance to see how long drivers were on the road, based on your work?

A. No.

10 Jose Menjivar has worked for Respondent for about 5 years; he works as a front load truck driver. His testimony was very, very brief. I could not make a good assessment of his demeanor one way or the other. But in the context of the entire record his testimony contributes little to the outcome of this case. Roberto Huerta has worked for Respondent for 23 years; he works as a driver. When asked what Gasparian said at the October 12 meeting, Huerta replied: "That he wasn't going to sell the company, that he wasn't going to close it." Enough said. Armando Villareal has worked for Respondent for 5 years; he works as a driver's helper. He gave 15 testimony concerning the October 12 meeting, but he had limited recall of that meeting. Martin Covarrubias Salazar worked for Respondent in a variety of positions; at the time of his testimony he was no longer employed by Respondent but his father still worked there. His testimony concerning the October 11 meeting was more detailed and credible than most of the others witnesses for Respondent. Indeed, Covarrubias to some extent corroborated the testimony of the 20 General Counsel's witness that Gasparian opened the floor for employees to express their concerns and responded to those concerns in some fashion. But when balanced against the record as a whole and his obvious loyalty to Gasparian family, I do not credit his testimony to the extent that it is inconsistent with the facts described above. Pedro Rojas has worked for Respondent for about nine months as a sorter. He testified concerning the October 11 meeting; 25 given that he testified on July 31, he must have just started working there. He gave a one-sentence description of what Gasparian said to the employees before he mentioned that Hidalgo interrupted the meeting; Rojas then gave a more detailed description of that interruption. He was asked: "Do you recall employees talking to Mr. Gasparian?" Curiously, he answered, "I realized that only Karla [Campos] was on her cell phone talking." Rojas even denied that anyone made 30 any comments to Gasparian during the meeting. He claimed that the lunch area looked the same now as it did when he started with the company. Rojas also testified concerning the safety meeting in December. Remember, even according to Respondent, that meeting covered a number of items. Yet when asked what was said at that meeting Rojas began with the "toxic waste and needles and things we cannot touch; that if we saw something toxic, we had to tell a supervisor and we couldn't touch it." This, of course, is related to the reason Respondent asserts that Campos was fired. I questioned him as to why that was the first thing he mentioned about 35 the meeting; his demeanor while answering my question was entirely unconvincing. For these reasons I do not credit Rojas' testimony. Jessica Cruz has worked for Respondent as a sorter since about February 2011; she was out on maternity leave from August 12 to November 7. In other words she left on maternity leave before there was any mention of syringes in the sorting 40 process or even before DeLeon himself claims he specifically addressed the problem. Nonetheless she testified that at the safety meetings that were held almost every month DeLeon instructed employees not to touch the syringes; instead they should stop there work and contact a supervisor. At the December 25 meeting, what is DeLeon say? On cue, "He talked about the 45 syringes Finally, Elsa Mira works as a sorter for Respondent; she has worked there for about 18 months. She presented testimony concerning the October 11 meeting, but it was apparent that she did not understand everything that was said at the meeting and was giving her

impressions rather than trying to give factual testimony. For all these reasons and more, I have decided not to credit the testimony of Respondent's witnesses to the extent that their testimony is inconsistent with the facts described earlier in this decision.

5

CONCLUSIONS OF LAW

1. By laying off Magdeleno Sanchez and Santos Orellana because they engaged in union activity and by discharging Karla Campos because she engaged in union and other protected concerted activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

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2. By threatening to discharge employees because they engaged in concerted activity that is protected by the Act, threatening to sell the company or shut it down or indicating that the employees would be out of work if the Union became their bargaining representative, soliciting employee workplace concerns and promising to address those concerns, improving the working conditions of employees in order to undermine their support for the Union, threatening to discharge employees because they engaged, or if they engage, in union activity, creating the impression that the union activities of employees are under surveillance, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

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REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged and laid off employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

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. Because of the Respondent's egregious and widespread misconduct, demonstrating a general disregard for the employees' fundamental rights], I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

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The General Counsel seeks additional remedies in this case. First the General Counsel seeks an order that the notice be read aloud to assembled employees. I grant that request. See *Marquez Bros. Enterprises*, 358 NLRB No. 61 (2012), and cases cited therein where the Board reversed my ruling that such a remedy was not necessary. As in that case, as here, the Respondent's unfair labor practices were both widespread and egregious. I shall require that the notice be read in both English and Spanish. I shall require that Gasparian read the notice to the assembled employees in English and because Gasparian does not speak Spanish I shall require DeLeon to read the notice in Spanish to the assembled employees. Respondent will have the option of having a Board Agent read the notice in English and Spanish to the assembled employees, provided, however, that Gasparian is present while the Board agent does so.

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The General Counsel also seeks two additional remedies. For reasons that follow I grant both of them. Section 10(c) of the Act gives the Board the power to devise remedies for unfair labor practices that will “effectuate the policies of the Act.” The discriminatees here will receive lump sum payments of backpay. This may result in higher state and federal income taxes than they would have paid had they not been unlawfully fired. To this extent the unlawfully discharged employees will not have been made whole. To more fully remedy the violations I have described above and therefore to more fully effectuate the policies of the Act, I shall order Respondent to reimburse the unlawfully discharged employees for the amounts equal to the difference in taxes they owe upon receipt of the lump sum payment and the amount of taxes they would have owed had they not been unlawfully terminated. Next, the General Counsel points out that the Social Security Administration generally credits backpay to an individual’s earnings record in the year reported by the employer. Here the unlawfully discharged employees will likely receive backpay several years after they were fired. In some cases this may result in lower benefits or even the failure to qualify for any benefits due to a lack of the required credits. Again, to the extent that this happens an unlawfully discharged employee will not have been made whole for the unlawful discharge. Again, to more fully remedy the violations I have described above and therefore to more fully effectuate the policies of the Act, I shall order Respondent to complete the paperwork needed to properly notify the Social Security Administration so that it may properly allocate the backpay to the appropriate periods.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, American Reclamation, Inc. Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Discharging, laying off, or otherwise discriminating against any employee for supporting the Package and General Utility Drivers, Teamsters Local Union No. 396 or any other union, or because they engage in concerted activity that is protected by the Act.
- (b) Threatening to discharge employees because they engaged in concerted activity that is protected by the Act.
- (c) Threatening to sell the company or shut it down or otherwise indicating that employees will be out of work if the Union became their bargaining representative.
- (d) Soliciting employee workplace concerns and promising to address those concerns in order to undermine support for the Union.
- (e) Improving the working conditions of employees in order to undermine their support for the Union.
- (f) Threatening to discharge employees because they engaged, or if they engage, in union activity.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the 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.

- i. (g) Creating the impression that the union activities of employees are under surveillance.

- 5 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of the Board's Order, offer Santos Orellana, Magdeleno Sanchez, and Karla Campos full reinstatement to their former jobs or, if those jobs no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously
10 enjoyed.
- (b) Make Santos Orellana, Magdeleno Sanchez, and Karla Campos 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 decision.
- (c) Within 14 days from the date of the Board's Order, remove from its files any
15 reference to the unlawful discharge and lay offs, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge and lay offs will not be used against them in any way.
- (d) Preserve and, within 14 days of a request, or such additional time as the
20 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 facility in Los Angeles,
25 California copies of the attached notice marked "Appendix"¹² in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60
30 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.
35 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
40 employees and former employees employed by the Respondent at any time since October 6, 2011.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

- 5 (f) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice, Appendix A, is to be read to the employees in both English and Spanish by the Respondent's owner and president or, at the Respondent's option, by a Board agent in that official's presence.
- (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

15 Dated, Washington, D.C. September 17, 2012

20 _____
William G. Kocol
Administrative Law Judge

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 discharge, lay off, or otherwise discriminate against any of you for supporting the Package and General Utility Drivers, Teamsters Local Union No. 396 or any other union or because they engage in concerted activity that is protected by the Act.

WE WILL NOT threaten to discharge employees because they engage in concerted activity that is protected by the Act.

WE WILL NOT threaten to sell the Company or shut it down or otherwise indicate that employees will be out of work if the Union became their bargaining representative.

WE WILL NOT solicit employee workplace concerns and promise to address those concerns in order to undermine support for the Union.

WE WILL NOT improve the working conditions of employees in order to undermine their support for the Union.

WE WILL NOT threaten to discharge employees because they engaged, or if they engage, in union activity.

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

WE WILL NOT in any other 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 this Order, offer Santos Orellana, Magdeleno Sanchez, and Karla Campos 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 Santos Orellana, Magdeleno Sanchez, and Karla Campos whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge and lay offs of Santos Orellana, Magdeleno Sanchez, and Karla Campos, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge and layoffs will not be used against them in any way.

American Reclamation, Inc.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824

(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.