

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

PORTOLA PACKAGING, INC.

and

Case 28-CA-067274

MARTA MAGALLON CORONA, an Individual

and

Case 28-CA-067345

JORGE GARCIA, an Individual

and

Case 28-CA-070621

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 99**

PORTOLA PACKAGING, INC.

Employer

and

Case 28-RC-067973

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 99**

Petitioner

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

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ACTING GENERAL COUNSEL'S ANSWERING BRIEF

By its exceptions, Portola Packaging, Inc. (Respondent)¹ seeks to have the Board ignore the record evidence which establishes that Respondent engaged in numerous unfair labor practices. These include: the oral promulgation of overly-broad and discriminatory rules prohibiting employees from discussing wages and what occurred at meetings between

¹ Portola Packaging, Inc. is referred to as Respondent/Employer. The United Food and Commercial Workers Union, Local No. 99 is referred to as the Union. References to the ALJD show the applicable page number. "Tr. ___" refers to pages of the hearing transcript. "GCX ___" refers to the Acting General Counsel's exhibits. "EX___" refers to exhibits introduced by Respondent/Employer. "UX___" refers to the Union's exhibits.

supervisors and employees; soliciting employee complaints and grievances; promising benefits and improved terms of employment; interrogating employees; creating the impression of surveillance; threatening employees with a reduction in benefits and wages; demanding that employees vote “no” in the upcoming representation election; and maintaining an overly-broad and discriminatory Employee Handbook rule. Moreover, Respondent also wants the Board to ignore the well-reasoned conclusions and credibility determinations made by Administrative Law Judge Gregory Z. Meyerson (the ALJ). Respondent, in its exceptions, disagrees with virtually each and every credibility determination made by the ALJ, which he relied upon as a basis to establish Respondent’s illegal conduct.

Respondent’s exceptions are without merit and should be denied. Except as otherwise set forth in the Acting General Counsel’s Exceptions, filed October 11, 2012, the Board should adopt the ALJ’s findings of fact, conclusions of law, and recommended order as they relate to Respondent’s Exceptions.

I. PROCEDURAL HISTORY

A hearing in this matter was conducted before the ALJ on March 20 through March 22 and April 26 and 27, 2012,² in Phoenix, Arizona, based upon allegations contained in the Consolidated Complaint dated January 31 (the Complaint). (GCX 1(q)) The ALJ issued his decision (ALJD) on September 13, properly finding that Respondent engaged in numerous violations of Section 8(1) of the Act. On October 11, Respondent filed with the Board, 25 exceptions to the ALJD and a supporting brief.³ In its exceptions, Respondent generally

² All dates are in 2012 unless otherwise noted.

³ Respondent’s exceptions numbered 19-25 are exceptions to the ALJD with regard to challenged ballot rulings and rulings on objections to the conduct of the election. Exceptions 19-22 deal with the ALJ’s determination that the challenged ballots should not be counted. (ALJD at 44-46) Exception 23 mirrors exception 15 where the ALJ found that a letter sent to employees’ homes violated Section 8(a)(1). (ALJD at 32; 47) Exception 24 mirrors exception 12 excepting to the finding of the ALJ that Respondent threatened employees with not assisting them because of their union activities (ALJD at 29-30; 48) Exception 25 excepts to the ALJ’s

excepts to all of the findings of the ALJ enumerated above, along with his credibility determinations. As demonstrated below, Respondent's exceptions are without merit and should be rejected. The ALJs findings of fact and conclusions of law regarding the meritorious unfair labor practices are firmly grounded in Board law and, therefore, should be adopted.

II. BACKGROUND

A. Respondent's Operations

Respondent is an international manufacturing company that manufactures bottle caps for dairy, juice and water containers. (ALJD at 3; Tr. 36; 496) Respondent operates a manufacturing facility in Tolleson, Arizona (the Tolleson facility) where it employs approximately 91 employees. (ALJD at 3; Tr. 36) The Tolleson facility is a 24-hour a day facility, operating seven days a week with three separate shifts. (ALJD at 3; Tr. 83) Respondent's General Manager and the highest ranking official at the Tolleson facility is Tim Tyler (Tyler). (ALJD at 3; Tr. 35) Chris McClanahan (McClanahan) is the Human Resources and Safety Manager (ALJD at 3; Tr. 67, 135), Tim DeCrow (DeCrow) is the Production Manager (ALJD at 3; Tr. 67; 93), and Ray Buchanan (Buchanan) and Fabian Franco (Franco) are both production supervisors. (ALJD at 3; Tr. 772; 846)

B. Union Organizing Campaign and Representation Election

On November 1, 2011, the Union filed a petition for an election among the operation employees at Respondent's facility in Tolleson. (ALJD at 21; Tr. 44; EX 2) Respondent's first reaction was to contact a labor relations firm, LRI Consulting Services, Inc. (LRI), for their services to defeat the Union in its campaign to organize employees. (ALJD at 21;

recommendation that the representation election held on December 1, 2011, be set aside. (ALJD at 51) This Answering Brief will not address exceptions 19-25.

Tr. 44) Many of the Section 8(a) (1) violations found by the ALJ occurred during the time after the filing of the petition and the election, held on December 1, 2011. (GCX 1(o)) The election resulted in a tie vote between those for and those against union representation, with three challenged ballots. (ALJD at 43; GCX 1(o))

III. DISCUSSION AND ANALYSIS

A. The ALJ Found that Respondent Violated Section 8(a) (1) by Promulgating an Overly-Broad and Discriminatory Rules Prohibiting Employees From Discussing their Wages with other Employees and Prohibiting Employees from Discussing What Occurred in Meetings with Supervisors with Other Employees.

1. The ALJ's Findings

The Complaint alleges,⁴ and the ALJ found, that on or about mid-May 2011, McClanahan, Buchanan and DeCrow, orally promulgated an overly-broad and discriminatory rule prohibiting employees from discussing their wages and those of other employees with each other and prohibiting employees from discussing what occurred in meetings with Respondent's supervisors with other employees, in violation of Section 8(a)(1) of the Act. (ALJD at 11-12) Respondent argues that the ALJ erroneously credited an employee witness, Maria Magallon, over three of Respondent's witnesses who are supervisors. Respondent claims that Magallon must have fabricated the testimony because they were not in the original Complaint. Respondent also argues that Magallon must have a bias against Respondent because her husband had recently been fired by Respondent. Respondent additionally argues that, because Magallon's statements were not corroborated by any other witness, the ALJ was wrong in crediting her testimony. Respondent's arguments have no merit and should be rejected.

⁴ See GCX 26.

2. The Record Evidence

In mid-May 2011, employee Maria Magallon (Magallon) took fellow employee Jorge Garcia (Garcia) with her to raise concerns about her working conditions with her immediate supervisor Ray Buchanan (Buchanan). (ALJD at 7) The next morning, Magallon arrived at work and was immediately directed by Buchanan to go to the conference room where Human Resources Manager McClanahan and Production Manager DeCrow were waiting for her. (ALJD at 7; Tr. 288-289) After informing Magallon that Garcia was disrespectful to Buchanan the night before, the conversation turned to Magallon's wages. (ALJD at 10; Tr. 290) McClanahan told Magallon that she was not allowed to talk about salaries or to see the salaries of other employees from other shifts. (ALJD at 10; Tr. 290) McClanahan then stated that anything that was said in the conference room had to stay there and Magallon was not allowed to talk about it to anyone else. (ALJD at 10; Tr. 291) The meeting then ended. (Tr. 291)

3. Legal Analysis

As found by the ALJ, the statements made by McClanahan were overly-broad and discriminatory rules on their face as they specifically restricted the exercise of Section 7 rights. (ALJD at 12) The ALJ applied the proper analysis laid out in *Lutheran Heritage Village Livonia*, 343 NLRB 646, 646 (2004) in his decision.

Respondent's exceptions on these findings center solely on the ALJ's credibility determinations. The Board should reject Respondent's invitation to disregard Magallon's testimony because this invitation ignores the Board's long-established policy against overruling an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence demonstrates that they are incorrect. See *Painters and Allied*

Trades District Council No. 51 (Manganaro Corporation, Maryland), 321 NLRB 158 (1996); *Standard Drywall Products*, 91 NLRB 544 (1995), *enfd.* 188 F. 2d 362 (3rd Cir. 1951).

Respondent initially makes the incorrect statement that the ALJ relied solely on a faulty “presumption” favoring the testimony of an individual employee over the contrary testimony of three different supervisors. A reading of the ALJD clearly shows that the ALJ applied the proper Board law with regard to current employees. The ALJ points out that there is a long line of Board cases that stand for the proposition that the testimony of a current employee, which is adverse to her employer, should be viewed favorably as opposed to the self-interest testimony of a supervisor. *Samaritan Medical Center*, 319 NLRB 392 (1995) (ALJD at 11) The ALJ goes on to state “This, of course, is nothing more than a rebuttable presumption, which is subject to the facts of each situation.” (ALJD at 11) The ALJ then points out all of the reasons that Respondent was not able to rebut this presumption.

The ALJ states that the three manager’s testimony that was contrary to Magallon does not have a ring of authenticity to it. The ALJ found their testimony lacked authenticity, appeared to be concocted, and lacked in specific information. (ALJD at 11)

Respondent further argues that the ALJs questioning as to why DeCrow did not provide more specific information was because “no one asked DeCrow to do so.” Respondent goes on to complain that General Counsel amended the Complaint after DeCrow had testified about the events in question. This is simply not true. Respondent called DeCrow on its case in chief a month after General Counsel amended the Complaint to add the statements made by Respondent during this meeting.⁵ Respondent specifically asked DeCrow about the meeting with Magallon. (Tr. 567–574) Respondent was afforded every opportunity to provide

⁵ On March 22, the ALJ granted Respondent’s request for a recess in the hearing to prepare for amendments to the Complaint made by the General Counsel. Respondent was afforded over a month—March 22 to April 26, to prepare its case in chief.

specific and detailed evidence about the meeting in question and Respondent failed to do so. The ALJ has the duty to examine the testimony and not credit a witness who fails to supply specific and detailed information.

Respondent goes on to argue that because three managers testified and said the same thing, the ALJ is incorrect in crediting one witness over three. Respondent seems to contend that one witness opposed by several others should always lose. However, the Board has disposed of that argument stating “a greater number of witnesses on one side of an issue is not controlling. It is the weight of the credible evidence, not the numerical superiority of witnesses which is controlling. *Parts Depot, Inc.*, 332 NLRB 670, 703 (2000) citing *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 782-783 (7th Cir. 1994) (court overturns decision which was based primarily on “which side produced more witnesses,” noting such is not a rational method of decision making), *Riley-Beaird*, 259 NLRB 1339, 1367 fn. 2, 115 (1982) (Board upholds the ALJ’s crediting a solitary witnesses over the testimony of five managers). As stated by the ALJ when referring to the collective testimony “this seems like something the managers concocted after the charges were filed in an effort to make their admonition to Magallon sound lawful”. (ALJD at 11) The ALJ points out that the reason he believed the three supervisor’s testimony was consistent was because it appeared concocted. Therefore, Respondent’s argument has no merit.

Respondent then argues that because Magallon may have been mistaken as to who made the unlawful comments, Magallon should not be credited. As pointed out by the ALJ, the statements being made in the meeting were being translated by McClanahan to Magallon into Spanish regardless of which supervisor made the statement. (ALJD at 11) Therefore, all of the statements that Magallon understood were spoken to her by McClanahan in Spanish.

The ALJ is correct when he states that Respondent is responsible for the unlawful statements of his supervisors whether they were originally stated by DeCrow and translated by McClanahan or stated by McClanahan. See *NLRB V. Link-Belt Co.*, 311 U.S. 584 (1941) (As a general rule, an employer is responsible for the actions and statements of supervisors who have actual or implied authority to represent the employer); *Aluf Plastics*, 314 NLRB 706 (1994) (Employer is responsible for translations of statements supplied to employees.) Respondent fails to mention in its exceptions that McClanahan was acting as a translator during this meeting and that Magallon speaks Spanish.

Respondent then argues that because the ALJ did not credit Magallon's testimony earlier in his decision, he cannot credit her statements at all. The ALJ is very clear that, although he believed that Respondent told Magallon she could not longer use a specific coworker as an interpreter, he believes she was mistaken that the prohibition was expanded to all fellow employees. (ALJD at 9) The ALJ does not state that Magallon "lied", as it argues in its exceptions. The ALJ goes on to state that a witness may be found credible regarding one issue, while at the same time found incredible regarding another issue. (ALJD at 11, fn 9) "It is well established that an administrative law judge has the discretion to credit a witness' testimony in part and discredit it in part." *Overseas Motors*, 299 NLRB 1086, 1088-1089 (1990) As Judge Learned Hand observed in *NLRB v. Universal Camera Corp.*, 179 F. 2d 749, 754 (2d Cir., 1950), "[N]othing is more common in all kinds of judicial decisions that to believe some and not all" of a witness' testimony.

In sum, the record shows and the ALJ properly found that Respondent, through DeCrow, Buchanan and McClanahan, orally promulgated an overly-broad and discriminatory rule prohibiting employees from discussing wages or discussing what occurred in meetings

with supervisors with other employees. The ALJ has laid out clear and cogent reasons for his credibility determinations with regard to Magallon and Respondent's attempts to attack those determinations have no merit and should be disregarded.

B. The ALJ Found that Respondent Violated Section 8(a) (1) by Threatening Employees with Discharge and Unspecified Reprisal for Engaging in Protected, Concerted Activities.

1. The ALJ's Findings

The ALJ properly found that DeCrow's statements to employee Jorge Garcia (Garcia), that he was "provoking some other people for them to complain . . . not the kind of person that was good to have around . . . not good for business . . . [and] one more warning and you're no longer going to be at Portola" constituted an unlawful threat of unspecified reprisal and discharge in violation of Section 8(a)(1) of the Act. (ALJD at 18-19) Respondent seeks, once again, for the Board to overturn the ALJ's credibility determinations. Respondent's arguments are without merit as the ALJ sets forth a clear and proper reasoning for his credibility determinations and any attempt to overturn those determinations should be rejected.

2. The Record Evidence

The record evidence contains many occasions when Garcia engaged in protected, concerted activity. (ALJD at 18-19; Tr. 174-179; 183-185; 280 -284; 328; 355; GCX 16) At one point, in the mid-May 2011 time frame, Garcia spoke to DeCrow about employee complaints. (ALJD at 7; Tr. 229) DeCrow's response was to say that all the employees do is whine—making a "wah, wah, wah" sound and rubbing his eyes as a child does when crying. (ALJD at 7; Tr. 177)

On October 5, DeCrow issued Garcia a written warning. (GCX 18) DeCrow then told Garcia that he was provoking other people to complain, that Garcia was not the kind of person that was good to have around, and that Garcia was not good for business. (ALJD at 18-19; Tr. 193) Garcia told DeCrow that he was not trying to provoke other people, but was merely passing on information that he hears, trying to help the other employees and trying to help management. (ALJD at 18; Tr. 194) DeCrow ignored Garcia's comments and threatened him by stating that, if Garcia received one more warning he would be fired. (ALJD at 18-19; Tr. 194).

3. Legal Analysis

The ALJ properly found that DeCrow's statements to Garcia threatened him with unspecified reprisal and discharge because of Garcia's protected concerted activities. (ALJD at 18-19) Respondent makes the same arguments against the ALJ's credibility determinations as he did earlier—that the ALJ improperly credited Garcia's testimony as to what was said over three supervisors who testified that the statements were not made. Respondent again argues that the ALJ applied an inappropriate presumption regarding Garcia being a current employee. This is not a numbers contest, where the ALJ simply counts the number of witnesses. See *Parts Depot, Inc.*, supra, *Riley-Beaird*, supra.

Respondent's attacks on Garcia bear little or no relation to the ALJ's findings that Respondent violated the Act. Respondent states in its exceptions brief at page 14 that the ALJ did not find "any reference to any protected activity during the discussion at issue." Respondent is completely incorrect. The ALJ found that DeCrow stated to Garcia "you are provoking some other people for them to complain." Immediately after making that statement, DeCrow makes the violative statements. (ALJD at 18) "Provoking some other

people to complain,” is a direct reference to Garcia’s protected concerted activities. As cited by the ALJ, Garcia’s actions on numerous occasions prior to these statements should be construed as the efforts of an individual employee seeking “to initiate or induce or to prepare for group action,” as well as that of an individual employee “bringing truly group complaints to the attention of management.” *Meyers Industries, Inc.*, 281 NLRB 882 (1986), affirmed 835 F. 2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984) (affirming the Board’s power to protect certain individual activities and citing as an example “the lone employee’ who “intends to induce group activity”). (ALJD at 15) As stated specifically by the ALJ, “it is clear that around May of 2011 Garcia engaged in protected concerted activities with other employees, and also alone but on behalf of other employees. (ALJD at 15) Moreover, the ALJ specifically points to the protected concerted activities of Garcia and Respondent’s knowledge of them when crediting Garcia’s statements. (ALJD at 18-19)

Respondent again points out that because the ALJ did not credit Garcia in other areas in his decision, he should not credit Garcia’s testimony regarding this discussion. Respondent’s argument is without merit. See *Overseas Motors*, supra; *Vogt-Conant Co.*, 248 NLRB 500, 504 fn. 4 (1980); *Frenchy’s K & T and Earl’s News Stand*, 247 NLRB 1212, 1216 (1980). The ALJ gave specific and detailed reasons for crediting Garcia in this discussion. The ALJ states that “Garcia’s version of the conversation was highly detailed, and, as he told the story, I could see the emotional effect that testifying about the incident was having on him...Garcia’s testimony had the ring of authenticity about it, was consistent, and inherently plausible.” (ALJD at 18) In discrediting the supervisors, the ALJ finds that “the supervisors testified in a cold, detached way, which led me to believe that their version of

these events was fabricated”. (ALJD at 18) Respondent has provided no legitimate argument to overrule the ALJ’s detailed and thorough credibility determinations and its exceptions on those determinations should be disregarded.

C. The ALJ Found that Various Statements made by Labor Relations Consultant Armando Talencon Violated Section 8(a) (1) of the Act.

1. The ALJ’s Findings

The ALJ found that Armando Talencon (Talencon), Respondent’s hired labor relations consultant, unlawfully solicited employee complaints and grievances, promised employees increased benefits and improved terms and conditions of employment if they rejected the Union, and threatened employees with unspecified reprisals. (ALJD at 26-27) Here, Respondent does not specifically call out the ALJ as having made incorrect credibility resolutions, but instead argues that its witnesses who contradicted General Counsel’s witnesses concerning these violations should be believed. Respondent’s exceptions are nothing more than another ill-advised attempt to invite the Board to overturn the credibility determinations of the ALJ. Such attempts should be disregarded.

2. The Record Facts

After the Union filed a petition for a representation election, Respondent hired LRI for their services to defeat the Union in its campaign to organize employees. (Tr. 44) As part of its services, LRI sent an “expert campaign consultant” Talencon to Respondent’s facility.⁶ (Tr. 45; 676) Talencon conducted numerous meetings with Respondent’s employees. (Tr. 681-682) Some of these meetings were specifically set up by Respondent, and the employees would attend the meetings in the conference room in small groups where Talencon

⁶ Although Respondent denied that Talencon was an agent of Respondent under Section 2(13) of the Act, the ALJ found that he was, finding the denial of Respondent frivolous. (ALJD at 23) Respondent did not except to this finding.

would be introduced by managers and supervisors, who would then leave, allowing Talencon to talk to employees alone. (Tr. 152-153)

Employee Herlinda Cervantes testified that during one of those meetings, Talencon said that he did not know how Respondent would react if the Union was voted in but that Respondent could treat employees that were in favor of unions badly, and could fire employees. (ALJD at 25; Tr. 252)

Employee Magallon attended one of these meetings where Talencon stated that he had listened to employees and would go to Respondent and tell Respondent to go and talk to the employees, to try to change the attendance policy, and to hold meetings after the employees' shifts to talk about these problems. (ALJD at 24; Tr. 298)

Employee Evangelina Villegas (Villegas) testified that in her meeting, Talencon said that the Union would deduct a lot of money from employees' paychecks. (ALJD at 25; Tr. 363) Talencon then told the employees that he had received a lot of complaints from employees and that he was taking notes of all the complaints employees had told him about, that he would be turning over those notes to managers, and that he would see that the managers would change things. (ALJD at 25; Tr. 364-365)

Respondent argues that because Talencon and two other witnesses testified differently than Cervantes, Magallon and Villegas, the ALJ incorrectly found violations. Again, Respondent seeks to have the ALJs credibility determinations overturned.

Respondent called Talencon as its witness, who denied he ever made such statements. Respondent called employee Paul Gaudet (Gaudet) who testified that he attended the same meeting as Magallon. (ALJD at 24-25; Tr. 839) Although Gaudet denied that Talencon threatened employees or told them how to vote, Gaudet was not asked about the specific

statements testified to by Magallon. (ALJD at 25; Tr. 841) Additionally, Gaudet neither speaks nor understands Spanish, so he would not understand any statements made by Talencon to Magallon that were made in Spanish.⁷ (ALJD at 24; Tr. 844)

Respondent called employee Maria Solano (Solano) to testify about what she remembered about her meeting with Talencon where Villegas was present. (ALJD at 25; Tr. 754-755) Solano's testimony consisted of denying that Talencon stated that Respondent would pay employees more if they voted against the Union or that Portola would assign more machines to employees if they voted for union representation. (ALJD at 25; Tr. 755) This testimony was completely unhelpful because those statements were never alleged to have been made at the meeting attended by Villegas and Solano. (Tr. 755) On cross-examination, Solano admitted that she really did not pay that much attention to what was said at the meeting. (Tr. 758-759) In fact, Solano stated at least three times that she really did not pay attention to the meeting. (Tr. 758-759; 761)

3. Legal Analysis

Respondent's credibility arguments are completely without merit. Not only did the employee witnesses they called—Gaudet and Solano—fail to testify about the specific statements alleged in the Complaint, the ALJ laid out detailed and specific reasons why he discredited Talencon. The ALJ states that “Preliminarily, I would note that I did not find him [Talencon] to be a credible witness.” (ALJD at 22) The ALJ goes further, stating that Talencon made “highly incredibly statements”, “seemed very uncomfortable especially when testifying about his role in the election campaign”, “struggled to make sense out of some really nonsensical contentions”, “seemed frequently uncertain as to what answer to give to

⁷ Talencon spoke to groups of employees in both English and Spanish, going back and forth between the two languages. (ALJD at 24)

counsel's questions", and his testimony was "simply incredible." (ALJD at 22) Finally, the ALJ finds that Talancon's lack of knowledge about the contract for his services "defies credulity", and that the contingent character of his \$50,000 fee being totally dependent upon the Union's defeat in the election, makes Talancon potentially "a highly biased witness". The ALJ concludes by stating that he will credit the testimony of employee witnesses over that of Talancon whenever they are at variance. (ALJD at 22)

In discrediting Respondent's witness Gaudet, the ALJ states "I did not find Gaudet to be a compelling witness. He seemed to have his testimony rehearsed and testified as if by rote". (ALJD at 25). The ALJ finds that Cervantes testimony was never directly challenged except by Talancon's discredited general denials, and, therefore, credits Cervantes' testimony. (ALJD at 25) Although the ALJ does not specifically state that he discredited Respondent's employee witness Solano, he notes in his decision that "where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimony evidence, or because it was inherently incredible and unworthy of belief. (ALJD at. 2, fn. 3) Thus the ALJ did, in fact, discredit Solano, as her testimony is in contradiction to his findings. The ALJ correctly finds that Solano never addressed the specific claim of Villegas regarding the solicitation of grievances and promises to have them addressed. (ALJD at 25) Therefore, when faced with employee Villegas' testimony or Talencon's discredited denials, the ALJ credits Villegas. (ALJD at 25)

Respondent's entire argument is that Talancon did not make brazen threats that Portola would fire employees or assign them more work if they voted for the Union and, because Talencon told employees they were free to vote any way they chose, there was no violation. The ALJ found that Talencon solicited employee grievances, made promises that

benefits and working conditions would improve if employees didn't vote for the Union, and threatened employees with unspecified reprisal and discharge. (ALJD at 26-27)

Respondent's argument is without merit and its exceptions should be disregarded.

D. The ALJ Found that Respondent Violated Section 8(a)(1) by Interrogating Employees, Threatening Employees and Creating an Unlawful Impression of Surveillance.

1. The ALJ's Findings

The ALJ found that when Buchanan approached employee Cervantes in the lunch room and asked her about whether she had signed a union card, informed her that he would not help employees who supported the Union, and indicated he knew who was supporting the Union, Buchanan violated Section 8(a)(1) of the Act. (ALJD at 28-30) Respondent argues that, because the General Counsel failed to call another employee who may have overheard the conversation between Buchanan and Cervantes should have resulted in an adverse inference by the ALJ, the ALJ incorrectly found the violation. Respondent's argument is without merit, is not supported by legal precedent, and should be disregarded for the reasons set forth below.

2. The Record Evidence

On November 16, 2011, employee Cervantes was in the lunch room and approached Production Supervisor Buchanan. (ALJD at 27; Tr. 246) Cervantes asked Buchanan to help an employee by the name of Jorge Mendez, who had a lot of work to do. (ALJD at 27; Tr. 249) Buchanan replied that he would not help Mendez because he knows that Mendez is in the Union. (ALJD at 27; Tr. 249) Buchanan then asked Cervantes if she knew whether Mendez was in the Union and Cervantes replied that she did not know. (ALJD at 27; Tr. 249) Buchanan then asked Cervantes if she had signed a card for the Union. (ALJD at 27; Tr. 249)

Cervantes told Buchanan no. (ALJD at 27; Tr. 249) Buchanan then asked Cervantes if she was sure to which Cervantes did not reply. (ALJD at 27; Tr. 249) Cervantes then asked Buchanan if he had been in the union before and Buchanan said that he had been in the union but it was not good. (ALJD at 27; Tr. 250) Buchanan asked Cervantes if she had been in the union before and she said yes, she had spent 15-18 years in the Union and was receiving money from the union. (ALJD at 27; Tr. 250) Buchanan stated that he did not believe it and then asked an employee known only as Daisy who was nearby what she thought about the unions which Daisy replied that she did not know. (ALJD at 27; Tr. 250) Cervantes then went back to work. (ALJD at 27; Tr. 250)

3. Legal Analysis

Respondent argues that because Buchanan had received training prior to November 16, 2011, about what he could or could not say to employees during an organizing campaign, there would be no way he would have made these violative statements. Respondent's argument has no weight—knowledge of what constitutes unlawful conduct is no guarantee that a supervisor will conform his behavior to the law. If that was the case, no one could ever be charged with having committed an unfair labor practice if they had knowledge of the Act.

Respondent then argues that, because Cervantes was asked a question three times, her testimony “bore the hallmarks of a witness who forgot her script, mangled the allegations she had constructed beforehand, and confused the issues.” See Respondent's Brief in Support of Exceptions, page 16 Respondent fails to mention in his argument the difficulties with the interpreter during these questions. First, the Union Attorney, proficient in Spanish, lodged an objection to the translation of Cervantes' testimony by the interpreter. (Tr. 247-248) The

ALJ directed the interpreter to ask the question again. (Tr. 248) The second time the question was asked, answered, and translated, the Union Attorney again objected to the translation, stating that the translation was not what the witness said. (Tr. 248) The ALJ instructed Cervantes to speak in shorter sentences, let the interpreter interpret, and then continue. The ALJ also directed the interpreter to put her hand up to have the witness stop so she could interpret. The ALJ then asked the interpreter to speak slowly. (Tr. 248) This was the beginning of Cervantes testimony as well as the beginning of the interpreter's duties as interpreter. Respondent's assertions completely leave out why the witness was asked the question three times—the interpreter's inaccurate translation and the ALJ's directives to both the interpreter and the witness to interpret the question again and interpret the answer again. Respondent's argument is disingenuous and should be disregarded.

Respondent then takes the ALJ to task for his credibility determinations because General Counsel did not call "Daisy" to testify. First of all, although an adverse inference can be drawn by an ALJ when a witness that is assumed to be favorably disposed to a party is not called by that party, it is not required. See *Douglas Aircraft Co.*, 308 NLRB 1217 (1992). Second, there is no indication that "Daisy" would be favorably disposed to the General Counsel. Cervantes only knew the person as "Daisy", and Respondent never identified who this person was. Being an employee of Respondent, Respondent would have more access to the identity of Daisy and the ability to contact her regarding this incident than General Counsel. *Reno Hilton*, 282 NLRB 819, 849 (1987) (adverse inference was inappropriate because the witness in question was a non-supervisory employee, and therefore equally available to both parties); *Keco Industries*, 276 NLRB 1469, 1480 (1985) (no adverse

inference where employees were not called as witnesses, because the witnesses were equally available to both sides)

Respondent's entire argument is that Cervantes should not have been credited and Buchanan's denials should have been credited. Again, Respondent is asking the Board to disregard the well-reasoned credibility determinations of the ALJ. The ALJ stated that although both Cervantes and Buchanan testified in a direct and forceful way, as a whole, he was more impressed with Cervantes. (ALJD at 28) The ALJ stated that her testimony was reassuringly detailed, logical, and likely. (ALJD at 28) The ALJ found Buchanan's testimony to be a bit contrived and self serving. (ALJD at 28) Finally, the ALJ stated that it was certainly easier for Buchanan to testify in favor of Respondent than it was for Cervantes, a current employee, to testify against her employer's interests. (ALJD at 28) Respondent's arguments have no merit and should be disregarded.

E. The ALJ Found That Respondent's Letter To Employees "Demanding" that They Vote "No" in the Upcoming Representation Election Violated Section 8(a)(1).

1. The ALJ's Findings

The ALJ properly found that Respondent's mid-November 2011 letter to employees, delivered to their homes, threatened employees with unspecified reprisals by demanding that they vote "no" in the upcoming representation election in violation of Section 8(a)(1) of the Act. (ALJD at 32) The ALJ found that the Spanish language letter sent to Spanish speaking employees was made in the name of the general manager of the facility, and reasonably had a tendency to coerce employees into voting against the Union based on their fear of the consequences of defying the general manager's demand. (ALJD at 32) Respondent argues that because the General Manager is not proficient in Spanish, that employees were aware he

was not proficient in Spanish, and because other communications to employees about the election were lawful, employees should have disregarded the Spanish translation “demanding” employees vote “no”. Respondent’s exceptions to the ALJ’s findings are completely meritless.

2. The Record Facts

The record evidence provides ample support for the ALJ’s findings. In mid-November 2011, during the height of the union campaign and prior to the election on December 1, 2011, Respondent sent a letter to all employees at their homes, signed by General Manager Tim Tyler (Tyler). (ALJD at 30; Tr. 71; 293; GCX 5 and 6) The letter was written in English and translated into Spanish. (ALJD at 30; Tr. 141; 705) At the end of the letter is the statement from Tyler “**I demand** that you vote “NO” on December 1, 2011.” Respondent’s English translation on the document read “**I urge** you to vote “NO” on December 1, 2011”. (EX 5) The Spanish verb in question is “**Exijo**.” At trial, the official translator properly translated the word “exijo” as “demand”. (Tr. 306) The official translation is affirmed by Webster’s New World Concise Spanish Dictionary, Second Edition, which defines the word as “to demand” (GCX 9), the McGraw-Hill’s Spanish and English Legal Dictionary, which defines the word as “to demand, command, order, require,” (GCX 8) and Google Translator which also defines “exijo” as “demand”. (GCX 7)⁸

Employees testified that after they received GCX 5 and 6 at their homes, they became fearful of losing their jobs and fearful as to what would happen to them if they voted in favor of the Union. (Tr. 295; 367) As testified by Magallon, the letter clearly told employees that they were expected to vote against the Union. (Tr. 295)

⁸ When Magallon testified, the interpreter heard Magallon use the word “exhort” in her testimony but when asked to interpret the actual letter, the interpreter translated the word to be “demand”. (Tr. 294; 306)

3. Legal Analysis

The ALJ, after considering “much testimony and evidence taken regarding the meaning of the Spanish verb “exigir”, determined that he was convinced that the word “exigir,” as used in the Spanish language letter expressed a command and that “demand” is a better translation than “urge” or “exhort”. (ALJD at 31) The ALJ determined that the use of the word in the letter fell within the forceful, commanding end of the spectrum, the words “urge” or “exhort” were not found in the dictionary translations of the word, the interpreter gave the common, regional translation as “demand”, and the reaction of the employees is consistent with the commanding sense of the word. (ALJD at 31)

Respondent argues that because the English version of the letter is not unlawful, that the Spanish word is not easily or readily translated into Spanish, that employees knew the Spanish version was a translation and were aware that Tyler was not a Spanish speaker, and that if you take that letter in the context of all the other communications from Respondent during this time frame, no employee could have been mistaken that this isolated statement required them to vote “no”. Respondent’s arguments have no merit.

As found by the ALJ, when an employee receives a letter, individually addressed to the employee, from the General Manager, employees would naturally take any demand made very seriously. (ALJD at 32) The ALJ further finds that the evidence of fear and concern testified to by Magallon, Villegas and other employees when they spoke about the letter, was instilled in employees by the letter itself. (ALJD at 32)

A threat need not be explicit to violate the Act. As pointed out by the ALJ, the Board has held that a threat need no specify the exact reprisal that will be taken. In *Martech MDI*, 331 NLRB 4887, 500 (2000), the employer’s order to “knock it off” regarding union

sympathies was found to contain an implied threat in violation of 8(a)(1) of the Act. In *Valleydale Packers, Inc.*, 238 NLRB 1340, 1343 (1978), the Board held that the employer's warning that an employee "had better leave it [the Union] alone," constituted an implicit threat to the employee, although the exact reprisal against the employee that was implied in the threat was not spelled out.

The ALJ did a thorough examination of the letter, of the translation, looking at several sources in the record, and the evidence of how the letter affected employees. The ALJ's rulings were consistent with the facts and the law and Respondent's exceptions should be disregarded.

F. The ALJ Found that Supervisor Franco Interrogated and Threatened Employees with a Reduction in Benefits and Wages in Violation of Section 8(a)(1)

1. The ALJ's Findings

The Complaint alleges, and the ALJ found, that sometime in mid-November 2011, Production Supervisor Fabian Franco (Franco) interrogated and threatened employees with a reduction in benefits and wages in violation of Section 8(a)(1) of the Act. Respondent argues that the ALJ should not have applied a presumption in favor of a current employee who is willing to testify against her employee's interest because at the time of the hearing, Franco was no longer a supervisor with Respondent. Respondent's argument is nonsensical, absurd and should be rejected by the Board.

2. The Record Evidence

In mid-November 2001, Franco had a conversation with Villegas. (ALJD at 32; Tr. 359) Franco was Villegas' immediate supervisor. (Tr. 359) Franco asked Villegas "what do you think about the Union?" (ALJD at 32; Tr. 360) Villegas told Franco she had never

worked with a union. (ALJD at 32; Tr. 360) Franco answered, “The Union wasn’t good because it would take away benefits, we’d get paid less, and would take away our vacations.” (ALJD at 32; Tr. 360) Villegas then asked Franco “if the Union’s not good and they’re gonna take away our benefits, and they are going to pay us less, wouldn’t that benefit the company?” (ALJD at 32; Tr. 360) Franco responded that “Portola had the money, not the Union.” (ALJD at 32; Tr. 361) Franco told Villegas that if she had any questions about the union to seek him out and ask him those questions. (ALJD at 32; Tr. 361)

3. Legal Analysis

Respondent, here again, is asking the Board to overrule the ALJ’s reasoned credibility determinations. In doing so, Respondent makes the absurd argument that Franco should be credited over Villegas because he no longer works for Respondent and is an entirely disinterested witness. Because of that, Respondent states that the ALJ cannot apply the current employee who testifies against the interests of her employer presumption. Respondent’s argument makes no sense, particularly in light of the ALJ’s ruling.

The ALJ specifically notes that Respondent’s argument regarding Franco being a disinterested witness is logical and has some merit. (ALJD at 33) The ALJ also states that General Counsel’s contention that Villegas should be credited, in part, because she is a current employee who is willing to testify against her employer’s interest, potentially jeopardizing her job, is also logical and has merit. (ALJD at 33) The ALJ is required to reconcile these two arguments and does so, crediting Villegas. (ALJD at 33) In crediting Villegas, the ALJ “views her story as too detailed and specific to be purely a product of her own imagination. Further, for the most part, she held to her account on cross-examination.” (ALJD at 33) The ALJ contrasts that with Franco who does not acknowledge the main

substance of the conversation even took place. (ALJD at 33) The ALJ finds this to be more improbable than Villegas' testimony about the context of the conversation, that it is logical and has the ring of authenticity to it. (ALJD at 33)

Respondent argues that Villegas has a self-interest in establishing her own claim. There is no record evidence that Villegas has any self-interest in supporting the General Counsel's or the Union's case. Villegas was not an organizer for the Union, and would receive no monetary remedy if she is believed. There is no record evidence establishing that Villegas desired a rerun election or desired a Notice to Employees be posted, the only remedy for this violation. Respondent's argument is absurd.

Again, Respondent argues that Franco could not have possibly violated the Act because he received training on what statements were lawful and what statements were unlawful during a union organizing campaign. As stated earlier, knowledge and training as to the provisions of the Act has never been a factor to be considered when credible evidence is presented showing the individual who attended the training violated the Act. Respondent's exceptions have no merit and should be disregarded.

G. Respondent Maintained an Overly-Broad and Discriminatory Rule in its Employee Handbook in Violation of Section 8(a)(1) of the Act.

1. The ALJ's Findings

The ALJ found that Respondent maintained in its Employee Handbook, a rule against speaking with the media about Respondent without express permission from Respondent. (ALJD at 38) This rule was found by the ALJ to limit the ability of employees to discuss work related issues with the media which constitutes an unlawful restriction on employees who wish to engage in concerted activity with others, in this case through the media. (ALJD at 37) Respondent argues that because the rule does not make reference to protected concerted

activities, that the nature of the information at issue is not information related to employees. Respondent's argument has no merit and should be rejected.

2. The Record Facts

On January 1, 2011, Respondent issued a revised Employee Handbook. (Tr. 39; GCX 23). Employees were presented a copy of the Handbook and signed an acknowledgment that they had received the handbook. (Tr. 42-43) Employees were provided the January 1, 2011 handbook on or about January 11, 2011. (Tr. 43) Contained within the Handbook is the following provision:

Section 1404: Media Relations

Policy Statement—Employees should not provide any information regarding the Company to the media (e.g. television, radio, and newspaper). All requests for information from the media regarding any aspect of Portola must be referred to the Chief Financial Officer or President. All press releases, publications, articles and any other documents for release to the media must be approved in advance by the Chief Financial Officer.

3. Legal Analysis

In *Lafayette Park Hotel*, 326 NLRB 824 (1998), the Board explained that an employer may violate Section 8(a) (1) through the mere maintenance of certain work rules even absent enforcement. The appropriate inquiry for such a case is whether the rule in question “would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Id.* at 825. The Board refined this standard in *Lutheran Heritage Village—Livonia*, *supra*, by creating a two-step inquiry for determining whether the maintenance of a rule violates Section 8(a)(1). First, the rule is clearly unlawful if it expressly restricts Section 7 protected activities. If the rule does not, it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section

7 rights. *Id.* at 647. Moreover, a rule that prohibits, among other things, unprotected behavior may be unlawful if it also contains prohibitions so broad that they can reasonably be understood as encompassing protected conduct. See, e.g., *Flamingo Hilton—Laughlin*, 330 NLRB 287, 288 n. 4, 294 (1999) (rule prohibiting “false, vicious, profane, or malicious statements unlawful because it prohibits statements that are ‘merely false’ and might include union propaganda”).

The Board has indicated that a rule’s context provides the key to the “reasonableness” of a particular construction. For example, a rule prohibiting “negative conversations” about managers that was contained in a list of policies regarding working conditions, with no further clarifications or examples, was unlawful because of its potential chilling effect on Section 7 protected activity. *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005). The Board held that, absent more guidance from the employer, an employee could reasonably construe the rule to limit his or her Section 7 right to engage in a protected protest. See also *Id.* at 832, n. 5 (Member Schaumber relying on the context of the other policies promulgated with the challenged rule to find the chilling effect reasonable).

The Board has also instructed that “[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.” *Double D Construction Group, Inc.*, 339 NLRB 303, 304 (2003). Thus, the established test does not require that the only reasonable interpretation of the rule is that it prohibits Section 7 rights; any reasonable interpretation is sufficient to sustain a violation. And to the extent rules may be subject to competing interpretations, lawful and unlawful, the Board has long held that any ambiguities must be construed against the

promulgator of the rule. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992), quoting *Paceco*, 237 NLRB 299 n. 8 (1978); *Teletech Holdings, Inc.*, 333 NLRB 402, 404 (2001).

In this case, the rule prohibits the disclosure of any information regarding the Company to the media. The Board has held that a rule prohibiting workers from contacting the media violates Section 8(a)(1). See *Crown Plaza Hotel*, 352 NLRB 382, 386 (2004). Additionally, the Board adopted an ALJ's finding that a rule in an employee handbook allowing only a company officer to comment to the media and requiring all media contacts be referred to a company official to violate Section 8(a)(1). See *Leather Center*, 312 NLRB 521, 525, 528 (1993)

Respondent argues that the rule only prohibits employees from providing "company" information to the media. What Respondent fails to point out is that "company information" is not defined by the rule. Therefore, company information could be wages, hours of shifts, safety information, whether employees receive lunches, breaks, protective gear, whether the employer provides health benefits, etc. The list is limitless as to what company information could be. Much of company information concerns wages, hours and terms and conditions of employment. Without further explanation, this ambiguity must be held against Respondent who promulgated the rule. The ALJ correctly found that the plain and reasonable reading of the rule in question would serve to chill employees' interest in engaging in lawful concerted activity by alerting the press to work related concerns regarding wages, hours and terms and conditions of employment. (ALJD at 37-38) Accordingly, the ALJ correctly found the rule to violate Section 8(a)(1) and Respondent's exceptions should be disregarded.

H. Credibility Determinations of the ALJ

1. The ALJ's Findings

The ALJ made certain credibility findings throughout his decision that have been discussed above. To summarize, the ALJ generally credited the testimony of current employees that testified but found many of the statements made by Respondent's witnesses with substantial justification, to be not credible. Respondent argues that the ALJ discredited Respondent's witnesses without proper justification. Respondent's arguments have no merit and the ALJ's credibility determinations should stand.

2. Legal Analysis

Respondent wants nothing more than to convince the Board to ignore the ALJ's careful, well-supported determinations, ignore the credible testimony, and instead credit its own witnesses' version of events. The Board should firmly decline because Respondent has not provided any concrete examples where the ALJ's credibility findings were glaringly erroneous. See *Standard Dry Wall Products*, 91 NLRB 544 (1995). (Board will not overrule an administrative law judge's credibility resolutions absent clear preponderance of the evidence dictates that the resolutions are incorrect); *Painters and Allied Trades District Council No. 51 (Manganaro Corporation, Maryland)*, 321 NLRB 158 (1996). Rather, Respondent points to the fact that it had more witnesses to testify about certain conversations that General Counsel, that the ALJ improperly applied a rebuttable presumption to current employees, and that a former employee should have been credited as a disinterested party. These arguments have no merit and should be disregarded, as outlined above.

Respondent's arguments that its own employee—Villegas—should not be credited because she has a “pro-union bias” is equally meritless. Outside of the mere fact that Villegas

was called as a witness by the General Counsel, Respondent is unable to point to any record evidence, or demeanor of Villegas that showed any union affiliation or sympathy that colored her testimony in any way. Likewise, Respondent failed to provide any evidence of bias on the part of Magallon, outside of the mere fact that her husband had been fired by Respondent. Magallon testified several times covering several subject matters and, at no time, was there any evidence that her testimony was other than what she remembered occurring. The ALJ credited the witnesses he did due to appropriate observations, and discredited other witnesses for the same appropriate and legitimate reasons.

IV. CONCLUSION

Based on the foregoing, and the entire record evidence, the General Counsel respectfully submits that the ALJ properly found that Respondent violated Section 8(a)(1) of the Act, as set forth in the ALJD, and Respondent's exceptions should be rejected. Except for

the General Counsel's limited exceptions which are filed on October 11, 2012, under separate cover, the Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order in all respects. It is further requested that the Board order whatever other additional relief it deems appropriate to remedy Respondent's numerous and serious violations of the Act.

Dated at Phoenix, Arizona, this 25th day of October 2012.

Respectfully submitted,

s/ Sandra L. Lyons

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S ANSWERING BRIEF in PORTOLA PACKAGING, INC., Cases 28-CA-067274, 28-CA-067345, 28-CA-070621, 28-RC-067973 was served by E-Gov, E-Filing and by E-mail, on this 25th day of October 2012, on the following:

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