UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PORTOLA PACKAGING, INC.,		
and	Case No.	28-CA-067274
MARTA MAGALLON CORONA, an Individual		
and	Case No.	28-CA-067345
JORGE GARCIA, an Individual,		
and	Case No.	28-CA-070621
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 99,		
and		
PORTOLA PACKAGING, INC.,		
Employer,		
and	Case No.	28-RC-067973
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 99		
Petitioner.		

PETITIONER UFCW LOCAL 99'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

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I. Introduction

Petitioner United Food and Commercial Workers Union, Local No. 99 ("Local 99" or "the Union"), pursuant to section 102.46 of the Rules and Regulations of the National Labor Relations Board submits the following Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge. ("the ALJD"), issued on September 13 2012.

As discussed in the Union's brief in response to the exceptions filed by Portola, Administrative Law Judge Gregory Z. Meyerson has found that Portola Packaging, Inc. committed numerous and significant unfair labor practices during the critical period leading up to the December 1, 2011 election petitioned-for by UFCW Local 99, and that Portola's conduct destroyed the laboratory conditions required by the Board.[1] The ALJ found merit to fourteen unfair labor practice allegations and two election objections, and sustained the Union's three ballot challenges. He also recommended that, in view of the "extremely close" nature of the election (a tie vote), the severe and pervasive nature of the Portola's unfair labor practices and objectionable conduct, and the fact that Portola's illegal conduct was widely disseminated among unit employees, the results of the election do not reflect the free and fair choice of employees, and should be set aside. ALJD at 51.

The Union submits that these findings of merit are fully supported by the record evidence and the law. However, the Union cross-excepts to the ALJ's findings of fact and conclusions of law on the seven points discussed herein.

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[1] United Food and Commercial Workers Union, Local 99 is referred to as "the Union" or "Local 99." Portola Packaging, Inc. is referred to as "the Employer" or "Portola." The Administrative Law Judge's decision is referred to as "the ALJD." "TR." refers to the transcript from the hearing held March 20-22; April 26-27, 2012. "GCX-__" refers to exhibits introduced by General Counsel at the hearing. "EX-__" refers to exhibits introduced by Portola at the hearing. "UX-__" refers to exhibits introduced by the Union at the hearing.

II. Argument

A. The ALJ erred in several ways in concluding that Jorge Garcia and Marta Magallon Corona were not engaged in protected concerted activity when Garcia interpreted for Magallon in a meeting with supervisor Ray Buchanan.

The Union's first three cross-exceptions relate to a meeting between employee Marta Magallon Corona ("Magallon"), her coworker Jorge Garcia ("Garcia"), and her supervisor Ray Buchanan ("Buchanan") that took place in mid-May of 2011.

1. Facts

In mid-May of 2011, Magallon decided to approach her supervisor, Buchanan, to raise an issue of concern with him regarding her work assignment. She had been scheduled to act as a "relief team lead" during certain weekend days, during which no supervisory or managerial staff would be present in the plant. As the ALJ noted, Magallon did not want to perform this role because, among other reasons, "she believed she had not been adequately trained for the job." ALJD at 7. Magallon had tried to discuss her concerns with Buchanan before, but "he had not responded positively." ALJD at 7.

It is relevant that Buchanan's poor treatment of employees had been the subject of discussions among Magallon, Garcia, and other co-workers at Portola. In a separate part of his decision, the ALJ noted Jorge Garcia's testimony that he had discussed a number of workplace issues with is co-workers during the same mid-May time period, including complaints by the operators/Production Team Members that Ray Buchanan was unresponsive to their concerns. ALJD at 6. The ALJ also noted Magallon's testimony that she had conversations during the same time period with a number of employees about work concerns including "mistreatment from supervisor Ray Buchanan." *Id*. Yet another

operator/Production Team Member, Evangelina Villegas, also testified about work-related concerns that she discussed with fellow employees in mid-May 2011. As the ALJ noted, Villegas testified that she and her co-workers discussed "'being treated badly' by supervisor Ray Buchanan, who would 'yell' at them, and about being overworked." ALJD at 6.

Magallon's first language is Spanish, while Buchanan speaks English. Magallon asked a fellow employee, Jorge Garcia, who speaks both Spanish and English, to accompany her to her meeting with Buchanan, which he agreed to do.

Also relevant to the analysis of these allegations is the record evidence that Jorge Garcia had recently raised concerns with management about inadequate training on behalf of himself and his fellow mechanics. On May 6, 2011, Garcia complained to management that he and the other mechanics needed "a lot more training" on a new system Portola was requiring them to use to record their work time. ALJD at 6; GCX-16; Tr. 179-80. Garcia had discussed the need for more training on the new system with fellow mechanics "Sammy," Benito Temperini, and Jose Corona. Tr. 180.

During the conversation with Buchanan, Magallon raised her concerns about the relief team lead assignment, including her concern that she had not been adequately trained for the role. Tr. 285; Tr. 324. Buchanan was unsympathetic. The ALJ found that Buchanan informed Magallon that he was the supervisor and that she must perform the work assigned to her. ALJD at 7.

The ALJ found that during the conversation Buchanan became loud and Garcia asked Buchanan "why he was so angry, why he was yelling, and why he was treating Magallon badly" ALJD at 7. This finding was based on part of Magallon's testimony. But Magallon also testified that Garcia asked Buchanan "why he treated *us* like that, why was he so

disrespectful to *us*." Tr. 328 (emphasis added). The ALJ found Magallon's overall testimony with regard to this incident to be credible, but did not explicitly discuss this aspect of her testimony in the ALJD.

2. Analysis

The Supreme Court has recognized that employees engage in concerted activity for mutual aid and protection when they take action to support a fellow employee, even when their fellow employee is the only one with an "immediate stake in the outcome." The Court cited Judge Learned hand with approval when he expressed the principle thusly:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts.

NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505-06 (2d Cir. 1942), cited with approval by *Houston Insulation Contractors Ass'n v. NLRB*, 386 U.S. 664, 668-669 (1967).

Here, Garcia did not need to share an immediate stake in the outcome of the meeting with Buchanan to render the purpose of his presence to be for mutual aid and protection. Rather, his support for Magallon as she raised her concerns with Buchanan was an act of solidarity that was "mutual aid in the most literal sense" *Id*.

Further, concerns about Ray Buchanan's indifference to employee concerns and his poor treatment of employees were not individual concerns; the ALJ found that they had been discussed among many employees during the same time-frame that the meeting took place.

These concerns were widely shared. Not surprisingly, when Magallon tried to meet with Buchanan on her own, "he had not responded positively." ALJD 7. So she turned to Garcia for help.

The activity was also for mutual aid and protection because Garcia himself had raised similar concerns with management earlier in the same month. As discussed above, Garcia had discussed with fellow mechanics Benito Temperini, Jose Corona, and "Sammy," their shared concerns about the lack of adequate training provided to them regarding a new computer system they were required to use to document their work. Tr. 180. On May 6, 2011, Garcia brought this shared concern to the attention of management when he conveyed to management that he and the other mechanics needed "a lot more training" on the new system. ALJD at 6; GCX-16; Tr. 179-80.

In *Holling Press*, the Board found that the activity of an employee in soliciting assistance from other employees was not for mutual aid and protection where there was "no evidence that any other employee had similar problems—real or perceived—with a coworker or supervisor." *Holling Press, Inc.*, 343 NLRB 301, 302 (2004). The Board also relied on the fact that fellow employees did not show any interest in helping the individual employee with her claim. *Id*.

Here, the evidence demonstrates that Garcia himself was facing a similar problem with regard to the inadequacy of training provided by Portola. Even if he did not have an immediate stake in the outcome of the meeting, he certainly had a stake in the larger issue raised by Magallon.

Finally, the evidence demonstrates that Garcia spoke on behalf of both himself and Magallon when he challenged Buchanan's treatment of them in the meeting. Tr. 328

("…Mr. Garcia had asked him, why he treated us like that, why he was so disrespectful to us because Mr. Buchanan had got upset with us and was speaking to us pretty harshly."); *Id.* (Mr. Garcia asked him, that why was he yelling at us, why do you treat us so badly.") Thus, Garcia was not merely acting as a "recording and translating device" (ALJD at 9) in the meeting, and the ALJ's conclusion that he was not acting as an "advocate, witness, or even supportive coworker" (*Id.*) is incorrect.

The ALJ erred in failing to find that Garcia and Magallon were engaged in protected concerted activity when he interpreted for her with Buchanan. There is no dispute that the activity was concerted, and the evidence and authority above demonstrate that it was for "mutual aid and protection."

B. The ALJ erred in failing to find that the statement by plant manager Tim Tyler, in his November 18 letter to employees, that wages and benefits would be certain to decrease as a result of a Union victory was an unlawful threat.

The Union's fourth and sixth cross-exceptions relate to the Spanish-language translation of a letter sent by plant manager Tim Tyler to all employees eligible to vote in the December 1 election. The ALJ found that, by the final sentence of the same letter, Tyler had threatened unspecified reprisals by *demanding* that employees vote against the Union. ALJD at 32. However, the ALJ erred in failing to find that another portion of the letter, where Tyler suggested that wages and benefits would be certain to decrease as a result of a Union victory, was unlawful.

1. Facts

In the English-language version of the letter, the sentence reads as follows: "Don't believe that wages and benefits must stay the same or improve as a result of bargaining."

EX-5. In the Spanish-language version, the sentence reads as follows: "No creas que salarios y beneficios se van a mantener igual or mejorarse como uno resulto de negociaciones." GCX-5.

The interpreter at the hearing translated the first sentence of that bullet point twice. The first translation was: "Don't think that the salaries and benefits will remain the same or improve as one result of the negotiations". Tr. 307-08. The second translation, including the sentence that follows, was:

> Do not think that the salaries and benefits remain the same or improve [sic][2] as a result of the negotiations. The law specifically allows the company to maintain its last offer to the union if the union and the company cannot come to an agreement.

Tr. 307-08. No alternative translation of this part of the letter was offered by Portola.

2. Analysis

By the first sentence in the final bullet point in the letter, Tyler threatened employees that negotiations with the Union *could only* lead to a decrease in salary and benefits. The statement introduces three options, and forecloses two of them. Salaries and benefits can remain the same, improve, or worsen. By admonishing employees not to think that they will remain the same or improve, the implication is clear: salaries and benefits will worsen as a result of negotiations with the Union.

This statement violates 8(a)(1), and interferes with the free choice of employees in the election in two ways. First, it is an implied threat of (a) negative consequences for employees if they choose the union, (b) which consequences are within the control of the

[2] The interpreter spoke the word "sic" to indicate that the Spanish-language version of the sentence, as written, was grammatically incorrect. Tr. 307.

employer, (c) but are not supported by any objective facts. Second, it is an implied threat of the futility of bargaining.

Under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), lawful predictions of the negative effects of unionization must address consequences beyond an employer's control and be based on objective fact. Tyler's statement satisfied neither element.

Here, there is no indication or claim that the worsening of salaries and benefits would be beyond the employer's control. To the contrary, the sentence that follows reinforces the idea that negative consequences of bargaining are squarely within the control of Portola. "The law specifically allows *the company* to maintain its last offer to the union if the union and the company cannot come to an agreement." Tr. 308. Reminding employees that Portola can implement its last and final offer to the Union suggests that the ultimate result of the negotiations is within Portola's control.

Nor was Tyler's threat supported by objective facts. The letter did not mention any facts that would compel a decrease in salaries and benefits as a result of negotiations. Rather, the letter implied that the negative results would come about because of Portola's right to implement its final offer.

Second, an inference of coercion exists when employer statements convey the message that bargaining will be futile. In *DHL Express Inc.*, 355 NLRB No. 224 (2010), the board found an unlawful threat where the employer suggested that employees would not gain any increase in any benefit during collective bargaining negotiations without an offsetting reduction in other benefits. *Id.* at 2. The Board found such statements violated Section 8(a)(1) by threatening employees that they would gain nothing in collective bargaining. *Id.*

Here, the threat is worse. Not only does Tyler suggest that employees will not gain anything, he threatens that employees' salary and benefits *will worsen* as a result of negotiations.

There is an important distinction to be made between the English-language version and the Spanish-language version. In the English-language version, the message is different – don't believe that wages and benefits *must* stay the same or increase. The statement accurately conveys the give and take of the bargaining process. However, the Spanish-language translation--don't believe that salaries and benefits *will* stay the same or increase—suggest that they *will not* stay the same or increase. The only other option is that they will go down. That important difference transforms the statement into an implied threat of reprisal, in violation of 8(a)(1). For the same reason, the Union's second objection, focused on this point, should be sustained.

This threat should be evaluated in the context of other aspects of Portola's anti-union campaign. In particular, a flyer posted by Portola in the Tolleson facility during the critical period contained the following statement: "Union representation is a game in which you will always **LOSE**." GCX-11.

Portola may argue that phrases from the English-language version of the letter neutralized the threat at issue here, but Portola did not request that any other phrases be translated from the Spanish-language version by the interpreter. To begin with, any general statement about good-faith bargaining would not neturalize Tyler's specific threat that the employees receiving the letter should think that salaries and benefits will worsen as a result of negotiations.

Furthermore, for any clarifying or neutralizing statements to be effective, they would have had to be timely, unambiguous, specific in nature, adequately published, accompanied by assurances against future interference with its employees' Section 7 rights, and free from other contemporaneous illegal conduct. *Passavant Memorial Hospital*, 237 NLRB 138 (1978). Here, Portola never specifically repudiated either of the statements in this letter.

As with the demand that employees vote no in the election, this statement interfered with employees Section 7 rights in violation of Section 8(a)(1) of the act, and interfered with their exercise of free choice in the December 1, 2011 election.

C. The ALJ erred in failing to find that the content of the anti-union videos played by Portola on a 24-hour loop created the impression that strikes would be inevitable, and unlawfully predicted strike violence in the absence of objective facts.

The Unions fifth and seventh cross-exceptions concern the ALJ's failure to find that the anti-union videos played by Portola in the weeks leading up to the election violated the Act (ALJD 43), and his dismissal of the Union's Objection 4 on those grounds.

1. Facts

Between November 14th and November 29th, Portola played eight videos in the plant. Tr. 168, 170. Four were in English, and four were in Spanish. Each English-language video had a Spanish-language counterpart, covering roughly the same material. Tr. 168. The videos were provided to Portola by LRI via Armando Talancon. Tr. 170.

The videos were played in two locations in the plant. The English-language videos were played on a monitor in the hallway leading from the employee lunch room to the production floor. Tr. 169. The Spanish-language videos were played on a monitor in the

employee lunch room. *Id*. Both monitors had speakers that projected the audio from the videos. Tr. 50.

Each day, one video would be played on each monitor in a continuous loop, for 24-hours. Tr. 169. The video reviewed at the hearing was approximately twenty minutes long. Thus, in a 24-hour period, it would have been repeated approximately seventy-two times.

The Union's fourth objection relates to the English-language video entitled "Your Job On The Line," and the Spanish-language video entitled "Job Security and Strikes." Both were played at the hearing for the purposes of transcription. "Your Job On The Line" corresponds with the transcript admitted into evidence as UX-8. Tr. 409. Portola stipulated that it was one of the videos played at the plant, in the manner described above, in the weeks preceding the election. Tr. 393. Portola also stipulated that "Job Security and Strikes" was one of the videos played in the plant in the weeks preceding the election. Tr. 438.

i. Threats of the inevitability of strikes

The first aspect of Objection 4 relates to a statement in the video that implies that strikes are an inevitable result of unionization. The English-language version of the statement is as follows:

> The only way to be sure that your future is never torn apart by a union strike is to never turn control of your working life over to the union. Never put yourself in the position of choosing between either the union or continuing to work to support yourself and your family.

Tr. 407; UX-8, p. 7. The clear message is that of the second sentence is that, if an employee votes for the union, and the union wins the election, the employee will *necessarily* be put in a position of having to choose between the union or continuing to work. And the only reason

an employee would be in that position would be if the union went on strike. The Spanish-language version is similar:

> There is only one way in which you can guarantee that your future does not fall apart because of strikes and this is never, ever giving control of your workforce future to a union. Never place yourself in the position between having to support the union and your job in order to be able to support and sustain your family.

Tr. 436.

ii. Threats of strike violence

The second aspect of Objection 4 relates to imagery that accompanies a portion of the English-language video, "Your Job on the Line". The imagery portrayed, taken with the words spoken by the narrator of the video, create an impression that the video is portraying *actual* violence associated with the strike described in the video. However, the portrayal of strike violence is not supported by any objective facts. During the footage in question, the narrator speaks the following words:

> Now months into the strike, daily reports of violence and vandalism have become common throughout the town. King City was a community being torn apart by a union strike. Local union leaders continued to claim the company was losing money and would soon give in to their demands.

Tr. 404; UX-8, p. 5. The imagery accompanying the above narration is, in the words of the Administrative Law Judge, of a vehicle being vandalized. Tr. 464. "[I]t appears that tires are being punctured, and then it appears that the front windshield is being smashed, the vehicle is being vandalized." Tr. 464.

The parties agreed that the following is an accurate description of the imagery accompanying the above narration:

> What we see on the screen is a black and white video image. On the lower right-hand corner, there is a date and time stamp that reads October 15th, 1999, and the time begins at approximately 1:13 and 38 seconds AM.

> In the image is a car and on the left-hand side of the car is a person wearing a dark hooded sweatshirt. The image appears to be taken from the perspective of the inside of a building, looking out through a window.
>
> As the video continues, the individual in the dark sweatshirt on the left-hand side does something to the rear passenger side tire of the car. And on the right-hand side we see another individual coming in from the right-hand side, and I'll note also that it appears to be nighttime.
>
> As the video continues, another individual comes in from the right-hand side and begins to smash the windshield of the car repeatedly. And you can hear the smashing sound in the background. As the video continues it appears that the car sinks somewhat as a result perhaps of the air being let out of the tire of the car.

Tr. 462-63 (Counsel for the Union's description, altered to reflect clarifications offered by Portola and Counsel for the General Counsel).

Greg Kittinger, an employee of LRI, testified that the King City strike discussed in the video took place at the facility of one of LRI's former clients, Basic Vegetable. Tr. 736. He testified that the portion of the video focusing on the Basic Vegetable strike was intended to be "an example of what can happen during a strike". Tr. 744. But he could not verify if the footage of the car being vandalized bore any relationship to the Basic Vegetable strike whatsoever.

Kittinger testified that the footage came to LRI as part of an assortment of different types of video footage provided to LRI by the Basic Vegetable. Tr. 739. Kittinger could not identify when the footage was shot or under what circumstances. Tr. 743-46. Kittinger admitted that he couldn't even verify whether the footage was a record of an actual event, or merely a dramatization. Tr. 745. He admitted that, to his knowledge, LRI had made no attempts to authenticate the footage or investigate where it came from. Tr. 746.

Within the Portola plant, the employee lunch room is the only place for employees to take their breaks. Tr. 386. Evangelina Villegas testified that the Spanish-language videos were played at a very high volume in the lunch room. Tr. 368. Employees get two thirty minute breaks per shift. Tr. 453. Villegas testified that generally she watched whichever video was playing the whole time she was on her 30-minute break in the lunch room, though sometimes she would leave because it was too loud and she "couldn't stand it". Tr. 385. Villegas testified that, after watching the videos, she and her coworkers were disheartened and afraid. Tr. 370.

2. Analysis

i. Implied inevitability of strikes.

Under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), lawful predictions of the effects of unionization must address consequences beyond an employer's control and be based on objective fact. This standard applies to predictions of strike activity. In *Homer D. Bronson Co.*, the company's president a speeches during the union's organizing campaign where he stated that "where there are unions . . . there are strikes." 349 NLRB 512, 513 (2007), enforced, 273 Fed. Appx. 32 (2d Cir. 2008). The Board concluded that the company president's statements were not fact-based, but instead threatened the employees with negative consequences of unionization. *Id*.

Here, the statement in the LRI video implies that strikes inevitably accompany unionization. The narrator in the video states:

> The only way to be sure that your future is never torn apart by a union strike is to never turn control of your working life over to the union. Never put yourself in the position of choosing between either the union or continuing to work to support yourself and your family.

Tr. 407; UX-8, p. 7. The clear message is that, where a union is present, employees are *necessarily* put in a position of having to choose between the union and their jobs. The statement implies that strikes are the inevitable result of unionization. But, the statement is not supported by any objective facts.

ii. Implied threat of strike violence, not supported by objective facts.

In addition to the above threat, the car vandalism footage in the video constitutes an implied threat of strike violence, unsupported by objective facts.

The vandalism footage is portrayed as surveillance footage of an actual event, and is associated by the narrator with the Basic Vegetable strike. However, LRI's employee testified that the vandalism footage was provided to the company with no information about its provenance, how or when it was created, and whether it depicts actual events, or a dramatization of abstract vandalism. Tr. 743-46.

With no evidence concerning what the footage actually depicts, the Board is urged to draw an adverse inference against Portola, and conclude that the footage is not, in fact, forage of actual vandalism that took place as part of the Basic Vegetable strike.

Lacking such evidence, the portrayal of strike violence in the video constitutes an illegal threat, because it predicts negative consequences of unionization without any basis in objective fact.

III. Conclusion

For all of the foregoing reasons, the Union respectfully requests that the Board find that Portola violated the Act as discussed above, and issue an order providing a full and appropriate remedy in this matter, including an order that the representation proceeding be

remanded to the Regional Director for Region 28 for the purpose of conducting a second election.

Dated: October 25, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITIONER UFCW LOCAL 99'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS – Case Nos. 28-CA-067274, 28-CA-067345, 28-CA-070621 and 28-RC-067973. was filed using the National Labor Relations Board on-line E-filing system on the Agency's website and copies of the aforementioned were thereafter served upon the following parties via email on this 25th day of October, 2012:

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