

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 17**

GREATER OMAHA PACKING CO., INC.

Cases 17-CA-085735

17-CA-085736

17-CA-085737

and

HEARTLAND WORKERS CENTER

**GREATER OMAHA PACKING CO., INC.'S
BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND.....	1
A. The Alleged Unfair Labor Practices	1
B. Background	2
C. Events Prior to May 14, 2012.....	5
D. Carlos Zamora	6
1. Respondent’s Evidence	7
2. Acting General Counsel Testimony	8
E. Jorge Degante Enriquez	9
1. Respondent’s Evidence	10
2. Acting General Counsel Testimony	10
F. Susana Salgado.....	12
1. Respondent’s Evidence	13
2. Acting General Counsel Testimony	14
III. ARGUMENT.....	15
A. The ALJ Erred In Making Unsupported Assumptions and the Acting General Counsel Failed to Establish His Prima Facie Case To Show That the Three Individuals Were Discharged Unlawfully.	15
1. There is Insufficient Evidence of Greater Omaha’s Knowledge of the Planned Strike.	17
2. There is Insufficient Evidence that the Terminations were Motivated by an Alleged Planned Strike.	22
B. The ALJ Erred in Relying on Greater Omaha’s Reasons for Discharging the Employees to Complete the Acting General Counsel’s Case.	26
C. The ALJ Erred in Crediting the Three Alleged Discriminatees’ Testimony.	29

**D. The ALJ Erred In Granting Zamora Reinstatement Despite Zamora’s
Threatening Actions..... 32**

IV. CONCLUSION 33

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>1621 Route 22 West Operating Co., LLC,</i> 358 NLRB 1 (2012).....	17
<i>Allentown Mack Sales & Service v. NLRB,</i> 522 U.S. 359 (1998)	23
<i>Borin Packaging Co.,</i> 208 NLRB 280 (1974).....	26
<i>Cardinal Home Products,</i> 338 NLRB 1004 (2003).....	24
<i>Continental Auto Parts,</i> 357 NLRB No. 78 (2011).....	17
<i>Framan Mechanical, Inc.,</i> 343 NLRB 408 (2004).....	26
<i>Holling Press, Inc.,</i> 343 NLRB 301 (2004).....	22
<i>Human Services Projects, Inc. d/b/a Teen Triumph,</i> 358 NLRB No. 2 (2012).....	32
<i>Lamar Advertising of Hartsford,</i> 343 NLRB 261 (2004).....	26
<i>Manor Care of Easton, PA, LLC d/b/a ManorCare Health Services-Easton,</i> 356 NLRB No. 39 (2010).....	17
<i>Merillat Industries,</i> 307 NLRB 1301 (1992).....	28
<i>Meyers Industries (Myers II),</i> 281 NLRB 882 (1986).....	22
<i>NLRB v. Instrument Corp. of Am.,</i> 714 F.2d 324 (4th Cir. 1983).....	28
<i>NLRB v. Transportation Management Corp.,</i> 462 U.S. 393 (1983)	16

<i>Pace Industrial</i> , 320 NLRB 661 (1996), <i>enfd.</i> 118 F.3d 585 (8th Cir. 1997).....	28
<i>Prill v. NLRB</i> , 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)	22
<i>Ryder Distribution Resources</i> , 311 NLRB 814 (1993).....	26
<i>Ryder Tank Lines, Inc.</i> , 135 NLRB 936 (1962).....	22
<i>Sam’s Club, A Division of Wal-Mart Stores, Inc. v. NLRB</i> , 160 F.3d 191 fn. 11 (4th Cir. 1998) <i>vacated on other grounds</i> , 173 F.3d 233 (4th Cir. 1999).....	17, 18, 28
<i>TT&W Farm Products, Inc. d/b/a Heartland Catfish Co., Inc.</i> , 358 NLRB No. 125 (2012).....	27
<i>Wright Line</i> , 251 NLRB 1083 (1980).....	16, 28

Respondent, Greater Omaha Packing Co., Inc. (hereinafter “Company” or “Greater Omaha”), for its Brief in Support of Exceptions to the Decision of the Administrative Law Judge in the above-captioned matter states as follows:

I. INTRODUCTION

This case came for hearing before the Honorable Arthur J. Amchan, Administrative Law Judge (hereinafter “ALJ”) on October 31 and November 1, 2012. On December 27, 2012, ALJ Amchan issued his Decision JD-69-12. The ALJ found merit to the unlawful labor practice charges based upon assumptions not supported or indeed refuted by record evidence, reliance on matters not in evidence, and the misapplication of the law. The record establishes that the Acting General Counsel failed to establish his prima facie case to show that the three individuals were discharged unlawfully. The ALJ made assumptions on top of assumptions to complete the prima facie case, relying on an incomplete set of facts and matters not in evidence.

Greater Omaha did not violate the National Labor Relations Act (hereinafter the “Act”), and as such the Board should reject the ALJ’s Order and dismiss the Charges herein.

II. FACTUAL BACKGROUND

A. The Alleged Unfair Labor Practices

The Acting General Counsel alleged that Greater Omaha Packing Company (hereinafter “Greater Omaha”) discharged three employees, Jorge Degante Enriquez, Susana Salgado, and Carlos Zamora, because the employees engaged in protected concerted conduct, or were believed to have engaged in protected concerted conduct, and to discourage employees from engaging in the same. (GC Exhibit 1-I, ¶ 5(b)-(e)). The alleged protected concerted conduct includes the following: demanding that Greater Omaha reduce the speed of the production line and provide additional staffing for various production and processing job functions; and increase employee wages; and by planning to take protected concerted action to support their demands. (*Id.* at ¶

5(a)). The Acting General Counsel also alleged that Greater Omaha interrogated employees relating to their protected concerted activities and created the impression that Greater Omaha was monitoring the employees' protected concerted activities, (*Id.* at ¶ 4), however the ALJ dismissed those allegations.

B. Background

Greater Omaha slaughters and processes beef. (Tr. 23:11-13). During May 2012, Greater Omaha employed approximately 440 persons. (Tr. 214:1-20). Jose Samuel Correa is the Plant Manager for Greater Omaha. (Tr. 23:7-10). Eliseo Garcia is the Fabrication Manager for Greater Omaha. (Tr. 58:3-6). Saturnino Mora, "Tony," is the supervisor for the loins line and directly supervised Jorge Degante and Carlos Zamora. (Tr. 222:19-223:6; 223:13-16). Alejandro Varela is the supervisor for the packing line and directly supervised Susana Salgado. (Tr. 231:14-24). Exhibit R-3 depicts the production floor for Greater Omaha. It depicts the following:

- the supervisor's office ("SO");
- the employee entrance ("Entrance");
- the employee cafeteria ("Cafeteria");
- the entrance to the production floor ("Entrance to Production Floor");
- the round line ("RL");
- the loin line ("LL");
- the trim line ("TL");
- the rib line ("Rib");
- the chuck line ("Chuck");
- the brisket line ("Brisket");
- the fat area ("Fat");
- the Cryovacs, which shrinks product wrap to seal the product in the bagging area, ("Cryovac 1 – 5");
- Salgado's workstation ("S");
- Zamora's workstation ("Z");
- Degante's workstation ("D"); and
- the catwalk ("Catwalk").

(Tr. 196:25-205:17). As depicted on Exhibit R-3, the employee entrance to the plant is near the supervisors' office. (Tr. 173:7-12). Notably, neither the supervisors' office nor the employee entrance is visible from the production floor. (Tr. 146:6-8).

Greater Omaha has a policy that requires employees to ask permission from their supervisor before leaving the line during production time. (Tr. 223:19-24; 232:4-10). This rule is necessary as the meat products are moving down a production line at a constant rate of speed, so if one employee leaves without a replacement being substituted, the remaining employees have to contend with an increasing workload, which, in Greater Omaha's view, creates a safety risk. (Tr. 98:15-17; 33:23-34:6; 65:7-66:1). There was no evidence presented to suggest that Greater Omaha ever refused an employee's request to leave the line. In fact, on some occasions, supervisors would step in to take the place of an employee. (Tr. 99:16-25). Degante, Salgado, and Zamora were each aware of this rule. (Tr. 100:1-4; 131:2-7; 167:24-168:5). Greater Omaha also has a policy which requires that an employee, when assigned from one job to another, immediately go and report to the supervisor of the job to which he or she was being assigned. (Tr. 224:12-20). Degante was aware of this work rule. (Tr. 108:9-23).

Employees are routinely called into the supervisors' office and taken off the production line. (Tr. 101:13-23; 132:15-22). Employees do not pay attention when other employees are asked to go the supervisors' office during the course of a workday. (Tr. 102:11-15; 112:6-10; 178:25-179:3). They cannot see the supervisors' office from the production floor. (Tr. 146:6-8). In fact, Degante testified that when working, the employees are only watching the product and the hands of the persons working on their left and their right. (Tr. 102:22-6). Employees watch the hands of their co-workers because the employees are all working with very sharp knives. In addition, and as noted earlier, the product is constantly moving down the production line and employees must pay attention to their specific job in order to keep the workflow moving. (Tr. 104:7-8). While at the production line and working, the employees are also standing on a

platform while the meat they are working on moves past them at about waist level. (Tr. 104:9-23).¹

Garcia performs counseling for the employees on the fabrication floor. In May 2012, Garcia managed over 400 employees. (Tr. 35:15-20). A lot of times, he may not be able to counsel an employee relating to improper conduct for several days after the conduct has occurred depending on his schedule. (Tr. 63:25-64:8). Employees may also receive verbal warnings from their supervisors when policies are not followed. (Tr. 225:11-20). Undisputed evidence established that warnings are not reduced to writing unless the policies are continually not followed. (Tr. 225:21-226:1).

Record evidence also established that Greater Omaha knows how to lawfully deal with protected concerted activity, and on a far bigger scale than what was supposedly to occur in May of 2012. In 2008, Greater Omaha experienced a work stoppage. (Tr. 215:18-216:10). During this stoppage, the entire production floor, around 400 people, walked away from the production line and went to the cafeteria. (Tr. 216:6-12). Correa attempted to talk to the employees about their concerns but was unsuccessful in getting them to return to work. (Tr. 217:7-20). The Vice President of Greater Omaha then spoke with the employees but was also unsuccessful. (*Id.*). Finally, the owner of Greater Omaha spoke with the employees and discussed their concerns and was successful in coming to the terms and the employees went back out to the production floor. (*Id.*). No employees were disciplined or discharged as a result of this work stoppage. (Tr. 217:21-23).

^{1/} The employees are also required to wear safety equipment, including gloves, a hard hat, a mesh apron, a white frock, and earplugs. (Tr. 104:24-105:11; 205:24-206:15). Exhibit R-4 shows a typical portrayal of employees at their workstations, the close proximity of workers, and the workers' safety equipment. (Tr. 207:19-208:3; 207:15-208:3; Exhibit R-4). This exhibit also depicts the difficulty of distinguishing one employee from another while the workers are wearing their safety equipment on the production floor. (*Id.*).

C. Events Prior to May 14, 2012

Around April 3, 2012, Greater Omaha received a letter from the United States Department of Homeland Security (DHS) identifying over 180 employees whose identity and employment eligibility were unable to be verified. (GC Exhibit 2). Subsequently, DHS entered the premises and arrested 15 persons. (Tr. 26:2-6).² Notices were sent to all employees whose eligibility documents could not be verified, advising them to take steps to correct that deficiency. (Exhibit G-2). After those letters were received, still prior to May 14, 2012, a few dozen employees voluntarily left Greater Omaha. (Tr. 27:20-28:1). Greater Omaha began hiring additional persons to make sure it had adequate staff on hand as employees with these document deficiencies left. (Tr. 28:2-7). Correa testified that every position was “covered” before any employee was discharged. (Tr. 28:2-12). Indeed, Greater Omaha had a greater number of employees working in the fabrication department (where each of the three employees involved worked) in May 2012 than in either March or April 2012. (Tr. 214:1-20). In May 2012, Greater Omaha had 440 employees working in the fabrication department—six (6) more than in the month of April and ten (10) more than in the month of March. (*Id.*).

In early to mid-April, Correa had a conversation with ten or twelve employees, including Zamora, who had left their production line and went to the cafeteria during working time. (Tr. 29:3-8; 165:10-166:7). At the time the employees left their production line, they mentioned that the production line was going too fast. (Tr. 29:9-13). Correa asked the employees to go back to work and he would meet them at the end of the day. (Tr. 29:14-18; 167:5-7). The employees complied and returned to work. (Tr. 29:19-20; 167:8-9). Correa met with these employees after

²/ DHS took no action against Greater Omaha as a result of these document deficiencies. In fact, DHS and Greater Omaha agreed upon a procedure to follow so that Greater Omaha could replace employees with document deficiencies in smaller groups rather than all at once. (Tr. 26:20-27:2; 28:2-7). That process continued into August 2012.

work. (Tr. 29:21-23). During this meeting, Zamora stated that he thought he should be making more per hour because other companies were paying more. (Tr. 30:1-5). Correa replied that when employees take into account benefits, their lower insurance costs, and the allowance for gas provided by Greater Omaha, their compensation is comparable or better than other companies. (Tr. 30:10-23). Correa additionally told employees that there was an open door policy at Greater Omaha and that if they had concerns they could discuss these issues with a supervisor, the Plant Manager, or the Floor Manager. (Tr. 31:22-32:2). Correa additionally reminded the employees of the importance of not leaving their workstation without permission from supervisors. (Tr. 32:3-16). Garcia was not part of this meeting. (Tr. 59:17-22; 150:19-151:19; 166:16-17). No employees were disciplined or discharged for leaving their production line or talking to management on this occasion. (Tr. 151:20-24; 167:10-12; 215:15-17).

The three discharged employees' managers and supervisors—Correa, Garcia, Mora, and Varela—were not aware of any sort of planned work stoppage or strike at the time of the employees' discharge on May 14, 2012. (Tr. 211:23-212:4; 220:8-12; 226:2-6; 232:17-19). Nor did Correa direct any supervisors to go on the catwalk and watch employees on May 14, 2012. (Tr. 220:13-15).

D. Carlos Zamora

Zamora was well aware of the work rule that he needed to ask permission prior to leaving his workstation. He admits he was terminated in 2008 for failing to comply with this very rule. (Tr. 169:8-13). Even after being re-hired, he continued to have problems following this indisputably legitimate work rule. (Tr. 223:19-224:11). It is undisputed that Carlos Zamora was terminated again on May 14, 2012.

1. Respondent's Evidence

The week prior to May 14, 2012, Zamora left his production line during working time and approached Garcia. (Tr. 33:23-34:24; 63:8-24; 210:12-18). Zamora told Garcia that he needed to talk to him about the line speed. (Tr. 210:22-211:8). Garcia told Zamora that they could talk after work and that he needed him to return to his production line because it was a safety issue having another employee stacking the meat that should have been Zamora's responsibility. (Tr. 65:7-66:5; 210:22-211:8). Zamora returned to his duties. Garcia was in his office after work but Zamora did not come and talk to him that day. (Tr. 211:12-19). On May 14, 2012, Garcia wanted to counsel Zamora concerning Zamora leaving his workstation without permission. (Tr. 33:20-22; 63:5-7).

After the morning break, at around 9:35 am, Garcia asked Saturnino Mora, Zamora's supervisor, to send Zamora to the supervisors' office. (Tr. 33:13-19; 63:1-4; 66:8-11). Zamora arrived sometime after 9:35 am. (Tr. 37:2-9). The people present for this meeting included Zamora, Correa, and Garcia. (Tr. 36:25-37:1; 66:12-15). Garcia asked Zamora to take a seat but Zamora refused. (Tr. 66:16-19). Garcia began the meeting by explaining to Zamora the work rule that if he needed to leave his production line for any reason, he needs to ask permission from his supervisor so that the supervisor is aware of where he is and so that his position can be replaced on the production line while he is gone. (Tr. 37:13-17; 66:16-23). Zamora replied that management was picking on him and that they were a bunch of "assholes." (Tr. 37:18-25; 66:16-23). Garcia again tried to explain to Zamora that he needed to follow the work rule of not leaving his production line without permission and Zamora became even more upset and repeated that management was picking on him and that they were a bunch of assholes. (Tr. 38:2-9; 66:16-67:15). Correa attempted to calm Zamora down, but he just kept repeatedly calling management assholes and used the Spanish word "pinche." (Tr. 67:6-68:4). Correa then told

Zamora that he was not going to allow any employee to be disrespectful to any of the supervisors or managers and told Zamora to turn in his equipment because he had lost his job. (Tr. 38:6-15; 68:5-12). After this, Zamora said “Fuck you and your family,” and threatened to kill Correa and his family stating “I am going to kill you and your family.” (Tr. 38:16-39:11; 68:13-69:1). Outside of the office Zamora was still mad and shouting. (Tr. 183:12-14; Exhibit R-2). Zamora also threw down his hard hat and work belt. (Tr. 38:23-39:4; 68:17-20; 183:19-22; 184:14-22; 189:11-18; Exhibit R-2). Zamora was so angry that security had to be called to escort him from the premises. (Tr. 181:16-21; 182:12-25). In point of fact, the security guard had to step between Correa and Zamora and tell Zamora that he needed to leave with the guard. (Tr. 183:23-25; Exhibit R-2). Zamora was terminated not for leaving the production line without notice to his supervisor, but rather because of his disrespectful and threatening behavior during this meeting with management. (Tr. 39:25-40:5; 69:9-12). Zamora was not allowed to go back in the production area after he was terminated. (Tr. 212:5-12; 212:16-19).

2. Acting General Counsel Testimony

Contrary to Salgado and Degante, Zamora testified that he and the rest of the plant took their break on May 14, 2012, at 9:00 am rather than 9:15 am, and returned to work at about 9:15 am. (Tr. 158:18-20; 159:21-22; 170:19-171:4). Zamora testified that during this morning break, he was told by his friend Pedro that there was going to be a labor strike at 10:00 am that morning. (Tr. 158:25-159:15). Pedro was not called as a witness to corroborate this testimony.

According to his testimony, after Zamora returned to work at about 9:15 am and began working on the next piece of meat, his supervisor, Saturnino Mora, asked him to go to the supervisors’ office because Correa wanted to meet with him. (Tr. 159:16-160:4). Garcia, Correa, and Zamora were the only individuals present at this meeting. (Tr. 160:5-6). Zamora claims that Correa wanted to know what else he wanted because he had a good job, good

insurance, and good overtime. (Tr. 160:10-13). Zamora claimed that he told Correa that he wanted an increase in wages. (Tr. 160:14-15). Zamora testified that in response Correa just said “[t]hat I was fired, just to leave my stuff back there because I had left my line twice.” (Tr. 160:16-18). Zamora insisted that he wanted to talk to Human Resources but was not allowed to do so and testified that Correa only responded by telling security to get Zamora out. (Tr. 160:19-161:6).

Contrary to Correa, Garcia, and Malwal’s (the security guard) testimony, Zamora testified that he took his work belt and hard hat off, put his work belt on the floor and put his hard hat on the table and it fell off. (Tr. 162:21-163:9). The security guard, Malwal, totally contradicted Zamora’s claim, and testified that he saw Zamora actually throw his hard hat and work belt directly onto the floor. (Tr. 183:19-22; 184:6-22; Exhibit R-2). Contrary to Zamora’s testimony, Malwal testified that Zamora was clearly very angry. (Tr. 183:2-14; 185:18-186:4). Zamora denied calling management assholes, denied talking loudly or arguing, denied being disrespectful, and denied threatening to hurt anyone or their family. (Tr. 162:1-20; 176:2-10).

E. Jorge Degante Enriquez

It is undisputed that Degante had been warned prior to May 14, 2012, about taking unauthorized breaks without permission. (Tr. 100:13-15). Indeed, Degante admits he had been warned several times in 2012, one of which resulted in a written form of corrective action. (Tr. 100:16-23; 116:6-24). Degante had also previously been called to the supervisors’ office relating to knife sharpening or letting other employees go on break. (Tr. 101:2-9). Additionally, he was counseled by the Company for taking too long to report to a supervisor. (Tr. 108:9-14). Degante also had issues with tardiness and promptly reporting to supervisors when asked to move positions. (Tr. 224:12-225:10). Greater Omaha does not dispute that Degante was able to perform several different tasks for Greater Omaha, but Greater Omaha had many other

employees with the same sets of skills. (Tr. 83:25-84:18; 219:2-220:7; Exhibit R-5). It is also undisputed that Jorge Degante was terminated on May 14, 2012.

1. Respondent's Evidence

On the morning of May 14, 2012, Garcia noticed Degante was tardy for work because he saw Degante putting on his hairnet while all other employees were already at the production line. (Tr. 41:2-21; 70:9-10). Garcia wanted to counsel Degante regarding this and other tardies on May 14, 2012. (Tr. 41:2-7; 69:22-71:4).

Garcia asked Tony Mora, Degante's supervisor, to send Degante to the supervisors' office, sometime after Zamora had been terminated. (Tr. 42:20-43:1). The individuals present at this meeting were Degante, Correa, and Garcia. (Tr. 43:8-9). In the meeting, Garcia told Degante that he needed to come into work on time and could not be tardy. (Tr. 43:10-44:8; 71:14-18). Correa also addressed with Degante his failure to return to work on time following breaks and taking too long to report to a supervisor when he was asked to do a different job in another area. (Tr. 43:10-44:8; 71:19-72:1). Degante would not acknowledge that he was not following directions and repeatedly answered that he was always doing what management asked. (Tr. 43:10-44:8; 72:2-11). Correa terminated Degante because he refused to acknowledge that he was not following the instructions of the supervisor and because of his constant tardiness. (Tr. 43:10-44:16; 72:6-11). Correa testified that had Degante said "I will change my ways," he would not have been discharged. (Tr. 46:17-20). Degante was not allowed to go back in the production area after he was terminated. (Tr. 212:5-12; 212:16-19).

2. Acting General Counsel Testimony

Jorge Degante testified that prior to May 14, 2012, he spoke with Roberto Silva about the line speed and that he told Silva that he deserved a wage increase. (Tr. 85:7-17). Degante also testified that on Friday, May 11, 2012, he talked to other employees about the line speed, salary

rates, and the number of people on the line. (Tr. 86:10-19). He does not remember the time of day that this conversation took place. (Tr. 105:18-25). However, he testified the entire conversation took place within a span of only ten to fifteen seconds, and that during those same ten to fifteen seconds, Degante and the other employees came to a conclusion to have a labor strike. (Tr. 86:10-87:19; 106:4-5; 108:4-7). Degante further testified that on Saturday May 12, 2012, he met with between five and ten employees who asked him “Carnal, are we going to strike?” (Tr. 87:20-88:16). He testified that he told these employees that they would strike on May 14, 2012, at ten o’clock sharp. (Tr. 89:2-9; 111:17-21). He claims that in response to an employee’s question as to what would be the “signal” to strike that he said there would be no signal; they should “just watch the clock and at ten o’clock sharp, that is the signal.” (*Id.*).

Degante also testified that he took his morning break at 9:15 am on May 14, 2012. (Tr. 89:22-23). He sat by himself for most of the break, and the only person he talked to was Susana Salgado. (Tr. 89:22-90:1). He claims he told her about the planned strike at 10 am during this morning break. (Tr. 90:2-18).

After the break was over, at 9:30 am, Degante went back to work for a while and then was informed by his supervisor, Saturnino Mora, that Garcia wanted to talk to him. (Tr. 90:19-91:2; 94:17-19; 109:9-15). He went to the supervisors’ office where Correa and Garcia were waiting for him. (Tr. 91:7-12). On his way to the supervisors’ office, he did not speak to nor make any gestures toward any other employees prior to arriving at the supervisors’ office. (Tr. 111:7-10). Not a single person testified that they saw Degante leave the line. Not a single person testified that they didn’t know what to do about the planned strike because they couldn’t see Degante or know what he was doing. Not a single employee left the production floor at 10:00 am on Monday, May 14, 2012.

Degante arrived in the supervisors' office sometime after Zamora had been escorted out of the building. Although no specific time of his arrival in the office was noted, it was sometime after 9:40 am. (Tr. 40:18-23). Garcia asked Degante to sit down but he declined the offer. (Tr. 91:15-17). Degante asked why he was called into the office. (Tr. 91:18-19). According to Degante, Garcia replied that Degante should tell him what he was doing and Degante replied that he wasn't doing anything. (Tr. 91:18-21). Degante claimed Garcia replied that Degante was the one that is provoking or agitating people, or in Spanish the "alborotando," and Degante replied that he was not. (Tr. 91:18-92:11). Degante and Garcia then discussed wages and Degante expressed that he was not happy with his wages because he is always moved from table to table and is willing to do his work. (Tr. 92:13-18). Degante said Garcia then asked one more time if Degante was sure that he was not agitating people and Degante responded "no." (Tr. 92:19-22). Garcia then terminated Degante. (*Id.*). Degante looked to Correa and he reiterated that Degante had heard Garcia and that he was terminated. (Tr. 93:10-16). Degante claims he replied that this was not fair and that Garcia told him that someone had told him that Degante was the leader of the strike. (Tr. 93:17-21). Degante replied that he needed to prove that and Garcia replied that he needed to leave his stuff because he was fired. (Tr. 93:22-25).

Degante further testified that he was escorted out of the office by two security people. (Tr. 94:1-9). Degante denied that anything was said during his meeting about being tardy, following instructions of supervisors, or acknowledging work rules or procedures. (Tr. 94:14-95:11; 108:24-109:8).

F. Susana Salgado

It is undisputed that Salgado was on the bridge or catwalk the morning of May 14, 2012, during production time without the permission of her supervisor. (Tr. 130:9-11; 130:17-131:1). This is true despite the fact that she was aware that there was a work rule that employees need to

ask their supervisor for permission to leave the line, including to use the restroom. (Tr. 131:2-7). Susana Salgado was also terminated on May 14, 2012.

1. Respondent's Evidence

Prior to May 14, 2012, Salgado had regularly left her work station without permission. (Tr. 232:11-14). The fact she did so on an almost daily basis was reported to Garcia by Salgado's supervisor, Alejandro Varela. (Tr. 54:21-56:12).

The morning of May 14, 2012, Garcia noticed that Salgado was away from her workstation during working time. He specifically testified he saw her walking on the catwalk, which goes over the production floor and is not near Salgado's workstation. (Tr. 48:18-49:8; 75:23-25; 76:22-77:2). Garcia wanted to ask Salgado if she had asked permission to leave her workstation for the time she was on the catwalk. (Tr. 77:7-10). Salgado's meeting took place in the locker room adjacent to the supervisors' office. (Tr. 47:19-22; 75:21-22). Varela, Salgado's supervisor, brought Salgado to this location and left. (Tr. 78:5-7). Correa first spoke to Salgado as Garcia was initially on the other side of the door but joined the meeting shortly. (Tr. 49:9-19; 78:8-19). Correa asked Salgado why she was leaving her workstation without first asking permission from her supervisor. (Tr. 49:9-16). Salgado replied that she saw others leaving their workstations without permission so it was okay for her to do the same. (*Id.*). When Garcia came into the meeting, Garcia told Salgado that she needed to ask her supervisor for permission before leaving her workstation. (Tr. 49:17-50:1). Salgado again replied that other people were doing it so she could too. (*Id.*). This exchange occurred repeatedly—Correa would say that Salgado needed to ask permission before leaving her workstation and she would reply that she could do it because other people were doing it. (Tr. 50:5-21; 78:20-79:24). Because Salgado would not acknowledge that she was doing something improper, Correa told her that if she didn't want to follow instructions that all employees need to follow, she no longer had a job. (Tr. 50:16-21).

At this point Salgado was terminated. (Tr. 51:12-16; 80:4-6). Salgado replied that they were mistreating her and Correa asked her to get her things and go. (Tr. 51:17-23). Salgado was terminated for not following the supervisor's instructions and for not acknowledging that she was not following the Company's policies. (Tr. 52:9-16). Salgado was also not allowed to go back in the production area after she was terminated. (Tr. 212:5-12; 212:16-19).

2. Acting General Counsel Testimony

Prior to May 14, 2012, Salgado testified that she had a conversation about the line speed with her supervisor, Alejandro Varela. (Tr. 119:6-21). Salgado also testified that she found out about the alleged work stoppage from Degante on May 14, 2012, during the morning break. (Tr. 120:13-121:2).

Salgado testified that on May 14, 2012, after the morning break that ended at 9:30 am, but before 10 am, her supervisor, Varela, told her that Correa wanted to see her in the office and she went to the cafeteria and waited for about twenty minutes to a half hour. (Tr. 123:1-10; 127:20-22). After this, Correa came and asked Salgado to go to the supervisors' locker area. (Tr. 123:11-14). Salgado testified that the following were present for the meeting: Correa, Garcia, Varela, and another supervisor. (Tr. 123:15-18). Salgado also testified that Correa said that Salgado was there because she was one of the organizers of the strike, that there was no need for witnesses, and that she was fired. (Tr. 124:5-20). Salgado testified that she requested but was denied the opportunity to speak with human resources and that she was escorted out by a security person. (Tr. 124:21-125:10).

Although Salgado testified that she was called to the supervisors' office prior to 10 am, her testimony is not consistent with her prior sworn statements. During the trial, Salgado testified that at about ten o'clock, there were four supervisors up on the bridge or catwalk. (Tr.

122:18-25).³ In her Supplemental Affidavit taken by the Board, she stated that she “was called in on May 14 after 10:00 a.m. ...” (Tr. 139:22-140:6). She also testified, under oath, in an unemployment compensation hearing in response to the question “What time were you fired,” “I came – I came back at 9:30 and they called me to the office around 10:45 or 11:00. ...” (Tr. 141:25-142:6).

On direct examination Salgado testified that she “never” leaves her working area without asking permission from her supervisor. (Tr. 126:10-16). However, on cross examination she admitted that she and the other employees in her area do not ask permission to go to the bathroom. (Tr. 130:17-131:7).

Salgado denied that she was told she did anything wrong, denied she was told she violated a company rule, denied that she was talked to about leaving her workstation without permission, and denied she said that other employees were leaving their workstations so it was okay for her to leave her workstation. (Tr. 125:11-126:1).

III. ARGUMENT

A. The ALJ Erred In Making Unsupported Assumptions and the Acting General Counsel Failed to Establish His Prima Facie Case To Show That the Three Individuals Were Discharged Unlawfully.

In order for the ALJ to reach the outcome that the three alleged discriminatees were terminated, he had to make unsupported assumptions on top of unsupported assumptions. These assumptions included the following:

- 1) Somebody must have told management about the planned strike.
- 2) The employees actually planned a strike.
- 3) Somebody must have told management that Jorge Degante was the leader of the planned strike.

^{3/} This testimony was refuted by Greater Omaha witnesses. Salgado’s version of the events was not corroborated by any other witness for the Acting General Counsel.

- 4) Somebody must have told management that Carlos Zamora played a significant role in the planned strike.
- 5) Somebody must have told management that Susana Salgado played a significant role in the planned strike.
- 6) Management had to of learned both of the planned strike and that Degante, Zamora, and Salgado were significant players of the strike prior to 9:30 a.m. on May 14, 2012.
- 7) Employees noticed that Jorge Degante was absent from his production line on May 14, 2012.
- 8) Employees noticed that Carlos Zamora was absent from his production line on May 14, 2012.
- 9) Because employees noticed the absence of Degante and/or Zamora, they did not strike at 10:00 a.m. on May 14, 2012.
- 10) Employees on the packing line did not strike at 10:00 a.m. on May 14, 2012 because the production line did not stop.
- 11) Management terminated Jorge Degante, Carlos Zamora, and Susana Salgado in order to prevent the strike.

Assumptions are not evidence. “Reasoned inference” cannot be based on speculation, for speculation is not evidence. Because the Acting General Counsel’s case is based almost entirely on speculation and unsupported assumptions, the ALJ erred in determining that the Acting General Counsel showed that Greater Omaha unlawfully discharged the three employees.

In determining whether an employer unlawfully discharged an employee, the Board utilizes a causation test first adopted in *Wright Line*, 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), and later approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under this test, the initial burden of proof lies with the Acting General Counsel to prove that a substantial or motivating factor for the employer’s challenged decision was prohibited by the

Act. In order to carry his burden, the Acting General Counsel must establish each one of the following elements by the preponderance of the evidence:

- 1) the employee engaged in a protected activity;
- 2) the employer knew of that activity; and
- 3) the employer took adverse action against the employee motivated in substantial part by the employee's protected activity.

See Manor Care of Easton, PA, LLC d/b/a ManorCare Health Services-Easton, 356 NLRB No. 39 (2010); *Continental Auto Parts*, 357 NLRB No. 78 (2011). The Acting General Counsel's burden to prove this evidence is by a preponderance of evidence. *1621 Route 22 West Operating Co., LLC*, 358 NLRB 1, 49 (2012). Only after a prima facie case has been established does the burden shift to the employer to prove that the employee would have been discharged even in the absence of protected activity. *Id.* Where the employer admits no wrongdoing, as is the case here, it is appropriate that the Acting General Counsel retain the ultimate burden of production and persuasion. *See Sam's Club, A Division of Wal-Mart Stores, Inc. v. NLRB*, 160 F.3d 191, 200 fn. 11 (4th Cir. 1998) *vacated on other grounds*, 173 F.3d 233 (4th Cir. 1999).

As described below, the ALJ erred in finding that the Acting General Counsel proved by a preponderance of the evidence that Greater Omaha knew of a planned work stoppage on May 14 or that it discharged each employee motivated in substantial part by the alleged protected activity. The ALJ's ruling is based completely on speculation and unsupported assumption after assumption. Accordingly, the Complaint should be dismissed in its entirety.

1. There is Insufficient Evidence of Greater Omaha's Knowledge of the Planned Strike.

The ALJ goes to great lengths to credit the testimony of the three alleged discriminatees' story that there was in fact a planned strike. However, he does so ignoring the greater weight of

the evidence which shows, even if there was a planned strike, Greater Omaha had no knowledge of it. In determining whether the Acting General Counsel has met his burden of proof, the Board must, of course, consider not only the evidence supporting the Acting General Counsel's position, but the evidence that tends to detract from it. *Sam's Club v. NLRB*, 173 F.3d 233, 239-40 (4th Cir. 1999).

All managers and supervisors involved in this matter testified that they had no knowledge of any alleged strike (Tr. 211-212; 220; 226; 232). Not a single witness testified that they told any supervisor or manager about the planned strike. The only testimony of any strike comes from the three terminated employees who have a vested interest in the outcome, and not one of them testified management somehow knew of any strike. Although other employee names were mentioned during the hearing as having been spoke to about a stoppage on May 14, not a one of them was called to testify about the same, nor support any claim that management "knew" of the plan in advance..

The employees' testimony is speculative and unconvincing. There was no other testimony as to how Greater Omaha had allegedly learned of the planned strike. There was no testimony as to the identity of the "someone" who had allegedly told management about the strike. The greater weight of the evidence—testimony of two supervisors and two managers—shows that Greater Omaha had no knowledge of the planned strike. In order to come to the conclusion that management at Greater Omaha was aware of the alleged strike, the ALJ made an unsupported assumption. He had to simply assume somebody must have told management. This is not evidence.

The ALJ additionally went to great lengths in determining that a strike was actually planned. As the ALJ pointed out, one of the Acting General Counsel's weakest parts of his case

is that no strike actually occurred on May 14, 2012. In order to arrive at his second assumption, that a strike was actually planned, the ALJ had to rely on additional assumptions. Degante testified that just days before May 14, 2012, he had two short conversations with other employees, one of which only lasted ten to fifteen seconds, where they decided to strike on May 14, 2012, at ten o'clock sharp. He also testified the employees agreed there would be no signal for the strike, only that the employees were to "just watch the clock and at ten o'clock sharp, that is the signal (to walk out)." (Tr. 86-89; 105-106; 108; 111). Zamora and Salgado testified that they learned of the strike during their morning break on May 14, 2012, less than an hour prior to their terminations⁴ (Tr. 120-121; 158-159).

In order to come to the conclusion that a strike was in fact planned even though it did not occur, the ALJ assumed that employees planning to strike would have noticed that Zamora and Degante were absent from their production lines.⁵ However, there was undisputed testimony that employees are routinely taken off the production line and sent to the supervisors' office (Tr. 101; 132). Salgado admitted employees are regularly called into the office for random pocket checks, looking for items not allowed on the production floor, and for personal calls such as from a school relating to the employees' children (Tr. 132).⁶ Employees do not pay personal attention when other employees are asked to go to the supervisors' office during the course of a workday (Tr. 101-102). Additionally, in April and May of 2012, Greater Omaha was replacing employees as a result of a letter from the Department of Homeland Security, resulting in numerous

⁴/ Zamora testified that he was told of the strike by his friend Pedro during the morning break (Tr. 158-159). Pedro was not called as a witness to corroborate this testimony.

⁵/ This is the only way to explain why employees did not strike because it is undisputed that the "signal"—the clock striking 10:00 a.m.—did in fact occur on May 14, 2012.

⁶/ In fact, Salgado testified that when she was asked to go to the supervisors' office on May 14, 2012, she thought she was being called in because one of her children was ill at school (Tr. 132).

employees being called to the supervisors' office (Tr. 28; GC Exh. 2). Thus, an employee being asked to go to the supervisors' office was not an odd occurrence. This testimony shows that if any employees noticed any of the three alleged discriminatees were called to the office away from their workstations—and there was no testimony that this was the fact—it is far more reasonable to assume that the reason they were called off the line was for a random check, a personal call, or an immigration issue.

Despite this testimony, the ALJ made the unsupported assumption that at 10:00 a.m. employees who had planned to strike were worried about retaliation if they did so because they would have noticed that Zamora and/or Degante had not returned from the supervisors' office. There was no testimony that any employees saw Degante and/or Zamora leave their workstations. There was no testimony that any employees noticed Degante and/or Zamora were still away from their workstations at 10:00 a.m. There was no testimony that any employees attached in significance to the absence of Zamora and/or Degante from their workstations. Not a single employee was called to testify that they saw Degante, Zamora, or Salgado leave the line and that because of that fact they decided not to observe the pre-determined signal to strike. Of 400 employees, not one testified they saw any of the three leave the line, or that if they had seen them leave, that such departure caused them to decide not to walk out. Salgado, who was the last to be discharged that day, testified that she did not see either Zamora or Degante leave their workstations after the morning break on May 14, 2012 (Tr. 143). Furthermore, Zamora and Degante's workstations were not near each other (R. Exh. 3). There is also not a shred of evidence that Zamora had any role in planning any stoppage or that employees looked to him as a leader. He admitted he knew nothing about it until the morning break on May 14. The ALJ's

assumptions are speculation, not evidence. His findings are unsupported and inconsistent with the evidence presented at trial.

The ALJ additionally made an incredible assumption that it would have been “difficult” for the employees on the packing line to leave their workstation because the production line continued to run on May 14 at 10:00 a.m. to support his conclusion that a strike had in fact been planned. That would be the entire point of a work stoppage...to stop work during production!

Degante, the alleged leader of the strike, testified that the strike was to have no signal, but rather employees were just to watch the clock and leave their workstations at 10:00 a.m. sharp (Tr. 88-89; 111). Salgado testified that after she learned about the strike during her break on May 14, 2012, she mentioned it to the other employees at her table. She testified that the other employees stated that they already knew about the strike. (Tr. 121). There was no testimony that the packing line was only going to strike if the production line stopped.⁷ There was no testimony by the other employees at Salgado’s table corroborating her story. As noted, the only signal testified to regarding the strike was the clock striking 10:00 a.m. There was no testimony that the production line stopping was the signal for the strike. The ALJ’s assumption is unsupported, unreasonable, against the greater weight of the evidence, and is not evidence.

⁷/ Salgado’s testimony as to her response to Degante informing her of the strike is hardly evidence that the entire pack-off line would have waiting for the production line to stop before striking. Furthermore, her testimony specifically states that the packers would stay behind, not that they would strike.

Q: What did you say?

A: I said, “That is fine. If the knife workers are going to stop, the line is going to stop, then what are we going to do? The packers are staying behind.”

(Tr. 121). As noted, Salgado testified that employees already knew about the strike prior to her mentioning it.

2. There is Insufficient Evidence that the Terminations were Motivated by an Alleged Planned Strike.

As there is no evidence that Greater Omaha had any knowledge of the alleged strike or work stoppage, there is no evidence that Greater Omaha had an unlawful motive in terminating the employees. Unlawful motive is a critical element of proof in an unlawful discharge matter. Here, there is a severe lack of evidence to support a claim of an unlawful motive.

The ALJ went out of his way to find additional protected activity by each alleged discriminate. Zamora's additional protected concerted activity was walking off his job with other employees to protest the speed of the product line in April 2012. Degante's was his complaint to supervisor Robert Silva about the speed of the production line and his compensation.⁸ Salgado's was her complaints to her supervisor about the speed of the production line. However, even after identifying all of these allegedly protected acts, the ALJ failed to find that any were a motivating factor in the employees' terminations. For good reason, as there is no evidence that any of these alleged acts motivated, in any part, Greater Omaha's decision to discharge of any of the three alleged discriminatees.

Indeed, the ALJ's ultimate conclusion was that the employees were discharged in order to prevent the strike from occurring—a reason unrelated to any of the above alleged additional protected activities. In order to arrive at this conclusion, in addition to the unsupported assumptions discussed above, the ALJ had to assume that somebody must have told management

⁸/ Degante's testimony shows that his alleged protected act was not concerted. He requested more compensation for himself. (Tr. 85). This is not a "concerted" activity. Employee activity is protected under Section 7 of the Act when it is "concerted and engaged in for the purpose of 'mutual aid or protection.'" See *Holling Press, Inc.*, 343 NLRB 301, 302 (2004). An individual complaint regarding salary is not concerted activity. *Ryder Tank Lines, Inc.*, 135 NLRB 936, 938 (1962). See also *Meyers Industries (Myers II)*, 281 NLRB 882 (1986), affd. Sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988) ("In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.") (citations omitted).

that Degante was the leader of the planned strike and that Zamora and Salgado played a significant role in the planned strike. There was no testimony by any employee stating that they told management about any strike or any of the three alleged discriminatees' alleged involvement in the strike. The only evidence comes from the alleged discriminatees themselves. They allege that the reason they were discharged was in retaliation for the alleged planned strike.⁹ The ALJ had to make the unsupported assumption that someone must have told management about each of the alleged discriminatees' alleged involvement with the strike.

The ALJ also relied upon the timing of discharges as evidence of Greater Omaha's motive. However, the timing in this case and the relationship of the employees doesn't make sense. Everything would have to have fallen into place perfectly, and all of the ALJ's unsupported assumptions proven true, in order for the Acting General Counsel's story to pan out. Somebody had to tell management about the strike. Somebody had to tell management that Degante, an employee on the trim line, was the leader of the strike. Somebody had to tell management that Zamora, an employee on the loin line, played a significant role in the planned strike. Somebody had to tell management that Salgado, an employee on the packing line, also played a significant role in the planned strike. All employees are on different lines and do not have any relationship to one another. It is incredible to believe that Greater Omaha found all of the information out, chose three employees to terminate—two of which themselves had just learned about the alleged strike less than an hour prior to their termination—in order to stop the alleged strike. The ALJ had to rely upon nonexistent evidence and assumption upon assumption to find that Greater Omaha's decision to discharge each of the three employees was motivated by the alleged strike. The evidence that was actually presented in this case clearly leads to the

⁹/ Importantly, at no time during his testimony did Zamora indicate that anything was said during his counseling where he was discharged about the strike (Tr. 159-161).

contrary outcome. The Board “is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.” *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). The greater weight of the evidence clearly shows that Greater Omaha was not aware of any alleged strike and the discharges of the three employees were not motivated by the alleged strike.

Any evidence that can be credited to the Acting General Counsel as evidence of Greater Omaha’s motive in discharging the three employees is merely a suspicion at best. The Board has observed that “[w]hile the General Counsel may rely on circumstantial evidence from which an inference of discriminatory motive can be drawn, the totality of circumstances must show more than a ‘mere suspicion’ that union activity was a motivating factor in the decision.” *Cardinal Home Products*, 338 NLRB 1004, 1010 (2003) (citation omitted). As discussed, the ALJ had to come up with at least eleven of his own assumptions, which were not supported by the record as a whole, to find that the Acting General Counsel’s case was more than a suspicion. The ALJ’s assumptions are not evidence and the Acting General Counsel’s case based entirely upon speculation fails to establish by a preponderance of the evidence that Greater Omaha unlawfully discharged these employees.

Furthermore, the ALJ ignored evidence which showed that Greater Omaha knew how to lawfully treat protected activity. Less than five years ago, in 2008, Greater Omaha experienced a work stoppage where the entire production floor, around 400 people, walked away from the production line and went to the cafeteria (Tr. 215-216). After three managers, including the Owner, talked to the employees, the employees went back to work (Tr. 217). No employees were discharged or disciplined as a result of this work stoppage (Tr. 217).

More recently, in early to mid-April 2012, Correa had a conversation with ten or twelve employees, including Zamora, who had left their production line and went to the cafeteria (Tr. 29; 165-166). At the time the employees left their production line, they mentioned that the production line was going too fast (Tr. 29). Correa asked the employees to go back to work and told them he would meet them at the end of the day (Tr. 29; 167). The employees went back to work (Tr. 29; 167). Correa met with these employees after work (Tr. 29). During this meeting, Zamora stated that he thought he should be making more per hour because other companies were paying more. Correa replied that when all things are considered, their compensation is comparable or better than other companies taking into account, benefits, insurance costs, and allowance for gas. (Tr. 30). Correa additionally told employees that there was an open door policy at Greater Omaha and that if they had concerns they could discuss these issues with a supervisor, the Plant Manager, or the Floor Manager (Tr. 31-32). Once again, not a single employee was disciplined or discharged for leaving their production line or talking to management (Tr. 151; 167; 215).

Clearly, management at Greater Omaha knew how to deal with protected activity and there is absolutely no evidence to suggest it would not have treated a recurrence of protected concerted activity as lawfully as it had done in the past. Indeed the only admissible evidence demonstrates that these employees would not have been fired for engaging protected concerted activity. There is not one shred of evidence to suggest that Greater Omaha management had in May of 2012, determined it could no longer respect employees' right to engage in protected concerted activity. There is not one shred of evidence to suggest that business circumstances had changed such that Greater Omaha could no longer tolerate the very conduct it had allowed and

respected for several years without recrimination. Thus, there is no evidence of an unlawful motive and the Acting General Counsel has failed carry its burden of proof.

B. The ALJ Erred in Relying on Greater Omaha's Reasons for Discharging the Employees to Complete the Acting General Counsel's Case.

The ALJ may not have agreed with Greater Omaha's reasoning for discharging each of the three employees. However, the ALJ's displeasure with the reasoning alone is not evidence of unlawful actions. "In the absence of a showing of antiunion motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all. Whether other persons would consider the reasons assigned for a discharge to be justified or fair is not the test of legality under Section 8(a)(3)." *Borin Packaging Co.*, 208 NLRB 280, 281 (1974). The ALJ inappropriately inserted his own judgment in the place of management criticizing Greater Omaha for the way in which Greater Omaha conducts its counseling, the reasons for counseling, and the level of discipline called for in each situation. That is not the province of the ALJ.

The Board has determined that decisions affecting an employee's condition of employment may be based on an employer's exercise of business judgment and that judges should not substitute their business judgment for that of an employer. *Lamar Advertising of Hartsford*, 343 NLRB 261 (2004). Further, the Board has emphasized that the crucial factor is not whether the business reason was good or bad, but whether it was honestly invoked and was in fact the cause of the action. *Framan Mechanical, Inc.*, 343 NLRB 408 (2004) (quoting *Ryder Distribution Resources*, 311 NLRB 814, 816 (1993)).

Each of the employees was terminated for his or her insubordination and conduct during their counseling meetings on May 14, 2012. The employees' misconduct provoking their May 14, 2012 meetings with management and terminations is clear from the testimony. Susana Salgado acknowledged that she was aware of the work rule that employees must ask permission

before leaving their work stations (Tr. 131). She admits to leaving her line without permission on a regular basis (Tr. 130). Additionally, her supervisor testified that she regularly left her work station without permission, and that he had counseled her about that behavior repeatedly (Tr. 232-233). Salgado testified—contrary to Garcia and Correa—that she did not argue during her meeting that other employees were leaving their stations so she could do the same (Tr. 125-126). However, she conceded this exact point during the trial:

Q: Okay. But when you were on the bridge, you hadn't asked permission to go to the bathroom?

A: We do not ask permission to go to the bathroom, because between the five people that work on that table, we relieve – we give a break to the one that needs to go to the bathroom and we cover for them.

Q: So all of the employees in your area don't ask permission to use the restroom, do they?

A: They don't give you a break. Between like the five people at our table, we have to give ourselves a break.

Q: You know that there is a work rule that you are supposed to ask your supervisor for permission to use the restroom, though, right?

A: Yes, but when we need to go to the bathroom, the supervisor is not around. He is always busy. He is supervising other people.

(Tr. 130-131). The ALJ's conclusion that Greater Omaha did not have a policy requiring an employee to ask permission prior to leaving their workstation to use the restroom is absurd. It is undisputed that Greater Omaha has a policy that requires employees to obtain permission before leaving their workstation.¹⁰ This policy applies to any reason an employee may need to leave his or her workstation. As explained above, Salgado was called into the supervisors' office to be counseled for breaking this very rule. Her supervisor also testified that she repeatedly broke this

¹⁰/ Although not alleged otherwise in the Complaint, Greater Omaha submits that its work rule requiring employees to obtain permission before leaving their workstation is lawful. See *TT&W Farm Products, Inc. d/b/a Heartland Catfish Co., Inc.*, 358 NLRB No. 125 (2012) (finding rules prohibiting employees from leaving their workstations without permission lawful).

rule and he had counseled her about her behavior (Tr. 232-233). In fact, as exhibited by Salgado's testimony outlined above, she admitted she was aware of the policy that she was required to ask her supervisor for permission to use the restroom (Tr. 131). The ALJ once again made a completely unsupported assumption, contrary to the evidence presented at trial, that Greater Omaha lacked such a policy. The evidence clearly invalidates this erroneous assumption.

Additionally, Zamora never testified that Correa or Garcia said anything about the alleged work stoppage during the meeting where he was terminated (Tr. 160). There is no evidence, beyond that of the three who seek backpay, that the employees' terminations were motivated by any protected conduct. In deciding what motivated the employer, the Board may not simply declare that the employer's stated reasons for disciplinary action are pretextual, rather the Acting General Counsel must put forth substantial evidence that anti-union animus motivated the employer's action. *Sam's Club, A Division of Wal-Mart Stores, Inc.*, 160 F.3d at 201 (citing *NLRB v. Instrument Corp. of Am.*, 714 F.2d 324, 327-28 (4th Cir. 1983)).

Furthermore, the ALJ's reliance on the discharges of the three other employees who were discharged for similar reasons to that of the three alleged discriminatees cannot support the Acting General Counsel's case. The evidence presented to satisfy the General Counsel's initial burden must be analyzed separately from the evidence presented in the Respondent's defense. *Pace Industrial*, 320 NLRB 661 (1996), *enfd.* 118 F.3d 585 (8th Cir. 1997). This evidence was submitted by Greater Omaha and shows that Greater Omaha has discharged other employees for similar reasons. Indeed, this evidence supports Greater Omaha's position that even if the Acting General Counsel satisfied its initial burden of proof under *Wright Line*, Greater Omaha proved that it would have discharged the employees even in the absence of protected activity. The

differences in the documents involved in those cases with those in the present case do not negate Greater Omaha's defense. The employer's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

C. The ALJ Erred in Crediting the Three Alleged Discriminatees' Testimony.

In addition to making unsupported assumptions, the ALJ additionally erred in crediting the three alleged discriminatees' testimony. The employees' testimony relied upon by the ALJ is uncorroborated, inconsistent, and contradicted by at least two witnesses.

Susana Salgado's testimony is almost entirely inconsistent. She testified the following relating to the timing of being asked to the office when questioned by Judge Amchan:

Q: You said that you – if I remember, Mr. Varela told you to go to the office and you went to the cafeteria; is that correct?

A: Yes.

Q: Do you know, was that before ten o'clock? Do you know what time that was?

A: Yes, it was before ten o'clock.

Q: It was not ten o'clock, yet?

A: We had to wait in the cafeteria because Samuel was busy upstairs, and he wouldn't let us in. We had to wait until he would ask me to go in.

Q: Who was "we?" You said "we." Who was "we?"

A: My supervisor and I.

(Tr. 127-128). However, prior to this questioning, during the hearing, Salgado testified that she had seen supervisors on the catwalk around ten o'clock (Tr. 122). Additionally, in Salgado's NLRB Supplemental Affidavit, she stated "I was called in on May 14 *after* 10:00 a.m., but the work stoppage did not happen because they had already fired Jorge and Carlos, and because Jorge was starting everything, and as the leader, he was fired before 10:00 a.m., and that is why

they didn't do nothing" (Tr. 139-140) (emphasis added). She admitted, however, she had no knowledge that Zamora and Degante had been terminated until later that afternoon (Tr. 142). Nor could she have known earlier, for both Zamora and Degante went directly from the supervisors' office to the employee exit without returning to the production floor or any area where they could be seen by or communicate with other employees (Tr. 212). As discussed above, there is not one shred of evidence that any employees knew, prior to 10:00 am that *anyone* had been fired. Furthermore, Salgado testified in an unemployment insurance hearing, under oath, in response to the question, "What time were you fired" she stated "I came – I came back at 9:30 and they called me to the office around 10:45 or 11:00. That is when I was terminated" (Tr. 141-142).

Carlos Zamora testified that he was speaking in a normal voice at the time he was terminated and that he did not get angry. However, Kek Malwal, a guard who works for a third party, testified that when Zamora exited the office, he was mad and shouting (Tr. 183). Malwal also testified that Zamora threw down his hard hat and work belt (Tr. 183). Malwal stated that after he escorted Zamora out to the parking lot, he reported to his supervisor the following:

Q: Did you tell anyone about what happened that day with Zamora?

A: Yeah, I just went inside to the office, you know. I talked to my supervisor. I explain, I say this guy was real upset, you know. I was scared the way they was talking, you know, and they were shouting in Spanish, you know. I think they threat each other, I don't know. But I was scared, you know, with the way they was talking, you know. So I explain that I was real upset, you know, what happened, you know.

Tr. 185-186). After escorting Zamora to the parking lot, an incident report was written relating to what Malwal reported to his supervisor regarding the events surrounding his escort of Zamora.

(See R. Exh. 2, Tr. 189). The incident report provides the following:

At 9:37 am on May 14, 2012, I arrived at the Supervisor's office on the main floor for a termination escort.

I could see that Mr. Carlos Zamora was very upset as he had thrown his hard hat & utility belt onto the floor. I could not understand what was being said as I do not speak/understand Spanish fluently. By the expression on his face, he was not happy.

I stepped between Correa & Zamora & told Zamora that he needed to come with me. Again, he was shouting at Correa in Spanish in a threatening manner. I escorted Zamora out of the office & walked him to his vehicle.

Before he left the Greater Omaha Packing Co. campus, I asked for his Parking permit & Employee ID. He gave them to me without any trouble.

(R. Exh. 2). The security guard's testimony relating to Zamora's termination is wholly consistent with Correa and Garcia's testimony as to what transpired, and directly refutes Zamora's testimony (Tr. 38-39; 66-69).¹¹ Correa and Garcia both testified that Zamora became very angry and actually threatened the life of Correa. His termination occurred because of his behavior in the meeting and for no other reason. Additionally, contrary to Salgado and Degante, Zamora testified that he and the rest of the plant took their break on May 14, 2012, at 9:00 am rather than 9:15 am, and returned to work at about 9:15 am. (Tr. 158-159; 170-171).

Degante testified that he talked to a few employees for about ten to fifteen seconds about a labor strike on Friday, May 11th on the loin line, which was the line to which Zamora was assigned (Tr. 86-87). However, Zamora testified that he never learned of the planned labor strike until the morning break three days later on May 14, 2012, when a friend of his named Pedro told him of the plan (Tr. 158-159). As noted earlier, neither Pedro nor any other employee who was supposedly in on the discussions for the proposed strike appeared and testified. Most certainly, no strike actually occurred. Degante also testified that he talked to five to ten employees on

^{11/} The ALJ made yet another assumption, this time in direct contrast to an uninterested third party, Malwal the security guard. The ALJ assumes that Malwal also escorted out Degante in direct contrast to Malwal's testimony that Zamora was the only person he escorted out of the plant on May 14. The ALJ additionally assumed that Greater Omaha made the decision to terminate Zamora prior to meeting with Zamora based on the timing of Malwal's testimony. This assumption is neither evidence nor supported by Malwal's testimony. The ALJ simply ignores the consistency of Malwal's testimony with that of Correa and Garcia.

Saturday, May 12th about the labor strike and to Salgado on Monday, May 14th (Tr. 87-90). None of these alleged employees testified.

According to Degante, there was to be no “signal” to commence the walkout. Employees were simply told to “watch the clock.” Significantly, the entire plan was not to be dependent on any action or conduct by Degante or any other employee. Not a single witness testified that they saw Degante, Zamora, or Salgado leave the production floor prior to 10:00 am and that removal caused those employees to abort their planned stoppage. The ALJ’s opinion and the Acting General Counsel’s case are based on speculation which is not admissible evidence, and which was directly refuted by admissible evidence. The inconsistent testimony from these three employees is speculative at best and certainly does not satisfy the burden of the Acting General Counsel to show, by a preponderance of the evidence, that these employees were terminated for unlawful reasons. The ALJ cannot, under the guise of claiming to be making a credibility determination, engage in speculation not supported by evidence, nor assume that which is not supported by the evidence. The Acting General Counsel must prove his case by a preponderance of the admissible evidence, and he failed to do so in this case.

D. The ALJ Erred In Granting Zamora Reinstatement Despite Zamora’s Threatening Actions.

Should the Board adopt the ALJ’s conclusion in this matter, which as explained above it should not, Zamora’s threatening conduct after he was discharged makes him ineligible for reinstatement. After Correa terminated Zamora, Zamora stated “Fuck you and your family,” and threatened to kill Correa and his family saying “I am going to kill you and your family.” (Tr. 38-39; 68-69). Zamora was so angry that security had to be called to escort him from the premises and had to step between Correa and Zamora. (Tr. 181-183; R. Exh. 2). Zamora additionally physically threw down his hard hat and work belt after his termination. (Tr. 38-39; 68; 183-184;

189; R. Exh. 2). Because of this threatening conduct, Zamora is not entitled to reinstatement. See *Human Services Projects, Inc. d/b/a Teen Triumph*, 358 NLRB No. 2 (2012) (finding that threatening conduct and behavior toward another employee post-discharge made employee ineligible for reinstatement).

IV. CONCLUSION

For the reasons discussed above, Greater Omaha respectfully submits that the ALJ's finding that Greater Omaha violated Section 8(a)(1) of the Act in discharging Carlos Zamora, Jorge Degante, and Susana Salgado, is not supported by the record herein. The ALJ based his opinion upon speculation and assumptions not supported and/or refuted by record evidence, matters not in evidence, and the misapplication of the law. Accordingly, Greater Omaha respectfully requests the allegations contained in the Complaint be dismissed.

Dated this 7th day of February, 2013.

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By:



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of February 2013, the above and foregoing was emailed to the following:

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