UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE

MARQUEZ BROTHERS ENTERPRISES, INC.

and Case 21-CA-078519

TEAMSTERS LOCAL 630, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Ami Silverman, Esq.,
for the Acting General Counsel.
Jonathan A. Siegel, Esq., & Matt Bennett, Esq. (Jackson Lewis, LLP),
for the Respondent Company.
Renee Sanchez, Esq. (Wohlner Kaplon Phillips Young & Cutler),
for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. This is the second of two recent cases involving alleged unfair labor practices by Marquez Brothers Enterprises (MBE), a distributor of Mexican-style grocery and perishable-food products in Southern California. In the prior case, the complaint alleged, and the Board found, that the Company committed several violations of Section 8(a)(1) and (3) of the Act in response to a 2010 organizing campaign among the perishable-food workers, including discriminatorily discharging the two drivers (Alfonso Mares and Javier Avila) who most actively supported union representation. *Marquez Bros. Enterprises,* 358 NLRB No. 61 (2012), petition for review filed No. 12-1278 (D.C. Cir. July 2, 2012). In this case, the complaint alleges that the Company committed several additional 8(a)(1) and (3) violations in early 2012, including unlawfully suspending and/or discharging three other drivers (Luis Ramos, Brian Guzman, and Omar Martinez) shortly after they requested a raise and began participating in another organizing campaign.[1]

---

[1] The original charge was filed by Teamsters Local 630 on April 10, 2012, and subsequently amended on May 29 and June 22, 2012. The General Counsel issued the complaint on March 27, 2013, and the Company filed an answer on April 9. Commerce jurisdiction is uncontested and well supported by the admitted complaint allegations. Although the Company challenges the proceeding on the ground that the Board lacked a valid quorum at the time the General Counsel investigated and prosecuted the allegations (citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 133 S.Ct. 2861 (June 24, 2013)), the Board has rejected similar arguments in numerous other cases. See, e.g., *Bloomingdale's*, *Inc.,* 359 NLRB No. 113 (2013); and *Art Institute of California –Silicon Valley*, unpub. Board order issued May 14, 2013, 2013 WL 2035011. Moreover, the issue has essentially become moot, as the Board now has a full

A 4-day hearing on these additional allegations was held on May 20–23, 2013, in Los Angeles. The General Counsel and the Company subsequently filed posthearing briefs on July 26. After carefully considering the briefs and the entire record,[2] for the reasons set forth below I find that, while the record supports some of the allegations, the General Counsel failed to establish by a preponderance of the evidence that the suspensions and/or discharges of Ramos, Guzman, and Martinez were unlawful under the applicable standards.[3]

I. FACTUAL BACKGROUND

As set forth in the Board's prior decision, the 2010 organizing campaign among the Company's perishable-sales drivers and merchandisers began in May and eventually culminated in a Board-conducted election on November 19, which the union (Teamsters Local 63) narrowly lost 17 to 20, with 1 challenged ballot. Mares, who initially contacted the Teamsters, was discharged in June, and Avila, who subsequently revived the campaign after the Company cut the drivers' pay rates, was discharged in December, shortly after the results of the election were certified.[4] As indicated above, the Board found that both discharges were unlawfully motivated by the drivers' prounion activity. The Board also found that one or more company supervisors committed certain other serious preelection unfair labor practices; specifically, interrogating and threatening Avila by telling him he was "burnt" with "La Señora" (Elizabeth Lara, the office manager, wife of Company Vice President Francisco Lara, and sister of co-owners Gustavo and Jaime Marquez) and on "the black list," and attempting to coerce the drivers to revoke their union authorization cards.

The relevant events here regarding Ramos, Guzman, and Martinez began a little over a year later, in or around late January 2012, at a company sales meeting with the drivers. The Company held such meetings regularly, as the perishable-sales drivers at that time made both sales and deliveries, for which they received a $10 hourly wage and ½-percent sales commission. At this particular meeting, Vice President Francisco Lara and Route Operations Manager Francisco Lopez were in attendance, as well as Manny Cuevas, whom the drivers

---

complement of five Senate-confirmed members and it would make no practical sense to require the case to be reinvestigated and relitigated.

[2] Tr. 857, line 24, is corrected to say "THE WITNESS."

[3] Factual findings are based on the record as a whole, including but not limited to the transcript pages and exhibits specifically cited. In making credibility findings, all relevant and appropriate factors have been considered, including the demeanor and interests of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences which may be drawn from the record as a whole. I have also taken into account, where appropriate, language and translation difficulties. See *Daikichi Corp*., 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). See also *Big Ridge, Inc*., 358 NLRB No. 114, JD. slip op. at 1 fn. 3 (2012).

[4] No timely election objections were filed.

understood to be an executive from the San Jose corporate office.[5] At some point in the middle of the meeting, after several new supervisors had been introduced, Guzman spoke up and asked Cuevas whether the drivers could get a raise. Ramos also spoke, complaining that the Company was always promising them better pay, but never followed through. Cuevas responded that the sales meeting was not the appropriate time to address the matter, and that the drivers should take their concerns up with Francisco Lara.[6]

Within a few days thereafter, Guzman and Ramos were each separately called upstairs for a meeting with Francisco Lara and Lopez. Lopez specifically advised Guzman at his meeting that he had been called in about the way he interrupted the sales meeting by asking for a raise. Speaking in a hostile tone and gesturing with his hands, Lara then told Guzman that if he wanted more money he should work harder or ask for a bigger route. Ramos had a similar experience at his meeting. When he arrived, Lara gave him a sheet of paper indicating that he was actually making more money compared to the previous year. Ramos responded that that was not the problem; the problem was the drivers wanted to get a raise. Appearing frustrated and irritated, Lara replied that if the drivers wanted to make more money, they should sell more product.[7]

About a week later, eight of the drivers, including Ramos, Guzman, and Martinez, decided that they would specifically request an increase in their sales commission from 1/2 to 2 percent, and if the Company refused, they would try again to bring in a union. They initially planned to make their request to Francisco Lara, but on the way to his office, they ran into Lopez, who told them to meet him in the conference room. All eight of the drivers spoke during the meeting. They told Lopez that they were requesting a commission increase, and that they wanted an answer from the Company immediately. Although none of the drivers specifically mentioned their "plan B" (bringing in a union), Martinez, who spoke last, hinted or impliedly referred to it by telling Lopez that, if the Company did not grant them the commission increase, the same thing that happened a year before would happen again.[8]

---

[5] Lopez and both Laras are admitted supervisors and agents of the Company. "The San Jose corporate office" is an apparent reference to Marquez Brothers International (MBI), which, according to Respondent MBE's counsel, operates in Northern California and other locations (Tr. 752). Although the record does not reveal Cuevas' actual title or position with MBE and/or MBI, the Respondent presented no evidence that the drivers' understanding was incorrect.

[6] The foregoing facts regarding the sales meeting are based on the materially consistent and unrebutted testimony of Ramos, Guzman, and Martinez (Tr. 75–79, 164–165, 190–193, 279–281).

[7] Again, the foregoing facts are based on the uncontroverted testimony of Ramos and Guzman (Tr. 79–83, 195–197).

[8] Ramos testified that Martinez referred to what happened "2 years" before (Tr. 85–86), but Guzman and Martinez testified that Martinez said "a year" before (Tr. 202, 284). Given that the 2010 election had been held only 14 months earlier, I find that the difference (both in the testimony and the actual facts) is insignificant. As for whether Martinez ever specifically referred to the union, Martinez testified that he was sure he did so because Lopez, who was not hired by the Company until September 2011, asked him what had happened a year earlier (Tr. 285, 319). However, Ramos, Guzman, and Lopez all testified otherwise (Tr. 85–86, 161, 202, 511–512).

Lopez told the drivers' he would take their request to Francisco Lara, and he did so. Within a few days thereafter, it was announced at another company meeting that the drivers' commission would be increased to 1 percent, effective the previous Monday.[9]

At least some of the drivers were happy with the sales commission increase, including Ramos and Guzman. However, within a few days, both learned, from sources inside and outside the Company, that the Company planned to separate the driver and sales functions, which would mean that some of the current drivers would no longer be doing any sales (or getting any commission in addition to their $10 hourly pay) whatsoever.[10]

In addition, around this same time, an incident occurred at the warehouse bench where the drivers normally congregated after their shift, while waiting for their inventory to be checked by the receiving office. About seven to nine drivers, including Ramos, Guzman, and Martinez, were at the bench talking when Elizabeth Lara walked into the area. A heated conversation ensued, during which Lara reproached the drivers for complaining and making demands. Lara said she wanted to burn them all like fried pork skins, and that if it were up to her she would close the Company and change its name.[11]

---

[9] Francisco Lara testified that the Company decided to immediately increase the sales commission to 1 percent at that time in response to the drivers' request because the Company had already planned to make operational changes in May (separating the sales and driving work), which would be "even better" for them (Tr. 781). However, given the Company's contrary response to Ramos' and Guzman's complaints only a week earlier, it is more likely that it was the large number of drivers who made the request and Martinez' closing comment impliedly threatening another union campaign that were the primary factors in the favorable decision, i.e. the Company hoped to forestall another union campaign, at least until after the planned operational changes had been implemented.

[10] The Company formally advised the perishable-sales drivers of the change and their new assignments (i.e. whether they would be a driver or a salesperson) at subsequent meetings in March. Under the new system, which became effective in May, the salespersons receive a 2-percent commission plus an auto allowance, but no hourly pay, and the drivers are paid $11 per hour, but no commission. There is no allegation in this proceeding that the change, which the Company had previously implemented on the grocery side, was unlawfully motivated by the perishable-sales drivers' protected activity. Nor is there any allegation that the new positions assigned to Ramos (salesperson), Guzman (driver), and Martinez (driver) were unlawfully motivated.

[11] In making the foregoing findings regarding Elizabeth Lara's statements, which are the subject of the alleged 8(a)(1) allegations in this case, I have given substantial weight to the testimony of Ramos, Guzman, and Martinez (Tr. 92–96, 211–214, 269–270, 290–293). Although they are not disinterested witnesses, and like certain Company's witnesses I have not credited them in all respects, there is good reason to believe their testimony in this respect. There is no dispute that the incident occurred or that they were present, and their testimony regarding Lara's specific statements is consistent and entirely believable given the previous events and history and Lara's position as office manager (her direct reports include Human Resources (HR) Assistant Zulema Pintado) and familial connections within the Company. Further, contrary to the Company's contention, an adverse inference cannot be drawn from the General Counsel's failure to also call two other identified perishable-sales drivers who were

The first union organizing meeting was held around this same time, on March 15. About 10 employees attended, including Ramos, Guzman, and Martinez. All three also attended the next meeting, on March 29, and were selected along with another driver to be on the organizing committee.

Ramos was discharged several days later, on April 3, assertedly because he had violated multiple company policies 4 months earlier in connection with a particular sale of perishable food products to an unidentified individual who did not have an account with the Company (Jt. Exh. 5). Guzman was suspended indefinitely without pay the same day, assertedly because he had been accused of engaging in sexual harassment and creating a hostile work environment for coworkers. He was discharged 3 days later, on April 6, the day after a third union meeting and the same day the Union served the Company with the election petition, assertedly because the Company's investigation concluded that he had, in fact, engaged in such behavior, and because he refused to cooperate in the investigation. (Jt. Exhs. 11, 13, 14.) Martinez was given a 1-day suspension on April 6 as well, assertedly for also failing to cooperate in the investigation of the allegations against Guzman. He was discharged the following Monday, April 9, assertedly for threatening a manager (Controller Arturo Perfecto) at the April 6 meeting when he was informed of the suspension. (Jt. Exhs. 23, 24).

II. ANALYSIS

The General Counsel alleges, and I find, that Elizabeth Lara's above-described statements to the drivers at the bench would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their protected right to concertedly complain about wages, hours, and working conditions, and therefore violated Section 8(a)(1) of the Act. See, e.g., *Mid-South Drywall Co*., 339 NLRB 480, 481 (2003); *Equipment Trucking Co*., 336 NLRB 277 (2001); and

---

present (Huziel de la Rocha and Eduardo Orihuela). See *Torbitt & Castleman, Inc*., 320 NLRB 907, 910 fn. 6 (1996), affd. on point, 123 F.3d 899, 907 (6th Cir. 1997) (unlike managers, employees cannot reasonably be expected to favor one party over another). Rather, this is but one factor in evaluating the weight of the evidence. *C&S Distributors, Inc*., 321 NLRB 404 fn. 2 (1996). Finally, the testimony of the Company's three witnesses regarding the incident—Elizabeth Lara, Sales Supervisor Efrain Diaz, and grocery driver Juan Valencia—is entirely unbelievable. According to their testimony, Ramos instigated and engaged in improper and threatening behavior during the confrontation, while Lara did and said virtually nothing. However, it is undisputed that the conversation was quite lengthy, lasting 20–30 minutes (Tr. 96, 582). And there is no documentary or other corroborating evidence that Lara or Diaz ever separately reported the incident to HR Assistant Pintado or other managers, as they claimed (Tr. 593, 761–763), or that Pintado or any other manager investigated the incident or recommended or imposed any disciplinary action against Ramos for his alleged improper and threatening conduct that day. Compare the Company's subsequent investigations and disciplinary actions involving the three alleged discriminatees, discussed infra. Moreover, the testimony of Supervisor Diaz (who, like Lara, is not a disinterested witness) and Valencia contains other obvious inconsistencies that likewise cast serious doubt on whether they were actually present during the entire conversation, heard the entire conversation, and/or truthfully recounted at the hearing everything they heard Lara say.

Southwire Co., 282 NLRB 916, 918 (1987). See also *Fixtures Mfg. Corp*., 332 NLRB 565 (2000).

As indicated above, the General Counsel also alleges that the suspensions and discharges of Ramos, Guzman, and Martinez were unlawful. Specifically, the General Counsel alleges that, notwithstanding the Company's stated reasons for the adverse actions, all three were actually suspended and/or discharged because of their wage complaints and demands and/or their union activity, in violation of Section 8(a)(1) and (3) of the Act.

The appropriate test for evaluating these allegations is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under that test, the General Counsel must prove by a preponderance of the evidence that the employee's union or protected concerted activity was a substantial or motivating factor in the adverse action. The General Counsel can make a sufficient initial showing in this regard by demonstrating that (1) the employee engaged in union or protected concerted activity and the employer knew it, or the employer believed or suspected that the employee engaged in or was likely to engage in such activity, and (2) the employer had animus against such activity. If the General Counsel makes the required initial showing, the burden shifts to the employer to prove, by a preponderance of the evidence, that it would have taken the same action even in the absence of the employee's union or protected concerted activity. See, e.g., *Saigon Gourmet Restaurant, Inc*., 353 NLRB 1063, 1065 (2009); *Consolidated Bus Transit,* 350 NLRB 1064, 1065 (2007); *Multi-Ad Services, Inc*., 331 NLRB 1226, 1240 (2000), enfd. 255 F.3d 363 (7th Cir. 2001), and cases cited there. See also *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243 (8th Cir. 1996).

Applying the foregoing analysis, for the reasons set forth below I find that the General Counsel made a sufficient initial showing with respect to the suspensions and/or discharges of all three drivers, but that the Company adequately established that it would have imposed the same discipline even absent their union and other protected concerted activity.

A. Ramos

The General Counsel clearly made a sufficient initial showing with respect to Ramos. As indicated above, Ramos concertedly complained about the drivers' wages at the January 2012 sales meeting and joined with the seven other drivers in subsequently demanding a commission increase. Further, the Company, including Francisco Lara, the ultimate decision maker, obviously knew of Ramos' wage complaints and demands. Lara met individually with Ramos to discuss his initial complaint, and Lopez admitted that he advised Lara of the eight drivers' subsequent demand for a commission increase. Although Lara testified that Lopez never told him the names of the eight drivers (Tr. 780), I discredit this testimony as it was not corroborated by Lopez (counsel never asked him) and is inherently improbable. See generally *NLRB v. Howell Chevrolet Co.*, 204 F.2d 79, 86 (9th Cir.), affd. 346 U.S. 482 (1953). In any event, given Ramos' previous complaint, Lara likely would have assumed Ramos' participation.

As for Ramos' subsequent involvement in the union campaign, there is no evidence that the Company knew of either the campaign or Ramos' prominent role prior to being served with the election petition by the Union on April 6. The drivers never mentioned the campaign to any

supervisors or managers, and they were careful not to pass out authorization cards in the presence of any supervisors or managers. However, there is sufficient evidence that the Company believed or suspected that the eight drivers, including Ramos, were likely to contact a union. As indicated above, that was, in fact, the drivers' "plan B" if the Company did not grant their request for a commission increase, and Martinez impliedly warned Lopez of this at the end of the meeting. Again, I find that Lopez would have told Francisco Lara of Martinez' warning (neither denied it), and that Lara would have been well aware what Martinez was talking about. Indeed, as previously noted (fn. 9), this is the most likely true explanation for why the Company immediately granted a retroactive increase notwithstanding its contrary response to Ramos' complaint only a week earlier.

A preponderance of the evidence also establishes the Company's animus towards union activity and the drivers' concerted complaints and demands. As indicated above, both Francisco and Elizabeth Lara expressed their irritation with the drivers' wage complaints, and the latter did so in a manner that was clearly unlawful. Further, the Company's animus toward union activity is well documented by the Board's findings in the prior case involving the drivers' 2010 organizing campaign.

Finally, as indicated by the General Counsel, there are a number of other circumstantial factors that, on their face, support a finding of unlawful motivation. These include the timing of the discharge, the relatively long passage of time between the subject improper sale in December 2011 and the April 2012 discharge, and the absence of any discipline when Ramos reportedly made a similar improper sale to the same individual several years earlier, in 2008.

Nevertheless, the General Counsel's allegations ultimately fail to withstand scrutiny. Ramos' disciplinary offense was plainly a serious one. Even accepting his uncorroborated version of the events—i.e. that he actually sold the perishable-food products at his immediate supervisor's direction to someone he thought represented a customer that would soon have an account with the Company (Tony's Market)—it is undisputed that he falsely invoiced and recorded it as a sale to one of the Company's established customers (La Escondida Market). See, e.g., Jt. Exhs. 1–3. Whatever the supervisor may have told Ramos (he left the Company shortly after for unrelated reasons and was not called to testify by either side), it is inherently unlikely that he would have told Ramos to do *that.* Certainly, the Company reasonably rejected Ramos' claim that the supervisor did so (Tr. 829–830, 877–879). See generally *McKesson Drug Co.,* 337 NLRB 935, 936 fn. 7 (2002); and *Alta Bates Summit Medical Center v. NLRB,* 687 F.3d 424, 434–437 (D.C. Cir. 2012) (the relevant inquiry is not whether the employee actually engaged in the misconduct, but whether the employer reasonably believed the employee engaged in the misconduct).[12]

Moreover, as noted in his disciplinary notice, Ramos failed to obtain or provide the Company with any identifying or contact information about the individual when the $412 check

[12] Ramos also testified inconsistently at the hearing about whether Tony's Market was already on his handheld computer at the time of the reported sale on December 8, 2011. See Tr. 148–149, 180–181, 187. In fact, according to the Company's records, the account was established on December 14, 2011 (E. Exh. 15), and thus would not have shown up on his handheld before that time (Tr. 633–634).

the individual gave Ramos for the produce—which contained an illegible signature and was under the name of yet another market that did not have a company account (Jordi's Market & Deli)—was rejected by the bank. Again, even if his immediate supervisor had told him to make the sale to the individual under a false invoice, it is inherently unlikely that Ramos would have failed to obtain such information and/or accepted such a check without objection given the result of his similar reported conduct in 2008. Although he was a new employee and was not formally disciplined at that time, Ramos admitted at the hearing that the Company required him to personally reimburse it for the bad check, and told him not to make such a sale again (Tr. 109, 141, 154–155). Thus, Ramos' failure to provide the Company with any such identifying information raised the obvious question whether the individual ever existed or there was any sale at all, i.e. whether Ramos had simply stolen the product from the Company for his own use or sale (Tr. 810).

As for the passage of time since the incident occurred, the Company provided detailed evidence explaining why it took so long to investigate the matter and determine the appropriate disciplinary action. See Tr. 536–550, 631–632, 782–809, 825–827, 866–867, 880. Indeed, the Company's evidence was corroborated or supported in substantial part by Ramos' own testimony. See Tr. 116–121, 176–177.

Finally, the Company also presented several examples where it discharged other employees for similar or analogous conduct during the same general time period. See E. Exh. 42 (March 2011 termination of Ochoa for admittedly failing to turn in cash payments from a customer); and Jt. Exhs. 25 (May 2011 termination of Alonso for failing to turn in a cash payment from a customer); 26 (April 2011 termination of Saldano for selling perishable products in the parking lots of customer stores to an unregistered customer that was not in the handheld computer system; selling the product for less than the regular price and/or failing to submit payments from the customer; and lying and falsifying records to cover it up); 27 (March 2011 termination of Oliver for "floating," i.e. delaying submission, or embezzling cash payments from customers). Although all of these examples arguably involved more severe violations, in the absence of any contrary examples during that or any other period since 2008 (none have been offered by the General Counsel or the Union), they are sufficient to establish that the Company would have discharged Ramos for the cited conduct even absent his union and/or protected concerted activity.[13]

Accordingly, the General Counsel's allegations involving Ramos are dismissed.[14]

---

[13] In reaching this conclusion, I have considered the Company's circumstantial evidence indicating that its business with La Escondida Market was significantly damaged by the Ramos incident. See E. Exhs. 16–18; and Tr. 633–635, 642. However, I would reach the same conclusion without it.

[14] The Company also argues that Ramos forfeited any right to reinstatement or backpay because of his admitted postdischarge conduct (asking another employee for HR Assistant Pintado's home address so he could slash her tires), for which the Company sought and obtained a workplace-violence restraining order against Ramos under California Code of Civil Procedure Sec. 527.8 (Jt. Exh. 29, 33). In light of my finding that Ramos' discharge was not unlawful, it is unnecessary to address this additional argument.

B. Guzman

Guzman is indistinguishable from Ramos in terms of his predischarge union and protected concerted activity and the Company's response. Like Ramos, Guzman concertedly complained about the drivers' wages at the January 2012 sales meeting, joined with other drivers in thereafter specifically demanding a commission increase, and was a leading participant in the subsequent union campaign. As with Ramos, Francisco Lara also met individually with Guzman to discuss his initial complaint. Thus, given the Company's demonstrated animus, for essentially the same reasons discussed above with respect to Ramos, I find that the General Counsel made a sufficient initial showing under *Wright Line* regarding Guzman's suspension and discharge.[15]

However, as with Ramos, the Company adequately established that it would have suspended and discharged Guzman even absent any union or protected concerted activity. Like Ramos, Guzman was charged with a serious disciplinary offense. Both of the female clerks in the receiving office had formally complained to Elizabeth Lara in March and early April 2012 that he acted "aggressive" towards them when they informed him of errors or omissions in his paperwork, saying things like "I don't give a fuck" and threatening that he would get them fired (Jt. Exhs. 6–9, 15–18). Both also specifically reported at that time, and the Company's subsequent investigation confirmed, that Ramos frequently used offensive words such as "cock" or "dick" in their presence (Jt. Exhs. 9, 12, 18; E. Exh. 31; Tr. 428–429, 792–793). Further, as indicated in the Company's initial suspension notice (Jt. Exh. 11), Guzman himself admitted that he used foul language in the workplace (Jt. Exh. 10; Tr. 849). Moreover, one of the clerks informed Lara that she was so upset by Guzman's conduct that she would not be returning to work after her upcoming vacation (Tr. 399; 792–793).[16]

Such conduct plainly violated the Company's policy against using "vulgar, profane or obscene language" and "harassment" (Jt. Exhs. 35–36), and justified disciplinary action, up to and including termination. See *Fixtures Mfg. Corp*., 332 NLRB at 566. Indeed, the Company's failure to take prompt and effective action under the circumstances, including temporarily removing Guzman from the workplace pending completion of the investigation, could have exposed it to liability under other Federal and State laws. See generally *Swenson v. Potter*, 271 F.3d 1184, 1192–1197 (9th Cir. 2001). And again, neither the General Counsel nor the Union presented any examples where the Company had failed to take similar temporary or permanent action against an employee in the face of such corroborated complaints.

---

[15] However, in so finding I do not rely on the General Counsel's contention that the termination notice improperly cited Guzman for failing to cooperate in the investigation in addition to sexual harassment and creating a hostile work environment. Guzman admitted that he refused to answer some of Pintado's questions during the investigation about the female clerks' own conduct towards the drivers (Tr. 229–231), which he himself had raised during his first interview with Pintado, and were obviously relevant in evaluating whether Guzman's alleged conduct towards the clerks warranted discharge.

[16] This is consistent with the demeanor of both of the office clerks on the witness stand. Notwithstanding that over a year had passed and Guzman was not in the courtroom, they both became visibly upset in recounting their experiences with him. In any event, I find that the Company reasonably believed their accounts over Guzman's.

Accordingly, the General Counsel's allegations involving Guzman are dismissed as well.[17]

C. Martinez

Martinez is somewhat different from Ramos and Guzman in that he did not complain about wages at the January 2012 sales meeting. However, like them, he joined with the other drivers in requesting a commission increase; indeed, he was the one who impliedly warned Lopez at the end of the meeting that there would be another union campaign if the Company did not grant their request. As previously discussed, I find that Lopez would have told Francisco Lara about Martinez' statement. And Martinez was, in fact, a leading participant in the subsequent union campaign. Thus, as with Ramos and Guzman, I find that the General Counsel made a sufficient initial showing under *Wright Line* with respect to Martinez' 1-day suspension and subsequent discharge.[18]

However, again, the Company adequately rebutted that showing. Although the Company does not have a written policy specifically requiring employees to cooperate in HR investigations, it does have a written policy prohibiting insubordinate conduct generally (Jt. Exh. 36). Further, I credit the testimony of Controller Perfecto and HR Assistant Pintado that Martinez did, in fact, insubordinately refuse to fully cooperate; specifically, that he admitted that he knew all about the situation with the receiving clerks, and that most of the drivers used foul language in the workplace, but refused to identify any of them by name or otherwise provide the Company with any information about the situation (Tr. 650, 851–852).[19] While Martinez—who had been identified in previous interviews as one of Guzman's friends—was the last person interviewed, and Pintado admitted that she had already made up her mind to recommend discharging Guzman at the time (Tr. 850, 890–891),[20] this does not excuse Martinez' refusal to fully cooperate. Martinez' reluctance to identify his coworkers may be understandable, but so is

---

[17] As with Ramos, the Company also argues that Guzman forfeited any right to reinstatement or backpay due to his alleged postdischarge threat to HR Assistant Pintado and Controller Perfecto (telling them that they had better watch out for their children), for which the Company likewise sought and obtained a workplace-violence restraining order (Jt. Exhs. 30, 32). Again, in light of my finding that the Company did not unlawfully suspend and discharge Guzman, it is unnecessary to address this issue. However, to the extent there is a factual dispute as to whether Guzman actually made such a threatening statement at the termination meeting, I credit Pintado and Perfecto and find that he did (Tr. 661–662, 859, 899).

[18] Martinez also testified that, at the time the drivers were given their new assignments, he told a new manager (Joseph Cannarozzi) in front of Israel Lara (son of Francisco and Elizabeth), that the designated salesmen would not be happy with the new commission-only system, and that there would be "trouble" or "problems" (Tr. 296–298). However, Cannarozzi generally denied that any such conversation occurred (Tr. 491–493). And given Martinez' faulty recollection with respect to similar matters (see fn. 8, above), there is reason to doubt his testimony in this regard. In any event, I would reach the same conclusions regardless.

[19] Although no notes of the interviews with Martinez were introduced, the General Counsel does not cite this as grounds for discrediting Perfecto's and Pintado's account.

[20] Contrary to the General Counsel's brief (p. 38), there is no evidence that the decision to discharge Guzman had already been made at that time.

the Company's desire to ensure that it receives as much relevant information as possible before actually implementing such a serious adverse employment action (and that employees fully cooperate in future investigations). Moreover, again, neither the General Counsel nor the Union offered any evidence that the Company disparately failed to discipline other employees for similar insubordinate conduct. Cf. *ATC/Forsythe & Assoc.,* 341 NLRB 501 (2004); and *Fort Dearborn Co*., 359 NLRB No. 11, slip op. at 2 fn. 5 (2012).

The Company also adequately established that it would have discharged Martinez absent any union and other protected concerted activity. There is no dispute that Martinez told Perfecto and Pintado, "You better watch your back," after they advised him of the 1-day suspension. Further, I credit Perfecto and Pintado that he was agitated and angry when he made the statement (Tr. 655, 689, 854). Accordingly, regardless of whether Martinez actually intended the statement as a physical threat, or whether he subsequently downplayed or reinforced it when they asked him if he was threatening them, I find that they and the Company reasonably interpreted the statement as a physical threat.[21]

Accordingly, the General Counsel's allegations regarding Martinez are likewise dismissed.

CONCLUSIONS OF LAW

1. By threatening employees with reprisals in or around March 2012 because they had complained about wages and requested a commission increase, the Respondent Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The Company did not otherwise violate the Act by suspending and/or discharging employees Luis Ramos, Brian Guzman, and Omar Martinez.

REMEDY

The appropriate remedy for the violation found is an order requiring the Company to cease and desist and to post a notice to the employees in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

[21] Martinez testified that he was simply warning Perfecto and Pintado about leaks of confidential information from their office, and that he told them that this is what he meant (Tr. 307–308). Perfecto also acknowledged that Martinez attempted to downplay his statement and that he at some point mentioned confidential information leaking out of the office (Tr. 655, 689, 691). However, Pintado testified that, when asked if he was threatening them, Martinez replied, "Take it like you want to" (Tr. 854). And Francisco Lara confirmed that this is what he was told at the time, when Perfecto and Pintado informed him of the incident (Tr. 796). Further, as with the postdischarge statements by Ramos and Guzman, the Company subsequently sought and obtained a workplace-violence restraining order against Martinez based on his statement (Jt. Exhs. 31, 34).

Accordingly, based on the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended[22]

ORDER

The Respondent, Marquez Brothers Enterprises, Inc., City of Industry, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with reprisals for complaining about wages or requesting a commission increase.

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

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

(a) Within 14 days after service by the Region, post at its facility in the City of Industry, California, copies of the attached notice marked "Appendix"[23] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2012.

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

---

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

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

Dated, Washington, D.C., October 25, 2013

Jeffrey D. Wedekind

5

Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT threaten you with reprisals for complaining about wages or requesting a commission increase.

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

MARQUEZ BROTHERS ENTERPRISES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

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

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5184.