JD–63–14
Washington, DC

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

TITO CONTRACTORS, INC.

and

Cases 5–CA–119008
5–CA–119096
5–CA–119414
5–CA–123265
5–CA–129503
5–CA–131619
5–CA–134285

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO
DISTRICT COUNCIL 51

Letitia F. Silas and Pablo A. Godoy, Esqs., for the General Counsel.
Jonathan W. Greenbaum and Kimberly Jandrain, Esqs., (Coburn & Greenbaum, PLLC, Washington, D.C.) for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Washington, D.C. on the following dates: August 4-8, August 12-14, August 18, and September 11-12, 2014. The International Union of Painters and Allied Trades, District Council 51 filed the charges pertaining to this case between December 16, 2013 and August 6, 2014. The General Counsel issued the initial complaint on July 11, 2014. He filed the complaint in case 5–CA–134285 on August 28, 2014 and I consolidated that case with the others.

This case involves a host of alleged Section 8(a)(1) violations, including alleged threats, interrogations, solicitation of grievances and promises predicated on eschewing union activity. It also involves a number of alleged Section 8(a)(3) and (1) violations, including: withholding overtime in retaliation for protected activity, retaliatory warnings and a suspension, and the terminations of the following employees: five of Respondent's employees working at the Montgomery County Recycling Center: Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin

Ramirez and Maria Chavez.[1] This case also involves the termination and/or lay-offs of Tito Contractors construction employees Hernan Latapy, Nestor Sanchez and Mauricio Bautista and allegedly depriving Norberto Araujo of use of a company vehicle.

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

FINDINGS OF FACT

10 ### I. JURISDICTION

Respondent, Tito Contractors, a corporation, has its primary office in the District of Columbia. It provides construction services and labor mainly to state and local governmental entities in Maryland and Virginia. The construction services include carpentry, painting, drywall
15 installation and snow removal. Respondent also provides labor to the Maryland Environmental Services Department (MES) at several recycling centers. Respondent performed services in excess of $50,000 outside of the District of Columbia in 2013. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Union of Painters and Allied Trades, District Council
20 51 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Introduction: Respondent's hierarchy

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The highest ranking official at Tito Contractors is Maximo "Tito" Pierola, its president and owner. The next highest ranking officials are his son Alex Pierola, vice-president and General Manager Kenneth Brown. Next in the hierarchy in the construction side of Respondent's business are a number of project superintendents including Edward Vivas, Manuel
30 Alarcon and Jorge Ramos. Below these project superintendents are field superintendents such as Fermin Rodriguez. Below the field superintendents are on-site crew leaders, including some of the alleged discriminatees. It has not been established that the crew leaders are supervisors or agents of Tito Contractors within the meaning Section 2(11) and 2(13) of the Act.

35 On the other hand, Respondent in its July 24, 2013 Answer to the Amended Consolidated Complaint, admitted that Maximo Pierola, Alex Pierola, Kenneth Brown, Manual Alarcon and Fermin Rodriguez were supervisors pursuant to Section 2(11) of the Act. I also find that they were agents pursuant to Section 2(13) of the Act. Whenever any of these individuals spoke to rank and file employees about matters relevant to this case, the employees reasonably understood
40 that these individuals were speaking on behalf of Tito Contractors and were reflecting company policy, *Community Cash Stores,* 238 NLRB 265 (1978).

At the Montgomery County Recycling Center, Respondent's top on-site supervisor was Tomas Berganza, In its July 24, 2013 Answer, Respondent admitted that Berganza was at all

[1] In this decision I will ignore the Latin American custom of referring to individuals by the father's last name and mother's last name. Thus I will refer to Aracely Ramos rather than Aracely Ramos-Garcia.

relevant times a supervisor pursuant to Section 2(11) of the Act. I find that he was also an agent of Respondent pursuant to Section 2(13) for the reasons stated above with regard to the construction supervisors. At times relevant to this case, Berganza reported directly to Maximo Pierola, Alex Pierola and office manager Davys Ramos.

The events regarding the allegations concerning the recycling center are somewhat confusing because Tomas Berganza at least initially appeared to support the Union and signed a union authorization card. However, as discussed below, at some point Berganza realized that he was a statutory supervisor and acted entirely in the interests of Respondent and as its agent.

Berganza knew of the union activity amongst the recycling employees and at least suspected that all five discriminatees supported the Union before they were discharged. However, Berganza signed a union authorization card on October 18 and at least outwardly supported the Union until sometime in November. He was identified as a union supporter in the Union's letter to Respondent dated November 14, 2013.

At some point in time, Tomas Berganza learned that he was a statutory supervisor and thus not protected by most of the provisions of the Act. Berganza testified he learned that from Respondent's counsel between Thanksgiving and Christmas 2013, Tr. 472. However, I do not credit that testimony and infer that he became aware of this much earlier. He testified that at some point he stopped cooperating with the Union, for example, by not answering telephone calls from the union organizers. I infer that Berganza began operating in Respondent's interests in opposing union organizing before Maria Sanchez's discharge on October 30, Tr. 333. This may have been due to his realization that he was a statutory supervisor or for other reasons.

The basis for my factual findings

In making factual findings, I am generally loath to take either parties 'self-serving testimony at face value, unless it is uncontradicted or supported by non self-serving evidence in the record. I would note in this regard that Maximo "Tito" Pierola and Manuel Alarcon, who are alleged to have committed unfair labor practices, did not testify at all. Other of Respondent's supervisors and/or agents were called as witnesses by the General Counsel but not by Respondent, such as Fermin Rodriguez, Tomas Berganza and Alex Pierola. Respondent relied principally on the testimony of its General Manager, Kenneth Brown, who in many instances had no first-hand knowledge regarding the facts of the case. Thus, much, if not all, of the testimony of the General Counsel's witness testimony regarding unfair labor practices pertaining to Respondent's construction employees is uncontradicted. Where that it the case, this testimony is credited.

The record with regard to Respondent's recycling operations is quite different. Tomas Berganza, Respondent's supervisor at the Shady Grove or Derwood, Maryland recycling center, was called by the General Counsel and contradicted the testimony of the discriminatees. Also, the General Counsel called MES supervisors David Wyatt and Mark Wheeler as witnesses, who were generally supportive of the Respondent's position. The part of the case involving the recycling employees thus requires resolution of the contradictory testimony of witnesses.

As to those instances in which there is a conflict in testimony, I find no basis for resolving the credibility of the witnesses by virtue of their demeanor when testifying. Thus, I base these credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole, *Daikichi Sushi,* 335 NLRB 622 (2001).

As early as October 11, 2013, Maximo "Tito" Pierola learns his construction employees are filing a class action suit against Respondent. Respondent's construction employees file suit pursuant to the Fair Labor Standards Act on October 18, 2013;

About a dozen or so of Respondent's construction employees met with union officials in September 2013. Among the subjects discussed was employees' belief that they were not being paid for overtime work as required under federal law. The Union facilitated contact between these employees and the law firm of Latham and Watkins, which is representing the employees on a pro bono basis. Six employees met with the firm's attorneys on September 16, 2013, G.C. Exh. 96.

A number of employees met with the firm's attorney prior to October 11. The law firm filed a class action suit against Respondent for failing to pay Roberto Ayala, Mauricio Bautista, Geremias Berganza,[2]Hector Delgado, Sabino Diaz, Jose Jimenez and Domingo Zamora in conformity with the requirements of the Fair Labor Standards Act on October 18, 2013. On November 13, 2013, Francisco Campos, Cesar Rodriguez, Nestor Sanchez, Milton Vega, Miguel Padron, Manual Rodriguez, Luis Palacious, Jose Granado, Jose Berganza, Jose Amaya, Jose Diaz, Vitalano Berganza and Hernan Latapy joined the suit. On November 22, 2013, Manuel Medrano joined the suit. Among the others joining the suit in 2014 was Norberto Araujo on May 5.[3]

Respondent's owner, Maximo Pierola was aware that the suit was going to be filed as early as October 11. On that day he called two employees and expressed his feelings about the lawsuit.

Pierola called employee Jose Amaya and told Amaya that he was very disappointed that the employees or that Amaya personally had taken legal action against his company. Pierola told Amaya that he should think about his family before he decided to do the things he was doing. Tr. 1138-42.[4]

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[2] Berganza is not related to Respondent's supervisor Tomas Berganza, but is a cousin of Respondent's supervisor Fermin Rodriguez..

[3] Although beyond the scope of this proceeding, it is clear that Respondent did not pay employees time and a half for hours worked outside of normal business hours for Arlington County. Respondent's General Manager Kenneth Brown testified that Owner Maximo "Tito" Pierola did not read his contract with Arlington closely enough and did not realize that he could bill Arlington time and half for hours worked outside of normal business hours, Tr. 1301.

[4] Although Amaya did not join the suit until November, his testimony about his October 11 conversation with Maximo Pierola is uncontradicted. I therefore credit it. I infer that Pierola found out that Amaya was one of the employees who met with the Latham and Watkins attorneys earlier.

Maximo Pierola also called Geremias Berganza on October 11, Tr. 818. He told Geremias that he could not believe that Geremias was doing this to him. Maximo told Geremias that "you guys are stabbing me in my back." He also told Geremias that it was never too late to reverse his decision to file suit. Further, Pierola said to Geremias that he did not want back stabbers in the company. Also, he said that if Geremias did not like his company, there were thousands of jobs elsewhere, Tr. 820-21.

Fermin Rodriguez tells employees that those participating in the FLSA lawsuit will not work overtime

On one or more occasions in October 2013, Fermin Rodriguez, one of Respondent's superintendants, told employees, including Domingo Zamora and Geremias Berganza, 2 of the original 7 FLSA plaintiffs, that Respondent would not allow those employees who participated in the FLSA lawsuit to work overtime. Although not pled as a violation, this evidence is relevant to the fact, as discussed later, that, at least in one pay period, Respondent discriminated against the original 7 plaintiffs in assigning overtime work.[5]

October 18, 2013: First contact between Respondent and the Union in 2013;

There was interaction between the Union and Respondent in 2012 when Sandro Baiza, a union organizer, spoke or attempted to speak with Respondent's General Manager Kenneth Brown, on behalf of three employees who had been fired, Tr. 1328-29. Respondent reinstated all three. Baiza spoke directly to Respondent's owner, Maximo "Tito" Pierola in January 2013 on behalf of one of these employees, who still had a wage dispute with Respondent.

The first contact between the Union and Respondent's management regarding an organizing drive in 2013 occurred on October 18, 2013, the same day on which the FLSA suit was filed. On that day, Tomas Berganza,[6] Respondent's supervisor at the Shady Grove, Maryland (also referred to as the Derwood facility) recycling plant met with union organizer Sandro Baiza and one of Respondent's construction employees, Mauricio Bautista. At the time Berganza and Bautista, who had been in contact with the union for several months, were close personal friends. Berganza signed a union authorization card at that meeting.

As discussed below, Berganza, on behalf of Respondent, engaged in a number of unfair labor practices. It is unclear whether he was in fact interested in joining the Union in October. However, he was no longer interested in joining the Union or assisting it by early November. Tomas Berganza may have changed his mind when he learned that he was a statutory supervisor and thus unprotected by the provisions of the NLRA.

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[5] The complaint alleges that Rodriguez and Manual Alarcon told employees that the plaintiffs could not work overtime without the approval of senior management. In fact, the record shows that Rodriguez told employees that the plaintiffs would not get overtime work. I find that the statements made by Rodriguez violated Section 8(a)(1). There is no due process issue here as the gravamen of the violation is the same, a statement that Respondent would discriminate on the basis of protected activity. Moreover, Respondent did not avail itself of the opportunity to seek a contradiction from Fermin Rodriguez, when he was called a witness by the General Counsel.

[6] Whenever I refer to Berganza without a first name, I am referring to Tomas. Other employees with the same last name will be referred to by their first and last names, or simply their first name,

In October, Baiza asked Tomas Berganza to assist him in getting other Tito employees at the recycling center to sign cards. Berganza asked Baiza which of Tito's employees at the recycling center had already signed cards, Tr. 332. Within a week of October 18, Berganza had a phone conversation with organizer Baiza. Baiza asked Berganza if a certain 4 employees had signed authorization cards. Berganza informed him that they had not. Then Berganza asked Baiza if Yasmin Ramirez, Maria Chavez, Reyna Sorto, Aracely Ramos and Elizabeth Lemus, had signed cards.[7]

Tito's work at the Montgomery County Recycling Center

At the Montgomery County Recycling Center in Shady Grove, 29 Tito employees work on a conveyor belt separating recycling materials into different categories, e.g. glass, clear plastic, colored plastic, etc. These employees work at the recycling center pursuant to a contract between the State of Maryland Environmental Services Department (MES) and Tito Contractors. 2 or 3 employees of MES, including Juana Rosales and Norma Garcia, also work on the sorting line. Part of their responsibilities is to oversee the work of the Tito employees. The contract between MES and Respondent gives MES the right to request that Respondent remove any of Respondent's employees from the site. Respondent is required to comply with this request, G.C. Exh. 95, section 3.3.2.[8]

The senior MES employees at Shady Grove are Field Operations Supervisor David Wyatt and Mark Wheeler, the Operations Manager. Wheeler reports to Wyatt. Neither Wheeler nor Wyatt are proficient in understanding spoken Spanish. Respondent's on-site supervisor, Tomas Berganza, often serves as the translator between, Wheeler or Wyatt and the Tito rank and file employees at the recycling center.

A Montgomery County employee, Thomas Kusterer, a project manager in the County Division of Solid Waste, is also responsible for the recycling center. The center produces plastic water bottles from recycled materials. Thus, it produces income for the county, which is dependent on the production of the Tito recycling employees.

Respondent's productivity tests for its recycling employees

At some point in the late summer of 2013, Tom Kusterer, Montgomery County's project manager, told MES' supervisors, Wyatt and Wheeler that the production of plastic bottles at the Shady Grove recycling center had declined. Wheeler discussed this with Tomas Berganza, who

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[7] I credit the testimony of Maria Guerra, a current employee, who overhead this conversation in Baiza's car, Tr. 163-64. Moreover, Berganza admitted that he asked Union Organizer James Coats whether specific employees had signed union cards, including Elizabeth Lemus and Maria Chavez, Tr. 333-34. Coates told Berganza that an employee named Maria had signed a card. Although there were several Tito employees named Maria at the recycling center, Berganza suspected or knew Coates was talking about Maria Chavez, Tr. 333-37.

Four of these five employees, excluding Lemus, were fired by Respondent within the next two months.

[8] The section provides: "MES shall have the right to request that the Contractor replace certain of the Contractor's employees. The Contractor will replace such employees by the start of the next business day following verbal notification from the MES supervisor."

devised a productivity test for Tito's employees at the request of MES and Kusterer. Each employee was tested on the number of hoppers they could fill on two test days at station 37a. These tests were conducted between September 9 and November 27, 2013; the results were provided to MES.

None of the five alleged discriminatees, who were later fired by Respondent in the fall of 2013, was a particularly low scorer. Maria Chavez was the top performer. Aracely Ramos and Reyna Sorto were also among the top performers. No action was taken against the poorer performers on the test, G.C. Exh. 14. In fact, it appears nobody made any use of the test results. Mark Wheeler's day planner for the months of October and November indicates that he monitored the performance of alleged discriminatees Reyna Sorto and Yasmin Ramirez closely, but did no monitoring of the poorer performers on the productivity test, such as Sylvia Sandino, Adriana Villavicencio, Miriam Meija and Estella Rodriguez. G.C. Exh. 48(a), G.C. Exh. 14.[9] Chavez's performance was consistent with the fact she was most skilled sorter at the facility, Tr. 725.

October 25, 2013: Respondent issues new policy on overtime for its construction employees

A week after being informed of FLSA lawsuit, Maximo Pierola conducted a meeting for all his construction employees. He announced that henceforth all overtime work would have to be approved in advance by either himself, his son Alex Pierola, or General Manager Kenneth Brown. Superintendent Manual Alarcon had made a similar announcement to employees in Virginia the day before. Although, Respondent contends such a policy existed prior to the filing of the lawsuit, such a policy was not strictly enforced. At the October 25 meeting, a memo setting forth the policy was distributed to all construction employees.

On October 25, after the meeting ended, Norberto Araujo approached Maximo to complain that he had not been paid enough for work he had performed at the University of Maryland. Pierola told him that Respondent "would fix that." Araujo asked Pierola about the memorandum. Pierola told Araujo that since he had not joined the lawsuit,[10] nothing would change with respect to his overtime hours. At some point, Respondent's field superintendent, Fermin Rodriguez, also told employees that the new or newly enforced overtime policy only applied to those employees who joined the lawsuit.

October 30, 2013: Respondent discharges Maria Sanchez

In 2013 one of the MES employees working on the production line at the Shady Grove recycling center was Juana Rosales. She is and was highly valued by MES. On about October 30, Rosales was told that a Tito employee had called her a whore. Another employee told

[9] Villavicencio and Meija are identified as union supporters in the Union's November 14 letter to Respondent. Wheeler's first notation about the performance of any alleged discriminate during the relevant time period was on October 10, 2013, the day before Maximo Pierola called Jose Amaya and Geremias about the FLSA suit. The notation is about Yasmin Ramirez, whose husband, Jose Jimenez, was one of the original FLSA plaintiffs. This is a further indication the MES' removal requests were related to the protected and union activity of the discriminatees.

[10] Araujo joined the suit in 2014.

Rosales that the employee who called Rosales a whore was Maria Sanchez. Sanchez had worked at the recycling center for 6 months, although she had worked for Tito Contractor's construction division before that.

Rosales complained to Tomas Berganza, who told her to tell MES Operations Manager Mark Wheeler, Tr. 1388-92. However, Wheeler was not at work when Sanchez was fired and testified that he had no involvement in requesting Sanchez's removal, Tr. 689.[11]

Tomas Berganza testified that Rosales complained to Wyatt. However, Rosales did not testify that she went to Wyatt or anyone else at MES about Sanchez.

Wyatt's testimony regarding Sanchez is as follows:

> Q. Are you familiar with someone by the name of Maria Raquel Sanchez?
> A. Yes.
> Q. And who was she?
> JUDGE AMCHAN: Well, I mean, I know who all these people are. He knows who they are. What do you want him to --
> Q. BY MS. SILAS: Did you request her removal?
> A. Yes.
> Q. Why?
> A. Performance, I believe.
> Q. What was it about her performance?
> A. Picking slowly.
> Q. Did Tomas tell you that?
> A. I can't remember if Tomas or Norma or Juana came to me.
> Q. I see. And any other reason for her removal?
> A. I can't remember if it was Sanchez that was teasing the coworkers, or which lady it was.

Tr. 751.

Since Rosales did not testify that she complained to Wyatt about Sanchez and he could not recall whether or not she did, I find that she did not do so. Since Norma Garcia did not testify, I find there is no credible evidence that she complained to Wyatt about Sanchez's work performance.

It is unclear why David Wyatt and Mark Wheeler were so eager to support Respondent in this case. However, neither of them is a credible witness. Given the ambiguity of Wyatt's testimony, there is absolutely no credible evidence that there was anything wrong with Sanchez's performance or that anyone told Wyatt that there was. Tomas Berganza testified that he talked to

[11] Thus, it is clear that all the post-it notes in Wheeler's day planner, G.C. Exh. 48(a), one of which recounts the reasons Respondent requested removal of Sanchez from the jobsite, are not contemporaneous with the event recorded.

Sanchez once about working too slowly, Tr. 350. He did not testify that he complained about this to Wyatt or Wheeler.

I find that any information that Wyatt received about Sanchez came from Berganza and was motivated by Respondent's desire to thwart the organizing drive and/or to get rid of employees who complained about working conditions in concert.

Rosales had a troubled relationship with a number of Tito employees, but Sanchez was not one of them. There is no credible evidence that Sanchez called Rosales a whore or anything else derogatory.

On October 30, Respondent, by Alex Pierola fired Sanchez, on Berganza's recommendation. Respondent had never disciplined Sanchez prior to October 30.[12] The termination letter signed by Alex Pierola does not mention Sanchez calling Rosales any derogatory names; it says MES requested her removal for "unsatisfactory work behavior."

Respondent discharges Aracely Ramos on October 31, 2013

Aracely Ramos had worked for Respondent at the Montgomery County recycling center for three years before she was fired on October 31, 2013. During that period she had received one disciplinary warning in June 2013 for calling Tomas Berganza unfair and a racist.

Juana Rosales, on one occasion, reported to Berganza that Aracely Ramos left the production line without first informing Rosales. She was unable to testify as to when this occurred or relate this incident in any way to the date of Ramos' termination, Tr. 1385-88.

David Wyatt testified that he requested that Ramos be removed because her performance was very low, Tr. 752. As in the case of Sanchez, there is no credible evidence to support such a contention. In an affidavit given to the Board during its investigation of the union's charges, Wyatt stated that sometime in October 2013 Norma Garcia and Juana Rosales told him that Ramos was letting materials bypass her on the sorting line to bother coworkers. Rosales not did testify to saying any such thing to Wyatt; Garcia did not testify and I find that the statement is false.

Wyatt went on to state in his sworn affidavit that he spoke to Berganza about this. Wyatt told Berganza to tell Ramos that if this happened again, she would no longer be employed at the recycling center, G.C. Exh. 17. Berganza testified that Ramos "admitted" that she was letting materials pass her station to bother her coworkers, Tr. 366. Ramos denies telling Berganza this and I credit her testimony. There is no reason why Ramos would make such a confession to Berganza. In any event Berganza told Wyatt that Ramos was letting materials pass to bother her coworkers.

[12] Sanchez testified that Berganza told her that he had heard she'd been talking to the Union just before he fired her, as well as complaining about her performance on the job. She had not received any prior warnings about her performance. Berganza denied mentioning the Union to Sanchez. I find Berganza not to be a credible witness generally. Thus, although self-serving, I credit Sanchez.

Wyatt testified that either Berganza or Wheeler advised him of problems with Ramos' production. However, Wheeler did not testify to making any complaints about Ramos. Indeed, he was on vacation when she was fired. I conclude that all of Wyatt's information about Ramos came from Berganza. Rosales testified that she spoke to Berganza about Ramos. She did not testify about discussing Ramos with Wyatt or Wheeler.

Berganza's email, G.C. Exh. 17, indicates that Wyatt as of 10:49 a.m. on October 31, Wyatt had not requested Ramos' removal from the jobsite. G.C. Exh. 18, Berganza's note to Alex Pierola and Davys Ramos, indicates that between 10:49 and 12:35 a.m., Wyatt did so after talking to Berganza again. Respondent then discharged Ramos.

Respondent discharges Reyna Sorto on November 14, 2013

On November 1, 2013, the day after Respondent discharged Ramos and two days after it discharged Sanchez, Tomas Berganza sent an email to Office Manger Davys Ramos stating that he had been watching Reyna Sorto for a week and that Sorto was working very slowly. He stated further that he had not discussed this with Sorto and hoped to talk to Mark Wheeler when he returned from vacation, G.C. Exh. 20.

Mark Wheeler's testimony is inconsistent with Berganza's contemporaneous email and thus not completely credible. He testified that he started monitoring Sorto himself the entire month of October and discussed her work performance with Berganza in October, Tr. 711-12. He also testified that Berganza told him in October that he had talked to Sorto about her work habits, which is also inconsistent with the Berganza November 2 email.

Mark Wheeler testified that he noticed that Reyna Sorto's production had declined. On November 1, 2013, Berganza called Reyna Sorto to his office and asked her why she was working slowly. Sorto told him her left arm hurt. Berganza told Sorto to get a doctor's note within the next two weeks. Berganza spoke to Mark Wheeler about Sorto's production on November 8. Wheeler, who generally observed the Tito employees on the sorting line three times a day, said he would watch Sorto. Wheeler noticed that Sorto worked considerably slower when she was not aware he was watching her.

Regardless of whether this was true or not, there is no evidence as to how Sorto's production compared to that of other employees. Based on the productivity tests it is likely that even when Sorto was not working to her full capacity, she was working faster than the employees who scored much lower on the test and who were never monitored by Wheeler or removed from the jobsite.

In late October, Berganza also informed Wheeler that another employee, Alba Ruanda, told him that Sorto was telling employees to slow down on the production line. Neither party called Rauda to testify, so there is no credible evidence that this was true. On or about November 14, Wheeler directed Respondent to remove Sorto from the recycling center.

November 15, 2013: Filing of Representation Petition

On November 15, the Union filed a representation petition with the NLRB seeking to represent Respondent's recycling employees at Shady Grove (aka Derwood, MD), Cockeysville MD and its construction employees.

The day before the petition was filed, the Union sent Respondent a letter identifying 35 union supporters in Respondent's workforce. Among those named were a number who are alleged to the victims of discriminatory conduct by Respondent. These included 5 recycling employees who were terminated between October 30 and December 13, 2013: Maria Sanchez, Yasmin Ramirez, Reyna Sorto, Aracely Ramos and Maria Chavez. It also included Mauricio Bautista, Hernan Latapy, who were discharged by Respondent in 2014, Nestor Sanchez, who was laid off and 12 employees who were allegedly denied the opportunity for overtime work. Recycling Supervisor Tomas Berganza was also named as a union supporter in the letter.

December 2, 2013: Representation Hearing

On December 2, 2013, the Board conducted a representation hearing to determine the appropriate unit for an election. Mauricio Bautista testified in this proceeding on behalf of the Union.

Respondent discharges Yasmin Ramirez on December 6, 2013

Yasmin Ramirez worked for Respondent for 6 years, and at the recycling center for four years. During that time, she had been disciplined once in 2011 for failing to wear safety glasses. In early October 2013 one of Respondent's employees, Martha Serpas, complained to Tomas Berganza that Yasmin Ramirez had been teasing her and calling her old and stupid, Tr. 393. Mark Wheeler joined Berganza and Serpas on this occasion. Berganza translated for Serpas, who speaks little or no English, and Wheeler, who speaks only a little Spanish. Wheeler told Berganza that he would watch Ramirez.

It is unclear why Wheeler decided to monitor Ramirez's work performance because Serpas' complaint was not about Ramirez's work. This decision could well be related to Respondent's desire to retaliate against Ramirez's husband, Jose Jimenez, one of the original FLSA plaintiffs. Wheeler testified that he watched Ramirez for the entire month of November. He noticed Ramirez scooping material on occasions on the recycling line, which is improper, on October 10 and on October 27 or 28. If Wheeler noticed her scooping material on any other day, he did not consider it significant enough to make a contemporaneous note in his day planner.

As noted earlier, the post-it notes in G.C. Exh. 48(a), Wheeler's day planner, are not contemporaneous with the event recorded. I do not credit his post-it notes indicating that Juana Rosales chastised Ramirez for scooping material or that Wheeler observed Ramirez scooping material on any date in November. Indeed, his testimony at Tr. 729 and 731indicates, contrary to his post-it note, that Wheeler had no idea whether anyone chastised Ramirez for scooping material. Tomas Berganza did not testify to discussing this with Ramirez. Even Wheeler's day planner notes are suspect in that there are two versions, one showing that he observed Ramirez

scooping material on Sunday, October 27, and the other with that date blank.[13]

Rosales testified about discriminatees Sanchez, Chavez and Ramos, but did not say word one about Yasmin Ramirez. There is no credible evidence that anyone chastised Ramirez about scooping material. Respondent's exhibits indicate that if it had any issues with Ramirez it involved her relationship with other employees, not the manner in which she performed her job.

For reasons not explained in this record, according to his day planner, Mark Wheeler, met with Martha Serpas on November 27, 2013.[14] Berganza apparently acted again as translator. Serpas apparently complained about comments Ramirez made to her a month earlier. It is unclear whether Serpas made any complaints about Ramirez that were more recent. Afterwards, on the same day, Tomas Berganza sent an email about this meeting to Maximo and Alex Pierola and Respondent's office manager, Davys Ramos, G.C. Exh. 27. The email stated that Serpas complained that Ramirez teased her and recounted an incident that occurred in late October.

Wheeler testified that he requested that Respondent remove Ramirez from the Shady Grove site. On December 2, Berganza sent Alex Pierola and Davys Ramos an email stating that Wheeler and Wyatt requested that Respondent remove Ramirez because she had no respect for her co-workers. He did not mention anything about scooping material or about Ramirez's work performance in any other respect.

That Berganza did not think Ramirez was a bad employee is established by the fact that he called Davys Ramos, then Respondent's office manager, and asked if Ramirez could be transferred to Respondent's recycling operation at Cockeysville, near Baltimore.[15] Berganza's notes to Davys Ramos and Alex Pierola, G.C. Exh. 28 say nothing about Ramirez scooping material or any other problem with her work. Berganza only mentioned Ramirez's problems with Martha Serpas and other co-workers as reasons for MES request for her removal, which may have occurred over a month previously.

Davys Ramos called him back and told Berganza that Alex Pierola, Respondent's vice-president, rejected this suggestion. There is no evidence in this record as to the reasons Respondent declined to transfer Yasmin Ramirez. She was fired instead.

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[13] Wheeler's post-it notes also recount that Ramirez would work faster when she was being watched than when she was not being watched. This is the same accusation he made about Reyna Sorto. He did not repeat this contention about Ramirez when testifying at the hearing. There is no indication about this in his contemporaneous day planner notes . This casts doubt in my mind as to whether either accusation was true.

[14] Serpas did not testify in this proceeding.

[15] Tomas Berganza's effort to have Yasmin Ramirez transferred from Shady Grove to Cockeysville, is somewhat inconsistent with the notion that MES' request that Ramirez be removed from Shady Grove originated with him. However, the unprecedented nature and number of the MES removal requests during the organizing drive leads me to conclude that none of these requests would have been made without the involvement of Respondent.

The Regional Director issues a decision and direction of election on December 13, 2013.

On December 13, 2013, the Regional Director for Region 5 issued a decision and direction for election, case number 5–RC–117169. The Regional Director found that an employer-wide bargaining unit, one that included Respondent's recycling employees and construction employees was appropriate. This finding was contrary to Respondent's contentions. The Regional Director also rejected Respondent's contention that a number of Respondent's crew leaders, who had the title of supervisor, were supervisors within the meaning of section 2(11) of the Act.[16]

Respondent discharges Maria Elena Chavez on December 13, 2013

Maria Elena Chavez worked for Respondent for about 10 years. She was generally considered one of, if not the most productive of Respondent's employees at the Shady Grove recycling center, Tr. 725. It appears that she was generally respected, but that some employees found her to be somewhat intimidating.

In September and October, a number of Respondent's employees were upset about the goggles they had been provided to protect their eyes. These goggles were apparently too big and caused employees to develop headaches. Chavez and Aracely Ramos complained to Berganza about the goggles on September 25. A group of five employees, including Yasmin Ramirez, complained to Berganza about the goggles on another occasion. Chavez also complained directly to MES personnel about the goggles.

On October 10, Chavez went to Berganza again to complain about the goggles. She said she wanted to talk to Mark Wheeler and David Wyatt about the goggles. Berganza told Chavez she was not permitted to complain about the goggles directly to MES. Chavez insisted on speaking to Wyatt and Wheeler. Berganza called them and they came to his office. Chavez made her complaints about the goggles to Wyatt and Wheeler in Spanish. Berganza translated her complaints into English. Wheeler promised to do something about the goggles.

Later that day Stedson Linkous, Respondent's safety manager, came to the recycling center. Linkous told Chavez that she was prohibited from contacting MES directly and that she would be suspended for seven days unless she apologized for going over the head of her supervisor. Linkous also told Chavez that if did something like this again she would be fired, Tr. 558.[17]

[16] Respondent appears to have abandoned this contention in this unfair labor practice proceeding. Assuming that it hasn't abandoned it, Respondent failed to establish that any of the crew leaders or discriminatees in this case are statutory supervisors.

[17] Linkous did not testify. Chavez's account of this incident is uncontradicted.

Respondent, as a general matter, forbids its employees to take complaints directly to MES. Other employees have also been disciplined pursuant to his rule.[18]

On December 10, at the end of the workday, Chavez had a verbal altercation with Juana Rosales, the MES employee working and supervising the recycling line. Someone swept cold dirty water onto Chavez, who was working a level below them. Chavez blamed another employee. Rosales claimed that she swept the water and may have been implying that Chavez was making the story up. Although Chavez was very angry, she did not touch Rosales and Rosales was not afraid that she would do so, Tr. 1364.

At some point Rosales complained to Berganza and the altercation came to the attention of MES Supervisor David Wyatt. Wyatt told Berganza that it was up to Respondent as to whether or not Chavez remained an employee at the Shady Grove recycling center. Neither Wyatt nor Wheeler requested nor recommended that Chavez be removed from the Shady Grove site.[19]

Berganza requested Chavez's personnel file from Respondent's main office. He reviewed that file and then decided that Chavez be removed from the site. One of the documents he reviewed was his October 10 memo chastising Chavez for complaining directly to MES about the goggles. Respondent then, by more senior management, discharged Chavez. [20]

December 18, 2013: Tomas Berganza interrogates Respondent's recycling employees

On December 18, Tomas Berganza summoned each of Respondent's recycling employees at Shady Grove to his office. There he interrogated them individually. He asked at least some of them if they had signed union cards and how they intended to vote in the union election. At about the same time, he handed out a packet intimating that if the union won the representation election there would be closer scrutiny of the employees' immigration status.

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[18] In complaint paragraph 14, the General Counsel alleged that Tomas Berganza violated the Act by instructing employees not to speak to representatives of MES concerning their working conditions and that Respondent violated the Act by threatening them with discipline for doing so. Restricting employees from taking complaints about working conditions outside of their "chain of command" is a clear violation of the Act, *Kinder Care Learning Center,* 299 NLRB 1171 (1990); *Guardsmark, LLC,* 344 NLRB 809-10 (2005) enfd. in relevant part 475 F. 3d 369 (D.C. Cir. 2007); *Trinity Protection Services,* 357 NLRB No. 117 (2011); *Greenwood Trucking,* 283 NLRB 789, 792 (1987); *Central Security Services,* 315 NLRB 239, 253-54 (1994).

[19] Wheeler's testimony at Tr. 723 that he requested Chavez's removal is, as demonstrated by Wyatt's testimony, clearly inaccurate.

[20] The General Counsel contends that Respondent by Tomas Berganza made the decision to remove Maria Chavez from the Shady Grove recycling center without reference to her personnel file. This is not entirely clear. Certainly, Berganza and Alex Pierola were aware of the contents of her personnel file by the time she was terminated on December 13. I find that it was relied upon and moreover, as explained herein, Chavez's removal from the jobsite and termination violated the Act regardless of whether Respondent considered her personnel file.

December 24, 2013 meeting in Baltimore[21]

On December 24, 2013, Maximo Pierola met with construction employees at a worksite in Baltimore. He spoke against union representation and suggested that employees would fare better by negotiating directly with the company. Pierola passed out copies of a page from Mauricio Bautista's testimony at the representation case proceeding. In that testimony Bautista testified that many of Respondent's employees did not have bona fide documentation to work in the United States.

January 10, 2014: Respondent requests Board Review of the Regional Director's December 13, 2013 Decision and Direction for Election

In its request for review, Respondent challenged the Regional Director's determination that an employer-wide bargaining unit was appropriate. It also challenged the Regional Director's determination that its crew leaders were not statutory supervisors.

Respondent warns, then suspends, Jose Amaya for failing to submit daily job reports on time

As mentioned previously, on October 11, 2013, Maximo Pierola called Jose Amaya at work after learning that Amaya and other employees were thinking of suing him. Pierola told Amaya "that before he [Amaya] decided to do the things that he was doing, to think about his family," Tr. 1141. On November 15, 2013 the Union advised Respondent that Amaya was one of its supporters.

On November 22, 2013 Respondent instructed its superintendents, project managers and crew leaders that at the end of each work day, they must email a report to the company office with the following information: job name, purchase order number, a summary of the work done, pictures of the job before work started and after it finished and the names of the employees who worked on the job, G.C. Exh. 39.

On December 11, Amaya submitted this report for the prior day somewhat late. Maximo Pierola administered a disciplinary warning to Amaya. He issued another such warning on December 16, to Amaya and Roberto Ayala, which he cancelled the next day.

On December 24, Maximo Pierola met with some employees at the Lakeland Recreation Center in Baltimore. He distributed copies of testimony given by Mauricio Bautista at the representation hearing of December 2, implying that many of Respondent's employees did not have bona fide immigration papers. He told employees not to trust Bautista. Pierola then proceeded to ask several employees their reaction to Bautista's testimony. Amaya defended Bautista and Pierola got angry with Amaya.

At this meeting, Pierola also suggested that he and the employees could settle their differences informally—without the Union.

[21] Complaint paragraph 11.

On January 10, 2014 Respondent suspended Amaya for 7 days for his failure to submit daily job reports for work performed January 7-9. Amaya had notified Respondent that his cellphone was not working on January 9. One of Respondent's office secretaries informed all Respondent's managers to contact Mauricio Bautista, who was working with Amaya, instead of Amaya.

Amaya submitted the reports for all three days on January 10 at 3:43 a.m. and minutes thereafter. Amaya worked from 6:00 a.m. on January 8, until 2:30 a.m. on January 9. He also worked from 6:00 a.m. on January 9 until 2:30 a.m. on January 10.

No other employee has been suspended for failing to submit the daily job reports or for submitting them late, or was given any other discipline aside from possibly Mauricio Bautista.

Other employees either failed to submit daily reports or submitted them late without being disciplined. These include Norberto Araujo—before Respondent was aware of his joining the FLSA suit or any other protected activity, and Henry Castellon, for whom there is no evidence of any protected activity, G.C. Exh. 108(b).

Mandatory employee meeting of February 27, 2014: Mail Ballot Election February 28 to March 14, 2014[22]

The Board conducted a mail ballot representation election amongst Respondent's construction and recycling employees between February 28 and March 14, 2014. The day before balloting began, Respondent held a mandatory meeting for entire bargaining unit at its facility at Sligo, Maryland. Two employees, Mauricio Bautista and Domingo Zamora, were not invited to the meeting.

Maximo Pierola encouraged employees to vote against union representation. He described Bautista and Zamora as "rotten apples" and stated that the other employees should not listen to them, Tr. 971. In response to a question, Pierola stated that if the Union kept bothering him, he could either close the company, get subcontractors or go bankrupt, Tr. 972.[23]

Maximo Pierola also suggested that the employees' grievances could be resolved with resort to private mediation between the company and its employees. Norbert Araujo responded that Maximo Pierola had been promising to resolve employee grievances for the past 25 years, but never did so. Pierola responded that this would change.

The election was conducted as scheduled. However, the ballots were impounded and apparently have not yet been tallied, Tr. 57-58.

[22] The Region's Order of August 1, 2014, Consolidating Case 5-CA-131619 with the prior matters alleges that Respondent violated Section 8(a)(1) of the Act in several respects at the February 27, 2014 meeting, G.C. Exh. 1-BB.

[23] One company to which Respondent subcontracts is Z Maxim, which is owned by Maximo Pierola's daughter.

Araujo receives a warning for working overtime without permission[24]

The day after Araujo spoke up at the February 27 meeting, Respondent issued him a written warning for working overtime without permission. Since the October 25 memo was issued, Araujo had worked overtime on numerous occasions without getting permission from Maximo Pierola, Alex Pierola or Kenneth Brown. He was not disciplined on any of those occasions.

April 2014 conversation between Maximo Pierola and Geremias Berganza[25]

In February 2014, Geremias Berganza was assigned to work at the MES recycling center in Cockeysville, Maryland. While working there, he sustained an injury to his eye. Afterwards, he performed work at the home of Alex Pierola, Maximo's son. Respondent paid Geremias in cash for this work. Geremias believed he was not paid properly and complained to Union Organizer Sandro Baiza.

In April 2014 Maximo Pierola called Geremias. He told him that he could sue him for defamation and that he would fire him in person.

April 23, 2014: Respondent orders Norbert Araujo to return his company truck (complaint paragraph 21)

Norbert Araujo signed a consent form to join the FLSA class action suit on February 10, 2014, G.C. Exh. 67. He testified that he informed Alex Pierola of that fact on March 6, after Alex Pierola had given him a written warning for working overtime without approval, Tr. 980-983. Araujo's testimony is uncontradicted and therefore credited. Araujo's consent form was filed with the United States District Court on May 5, 2014, G.C. Exh. 13.

On April 23, Alex Pierola ordered Araujo to return his company van. The General Counsel alleges that this was done to retaliate against Araujo assumedly for joining the FLSA suit and challenging Maximo Pierola at the February 27, 2014 employee meeting. Prior to April 23, Respondent had provided Araujo with a company van to drive from home to work since 1992. In April 2014 that van was a Ford Araujo had been driving for 4-5 years.

Kenneth Brown testified that he attended a manager's meeting at which it was decided to reduce the number of company vehicles at the Arlington County courthouse/detention center from 5 to 4. He did not testify when this meeting occurred or why it was determined that Araujo, as opposed to another employee, should lose use of his company truck. It also appears that at some unspecified point in time, Respondent could have reassigned the truck driven by Manuel Medrano, rather than that driven by Araujo, Tr. 1330-31. In the absence of any explanation for why it was Araujo who lost use of the company vehicle, I find this action was discriminatorily motivated.

[24] This was not pled as a violation of the Act. I assume that Araujo's testimony about this warning was elicited to establish discriminatory animus towards him.

[25] Complaint paragraph 12.

Lay-offs and terminations of Nestor Sanchez and Hernan Latapy

Between January 21, 2014 and April 25, 2014 Tito employees Nestor Sanchez and Hernan Latapy were performing painting work at the Washington D.C. Convention Center. Sanchez was one of three employees fired by Respondent in 2012 and then reinstated, in part due to the efforts of Union Organizer Sandro Baiza.

On April 25, 2014 Manual Alarcon informed Norbert Araujo, who had been working in Arlington County, that he was going to be assigned to the Convention Center and that Latapy was going to be sent to paint in Maryland. Nestor Sanchez would be sent to work in Arlington.

Latapy told the D.C. Government supervisor, Juan Jimenez, about the change. Jimenez insisted that Latapy stay at the Convention Center. Respondent insisted on the change. As a result, either the D.C. Government kicked Respondent off the job, or Respondent abandoned the project. Araujo stayed at Arlington and Respondent did not give Latapy or Sanchez any more work as employees of Tito Contractors. In June 2014, Respondent's superintendent, Fermin Rodriguez, told Sanchez that there was plenty of work and suggested that he "fix it with Tito or with the lawyers," Tr. 887. Kenneth Brown's testimony at Tr. 1324-25 and 1650, as well as Milton Antezana's at Tr. 1741-44, also indicates that Respondent had plenty of work for Latapy and Sanchez in the summer of 2014.

Fermin Rodriguez called Latapy on May 22 or 23, and offered him employment as a subcontractor of Respondent, or as an employee of a subcontractor. Fermin Rodriguez operates a company called RDI Construction which performs some or all of its work pursuant to a subcontract with Respondent. Some employees of Respondent have performed work for RDI, including drywall and plumbing work at Kenmore Middle School in Arlington, Virginia. This record also establishes that individuals who worked as Tito employees prior to the summer of 2014, such as Jose Granados and Angel Alvarado, were removed from Respondent's payroll but continued to perform work for Respondent at other sites, such as the Candlewood School in Maryland, either as subcontractors or employees of a subcontractor, G.C. Exh. 10(b) and Resp. Exh. 30.

Latapy declined to work for Respondent as a subcontractor. During this conversation Fermin Rodriguez encouraged Latapy to accept Respondent's offer because after the lawsuit was finished, Maximo Pierola "would fire all those son-of- a-bitches," Tr. 1088-89.

On June 25, 2014, Respondent terminated Latapy, ostensibly for refusing to report to work at a job site in Howard County, Maryland. There is no evidence that Respondent ordered Latapy to report to such a jobsite. Thus, I credit his testimony that this never happened, Tr. 1095.

New or strictly enforced policy requiring prior high level approval of overtime work in advance

On October 25, 2013, Respondent issued to its construction employees a memorandum stating that, prior to working overtime, employees must get prior approval from either Maximo or Alex Pierola or Kenneth Brown. Alex Pierola testified that Respondent had a policy requiring

prior approval for overtime from top management prior to the filing of the FLSA lawsuit. However, he admitted that this policy was not strictly enforced until after the suit was filed, Tr. 1435. There is no evidence that any construction employees had ever been informed that such a policy existed prior to the filing of the FLSA suit.

Discriminatory and/or retaliatory withholding of overtime work

The General Counsel alleges that Respondent has been withholding overtime work from certain employees in a discriminatory manner, and/or to retaliate against them for their protected activities.

The General Counsel and Respondent in their briefs focus on different portions of Respondent's payroll records in arguing whether or not there was any discrimination against the FLSA plaintiffs. Much of this evidence is amorphous. However, I find that Respondent violated the Act in discriminating against the 7 employees who were identified as plaintiffs prior to November 2, 2013 by withholding overtime work from them during the pay period ending on that date. Indeed, the chart attached to Respondent's brief as exhibit A establishes discrimination in assigning or allowing overtime work. Not one of the construction employees who had been named in the initial FLSA complaint (Roberto Ayala, Mauricio Bautista, Geremias Berganza, Hector Delgado, Sabino Diaz, Jose Jimenez and Domingo Zamora) worked an hour of overtime that pay period.[26]

G.C. Exh. 10 and well as Respondent's chart establishes that many of Respondent's employees, who either had not yet joined the suit, or never joined, worked many hours of overtime during that pay period. These include: Hector Cortez, 42 hours of overtime; Norberto Araujo, 38 hours; Henry Castellon 34 hours; Jose Granados, 33 hours; Leonel Rosales 23 hours; Manuel Medrano, 52 hours; and Manuel Rodriguez 21 hours. There is no explanation in this record for this disparity. Thus, as more fully discussed in the analysis section of this decision, I find it was discriminatorily motivated consistent with the threats from Respondent's managers that the company would discriminate against the plaintiffs.

I leave to compliance whether or not there was discriminatory allocation of overtime in other pay periods. There is evidence that suggests as much. Certain employees, for example, Robert Ayala, a party to the FLSA suit, have experienced a dramatic drop in the number of overtime hours they have worked since the suit was filed. Respondent has not offered any explanation as to why this is so, Tr. 1443-1446, G.C. Exh. 10, p. 8.

In July 2014 Respondent prohibited any overtime work at the Arlington County detention center and courthouse. Maximo Pierola and Manual Alarcon instructed Project Superintendent Jorge Ramos that if employees had to work on a Saturday, they would have to take a day off on a weekday, G.C. Exh. 104.

[26] Respondent was not aware that Luis Palacious had joined the lawsuit until November 13, 2013.

Respondent discharges Mauricio Bautista[27] *on August 1, 2014 (Case No. 5-CA-134285)*

Mauricio Bautista worked for Tito Contractors from June 30, 2004 until August 1, 2014. Ever since 2006, he had worked primarily at the Arlington County detention center, almost always as a crew leader. Prior to July 25, 2014, Respondent had never disciplined Bautista.

On July 23, Respondent replaced Bautista as crew leader at Arlington with Jose Amaya, after Bautista refused to sign a document stating his liability if his company cell phone was either lost or damaged. Respondent's superintendent, Jorge Ramos, also found Bautista's crew taking a coffee break on the jobsite when they may not have been authorized to do so.[28]

On July 24, Amaya informed Bautista that he was being transferred to the Candlewood Elementary School in Rockville, Maryland the next day. According to Respondent's position statement, G.C. Exh. 202, this was to be a temporary assignment. Bautista was to return to Arlington upon completion of his assignment at Candlewood. Unlike other temporary assignments of this nature, Respondent did not provide Bautista with a company vehicle to get to the Candlewood jobsite.

Maximo Pierola decided to transfer Bautista from Arlington to Candlewood. Jorge Ramos, Respondent's superintendent overseeing the Arlington contracts, did not want Bautista transferred, G.C. Exh. 206. Ramos was concerned as to whether employees slated to replace Bautista had the proper clearances to work inside the detention center. Manual Alarcon, who apparently outranked Jorge Ramos, insisted that Bautista, not any other employee, go to Candlewood. There is no explanation for this insistence. Bautista was not happy with this transfer since it doubled his commuting time, a fact of which Respondent was most likely aware, G.C. Exh. 206.

At Candlewood, Respondent's employees were hanging double doors in door frames. Contrary to the suggestions of Respondent, the record establishes that hanging the double doors at Candlewood was not a routine task that any of Respondent's experienced employees could perform. Milton Antezana, Respondent's job site superintendent at Candlewood, testified as to how Bautista ended up at his project:

> Well, I called the office because we need someone who knows to install the continuing hinge. You cannot make the mistake, because if you made mistakes, that hinge is not good anymore.
>
> And I was specific when I called out to say I need a carpenter who knows. And they told me I got one person who he has a lot of experience in this. And, okay, I say fine, then that will be great for me. So that's when they sent him.

Tr. 1685-86; also see Tr. 1690-91, 1726.

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[27] Bautista's full name is Jose Mauricio Lopez Bautista. In Respondent's payroll records, G.C. Exh. 10(b), he is listed as Lopez Bautista, Jose M.

[28] Jorge Ramos did not testify in this proceeding.

Antezana also testified that the reason he asked for someone who knew how to install a continuous hinge was that Jose Granados, who worked at the site from January to July made a lot of mistakes, Tr. 1719-20, 1733. [29]

In fact Bautista did not have any experience in installing doors with a continuous hinge. There is no evidence that Respondent made any effort to determine whether Bautista or any of its other employees has the experience and skills that Antezana was seeking. After Respondent terminated Bautista, it did not send Antezana a carpenter to replace him, Tr. 1717-18. This suggests that it was not imperative to transfer Bautista to Candlewood and that the decision to send him to Candlewood was a "set up" designed to provide an excuse to terminate him.[30]

Bautista did not report to Candlewood on Friday, July 25 as directed. He emailed Superintendent Manual Alarcon at 5:56 a.m. that he was ill and could not report to work. Pursuant to Alarcon's direction, Bautista forwarded his email to the job superintendent, Milton Antezana.

Bautista reported to Candlewood on Monday, July 28. Antezana told him to hang a double door on the building exterior. Bautista told Antezana he had never erected a door like this before. The door has a 79-inch continuous hinge. Bautista had hung doors before, but only the type with several 4 ½ inch hinges. Moreover the double door did not come with a premanufactured door frame which corresponding holes already drilled. The installer had to line up the holes in the hinge and drill properly aligned holes into the door frame, before installing the screws through the holes in the hinge and the door frame.

On July 28, Bautista and Angel Alvarado hung 2 double doors. The next day, Tuesday, July 29, Bautista hung one double door by himself. At least one of the screws attaching the door hinge to the door frame was not properly aligned. At some point neither of the two chargers for his drills were charged. On Wednesday, when Bautista reported to work, Antezana told him he was not supposed to be there. However, Antezana then asked Bautista if he would help install

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[29] Jose Granados worked at Candlewood as late as July 18, 2014, Resp. Exh. 30. Granados was an employee of Tito Contractors through June 14 and then apparently began working for Respondent as a contractor, rather than as an employee, G.C. Exh. 10 (b). Respondent's payroll records show that Granados worked as a Tito employee doing carpentry work at Candlewood (Job # OMD –C-13001 500X050, G.C. Exh. 102, p. 19) as early as the pay period ending December 28, 2013 and through the pay period ending June 14, 2014. His wage rate was $15.50 per hour. Bautista's wage rate was $17.00 per hour. Angel Alvarado, who performed carpentry work at Candlewood from as early as April 19, through July 2014 was paid $13.00 and then $14.00 per hour. After the pay period ending July 12, 2014, Alvarado also appears to have worked at Candlewood as a subcontractor because he no longer appears on Respondent's payroll records.

I note that G.C. Exh. 10 and 10(a) are Respondent's payroll records from pay periods prior to December 14, 2013. G.C. Exh. 10(b) are the payroll records for the pay period ending December 14, 2013 through August 9, 2014. In the bound exhibits, G.C. 10 (a) and (b) are in a separate binder from G.C. Exh. 10, which is for exhibits admitted at the September 11 and 12 sessions. The manner in which they are bound makes it very difficult to read the dates. However, this can be done more easily from the electronic version of the exhibits.

[30] There is also no explanation for why other employees, such as Francisco Garza, who had performed carpentry work at Candlewood between December 2013 and March 2014, were not sent to that site in July, instead of Bautista, or to replace Bautista, G.C. Exh. 10(b).

some door frames. Bautista declined on the grounds that he was not authorized to be at the site that day. Later that day, Bautista spoke to superintendent Fermin Rodriguez, who offered to seek authorization for Bautista to work that day at Candlewood. Bautista told Fermin that he was already too far from Candlewood and did not want to go back.

On Thursday, July 31, Antezana gave Bautista two doors to hang. After drilling the holes for the screws and installing the screws, Bautista asked Antezana for help in lifting the doors. The screws were not properly aligned and Antezana had difficulty getting one screw out.

Antezana told Bautista that he would have to tell Respondent's office that no doors had been erected that day. He also handed Bautista a warning for being absent on July 25 and not providing a doctor's note.

At 5:30 p.m. on July 31, Manual Alarcon called Bautista and told him that Antezana did not want him working at Candlewood because he didn't know how to hang doors. On August 1, 2014, Respondent's superintendent Alfonso Caviedes called Bautista and told him he had been terminated. Caviedes read Bautista a letter signed by Respondent's General Manager, Kenneth Brown. The letter stated that Maximo Pierola directed Brown to terminate Bautista because of "his failure to perform basic carpentry duties such as installing door frames and hanging doors at your last job assignment." G.C. Exh. G.C. 188(a).

Analysis

The Alleged Section 8(a)(3) and (1) violations

General Principles

Each of the alleged violations must be analyzed independently; however, the context in which they occurred must also be considered. Related unfair labor practices are highly relevant in determining both the credibility of witnesses and Respondent's motive with regard to a particular allegation. Unlawful discrimination against one prounion employee based on antiunion animus often supports an inference that the same animus motivated its actions against other prounion employees, *Embassy Vacation Resorts,* 340 NLRB 846,848 (2003). This is particularly true where, as in this case, Respondent's obvious discrimination against several of its prounion employees establishes hostility to unionization and employees' Section 7 rights, See *NLRB v. DBM, Inc.,* 987 F. 2d 540 (8th Cir. 1993); *Reeves Distribution Service,* 223 NLRB 995, 998 (1976).

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action.

However, it is not always the case that the General Counsel must establish that an individual discriminatee engaged in union or other protected activity or that a Respondent was aware of an individual employee's union activity. For example, where an employer institutes an unprecedented mass discharge in the context of a union organizing campaign, knowledge of each

employee's protected activity is unnecessary for the General Counsel in proving illegal discrimination. Indeed, the knowledge of any of the individual's protected activities may be unnecessary, as in this case, when the employers is aware of union or other protected activity, and has, as in this case, suspicions as who is involved and bears considerable anti-union animus, *Hunter Douglas, Inc.,* 277 NLRB 1179 (1985) enfd. 804 F.2d 808 (3d Cir. 1986). Moreover, in the context of an organizing drive, it is a violation of Section 8(a)(3) to discharge a neutral employee in order to facilitate or cover-up discriminatory conduct against known union supporters, See *Bay Corrugated Container,* 310 NLRB 450, 451 (1993) enfd. 12 F. 3d 213 (6th Cir. 1993).

Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil and Gas Co.,* 337 NLRB 1120 (2002).

Respondent makes much of the fact that many of its employees who joined the FLSA suit are not alleged discriminatees. However, it is well established that an employer's failure to take adverse action against all union supporters, or employees who engaged in other protected activity, does not disprove discriminatory motive, otherwise established, for its adverse action against a particular employee, See *NLRB v. Nabors,* 196 F. 2d 272, 276 (5th Cir. 1952); *Master Security Services,* 270 NLRB 543, 552 (1984); *Volair Contractors, Inc*., 341 NLRB 673, 676 fn. 17 (2004). Moreover, according to Fermin Rodriguez's statement to Hernan Latapy at Tr. 1088-89 that Maximo Pierola would fire all the SOBs when the lawsuit was over, this may just be a matter of time and opportunity.

The Section 8(a)(3) allegations involving Respondent's construction employees

All of the alleged discriminatees who worked in Respondent's construction division, Mauricio Bautista, Jose Amaya, Roberto Ayala, Jose Diaz, Geremias Berganza, Hector Delgado, Sabino Diaz, Jose Jimenez, Hernan Latapy, Luis Palacious, Nestor Sanchez and Domingo Zamora engaged in protected activity both by joining in the class action lawsuit against Respondent under the FLSA and by supporting the Union.[31] Respondent was aware of the protected activity of all of these employees.

Moreover, the record is replete with evidence of Respondent's animus to these employees and their protected activities. For example, Hernan Latapy's testimony that Fermin Rodriguez told him that Respondent's owner, Maximo Pierola "would fire all those son-of- a-bitches," after the lawsuit is finished, is uncontroverted. Fermin Rodriguez, when called as a witness by the General Counsel, neither denied making this statement nor testified that he had no basis for making the statement. I infer that Maximo Pierola informed Fermin Rodriguez that this is precisely what he intended to do.

On this basis alone, I find that the General Counsel has met his initial showing of discrimination with regard to all the alleged adverse actions. Moreover, largely because

[31] Concertedly filing and maintaining a lawsuit under the FLSA is concerted activity protected by the NLRA, *U Ocean Palace Pavilion, Inc.* 345 NLRB 1162 (2005).

Respondent put on no evidence to prove an affirmative defense in many of these instances I find that Respondent violated the Act as alleged. To the extent Respondent has offered an explanation for the adverse actions taken against the alleged discriminatees, I find these explanations to be pretextual.

As to specific employees, the record shows as follows:

Mauricio Bautista: Respondent offered no testimony as to why it decided to terminate Mauricio Bautista as opposed to transferring him back to his job at Arlington which he had performed acceptably for years. Moreover, the record establishes that Respondent treated Bautista disparately than other employees who mishandled a particular assignment. Even with regard to the Candlewood project, it is clear that Jose Granados and others performed shoddy work and were not disciplined at all. At a jobsite in Alexandria, several employees, particularly Francisco Garza, did such poor work that Respondent lost its contract. However, there is no evidence that any of them was disciplined. Finally, this record makes it very clear that Maximo Pierola's animus toward the protected activity of all employees was particularly focused on the "rotten apples, spoiling the whole bunch," Bautista and Domingo Zamora.

Hernan Latapy and Nestor Sanchez: There is absolutely no evidence that Respondent did not have work for Latapy and Sanchez. Indeed, the record strongly suggests just the opposite.

Norberto Araujo: There is no evidence as to why a company vehicle was taken away from Araujo as opposed to other employees the Arlington project. Moreover the timing of this action strongly suggests discriminatory motive.

Jose Amaya: Respondent's disparate treatment of Amaya's filing job reports late as opposed to its inaction with regard to other employees who also filed the reports late strongly suggests discriminatory motive.

As to the withholding of overtime from the alleged discriminatees: the uncontradicted evidence shows that Respondent told these employees it would discriminate against them and that it did so.

I find that Respondent violated the Act as alleged with regard to each of these employees.

By restricting the overtime of its employees, and instituting a policy requiring the advance approval of overtime by Respondent's top management, Respondent violated Section 8(a)(3) and (1)

Respondent has a facially appealing defense to the allegation that it violated the Act by instituting the policy requiring top management approval of all overtime. Of course, Respondent had to insure that it was in compliance with the FLSA regardless of whether or not it complied with this statute before its employees sued it. However, under Board law, specifically *Wright Line,* 251 NLRB 1083 (1980), it is not enough for an employer to present a legitimate reason for its actions. Once, as in this case, where the General Counsel has made an initial showing that discrimination and or retaliation for protected activity was a motivating factor in an adverse

employment action, the respondent employer must establish that it would have take the steps it took regardless of the protected activity.

The Act does not allow an employer to substitute "good reasons" for the "real reasons." In order to meet its burden, once the General Counsel has made his initial showing of discrimination, it is not enough for the Respondent to show that it *could have* taken action for a non-discriminatory reason, it must establish that it in fact took the action for such legitimate purpose, *Structural Container Industries,* 304 NLRB 729,730 (1991); *Yellow Ambulance Service,* 342 NLRB 804, 805-06 (2004); Also see *Watsonville Register-Pajaronian,* 327 NLRB 957-61 (1999) [compliance with the FLSA did not necessitate the employer taking the actions it took in violation of Section 8(a)(5)].

Here, there is no question that Respondent bore tremendous animus towards the protected activity of its employees, and indeed took discriminatory action against some of the employees who participated in the FLSA lawsuit. Respondent has put forth one possible way of complying with the FLSA. It has put forth no evidence as to why it chose this manner of complying with that statute, as opposed to, for instance, paying them the wages they were entitled to under the FLSA.

Alleged Independent Section 8(a)(1) violations regarding the construction employees

The test of whether a statement violates Section 8(a)(1) is whether Respondent's conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights, *Alliance Steel Products,* 340 NLRB 495 (2003); *Southwestern Bell Telephone Co.,* 251 NLRB 625, 631-32 (1980). I find that the following statements by Respondent are violative under this standard:

Superintendant Fermin Rodriguez's statements to Domingo Zamora, Geremias Berganza and others in October 2013 that employees who participated in the FLSA lawsuit would not be allowed to work overtime.

Owner Maximo Pierola's statements to Jose Amaya on October 11, 2013 that he should think about his family before taking legal action against Respondent;

Owner Maximo Pierola's statements to Geremias Berganza on October 11, that employees were stabbing him in the back by filing the FLSA lawsuit and that he did not want backstabbers in his company and that there were thousands of jobs elsewhere.

Maximo Pierola's statements to employees on December 24, 2013 indicating that their workplace issues could be resolved if they eschewed union representation.

Owner Maximo Pierola's February 27, 2014 characterization of Mauricio Bautista and Domingo Zamora as "rotten apples" which was based on their union and other protected activity.

Owner Pierola's threat on February 27 to close his company or subcontract out most or all of his work.

Maximo Pierola's statement to Geremias Berganza that he could sue him for defamation and would fire him in person.

Fermin Rodriguez's statement to Nestor Sanchez indicating that he could get work if he "fixed it" with Tito or his lawyers. This was an attempt to coerce Sanchez from withdrawing from the lawsuit.

Fermin Rodriguez's statement to Hernan Latapy that Maximo Pierola would fire all the SOBs when the lawsuit was over.

Legal Analysis with regard to the 5 discharges of employees at the Shady Grove Recycling Center

In an approximately six-week period from October 30, 2013 to December 13, 2013, Respondent discharged 5 of its employees at the Shady Grove recycling center. These discharges occurred during the Union's organizing campaign and all five engaged in union activity. Four of these employees were removed from that site at the request of MES, which had the contractual right to request their removal. The number of discharges and requests for removal of employees by MES was unprecedented.

The record shows that MES rarely requested that Respondent remove an employee prior to October 30. Mark Wheeler had been MES' operations manager at Shady Grove for 11 years. He could specifically recall requesting the removal of only one employee, Sandra Melgar between 2010 and October 30, 2013.[32] The discriminatees in this case were treated in a much different manner than was Melgar. Wheeler's day planner shows that he became concerned about her performance on January 7, 2013. He noted further complaints about Melgar's performance on February 18, 2013 but did not ask for her replacement until April 18, 2013.

Wheeler's conduct with regard to Keila Diaz in July 2011 also offers a sharp contrast with the conduct of Wyatt and Wheeler with regard to the discriminatees. Diaz was found sleeping in her car during work time on July 5, 2011. He emailed Berganza's predecessor that this type of behavior would not be tolerated, but did not request her removal, R. Exh. 2.

There is no evidence that David Wyatt, Wheeler's superior, had ever requested that Respondent remove an employee prior to October 30, 2013. As set forth below, I find that MES' request for the removal of 4 of Respondent's employees during a union organizing drive was not a coincidence.

It is true that during the period in question, MES had concerns about productivity at the Shady Grove facility. In part due to this concern, Respondent conducted a productivity test, G.C. Exh. 14. The 5 discriminatees were not the low producers on those tests. Indeed, Maria Ellen Chavez was the highest producer and Reyna Sorto and Aracely Ramos were also among the high producers. There is no convincing nondiscriminatory explanation for why Mark

[32] Andrea Monroy abandoned her job on January 18, 2013, G.C. Exh. 82. There is no evidence that MES requested her removal. Moreover, Monroy received three warnings for misconduct, while some of the discriminatees in this case were removed from the site and discharged without warning.

Wheeler started monitoring Reyna Sorto's and Yasmin Ramirez's productivity as opposed to the employees whose productivity was low even when they knew they were being tested, such Sylvia Sandino, Miriam Mejia and Adriana Villavicencio.[33] There is absolutely no non-discriminatory correlation between MES' productivity concerns and its requests for the removal of the discriminatees.[34]

There is no evidence that Respondent positively knew of the union activities of any of the discriminatees until November 15, 2013, when the Union identified them in a letter to Respondent. By that time Maria Sanchez and Aracely Ramos had already been discharged. Reyna Sorto may also have been discharged before Respondent knew for sure that she supported the Union. Respondent had been informed of Yasmin Ramirez's and Maria Ellen Chavez's support for the Union before it discharged them.

As stated earlier, Tomas Berganza, Respondent's supervisor at Shady Grove knew of union activity and at least suspected that all five discriminatees supported the Union before they were discharged. Also as discussed at the outset of this decision, I find that Berganza began operating as Respondent's agent in opposing union organizing before Maria Sanchez's discharge on October 30, 2013.

Consistent with the *Wright Line* analysis above, I find that MES would not have requested the removal of Maria Sanchez, Aracely Ramos, Reyna Sorto and Yasmin Ramirez[35] but for the involvement of Respondent. I find that this involvement was motivated by Respondent's animus towards the known or suspected union activity and/or other protected activity (complaining about the goggles).

Respondent has not shown that MES would have, independently, without its involvement, have sought the removal of the five alleged discriminatees from the Shady Grove jobsite. This record shows that all the information that Mark Wheeler and David Wyatt, both of whom speak little or no Spanish, based their removal requests, came from Tomas Berganza. Thus, each of these requests was influenced by Respondent's anti-union animus.

I find that the Respondent's termination of these employees, the removal of Maria Chavez from the Shady Grove site and her termination were also motivated at least in part by the discriminatees' union and other protected activity (e.g. Chavez's complaining directly to MES about the goggles).

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[33] Meija and Villavicencio are identified as union supporters in the Union's November 14, 2013 letter to Respondent.

[34] There is a correlation, however, between Respondent's awareness of the FLSA suit and MES' monitoring of Yasmin Ramirez. I find that the impetus for this monitoring came from Respondent and was related to her husband's participation in the FLSA suit. Discrimination against an employee's family members in such circumstances violates the Act, *PJAX*, 307 NLRB 1201, 1203-05 (1992), enfd. 993 F.2d 378 (3d Cir. 1993).

[35] Tomas Berganza's effort to have Yasmin Ramirez transferred from Shady Grove to Cockeysville, is somewhat inconsistent with the notion that MES request that Ramirez be removed from Shady Grove originated by him. However, the unprecedented nature and number of the MES removal requests during the organizing drive leads me to conclude that none of these requests may have made without the involvement of Respondent.

Remedy

The Respondent, having discriminatorily discharged 5 of its recycling employees, must offer them reinstatement and notify the Maryland Department of Environmental Services in writing that it has no objection to their reinstatement to their former positions or substantially equivalent positions at the Shady Grove recycling center. Respondent must also make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Tortillas Don Chavas*, 361 NLRB No. 10 (2014)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The Respondent, Tito Contractors, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, laying-off or otherwise discriminating against any employee for supporting International Union of Painters and Allied Trades, District Council 51, or any other union, or for engaging in other protected concerted activity, including participating in a class action lawsuit.

(b) Coercively interrogating any employee about the union support or union activities of that employee or any other employee.

(c) Coercing employees regarding their participation in protected concerted activity such as participating in a class action lawsuit.

(d) Promising benefits to employees if they refrain from engaging in union or other protected activity, such as a class action lawsuit.

(e) Threatening to withhold overtime from employees who engage in protected activity, including participating in a class action lawsuit.

[36] 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.

(f) Withholding overtime from employees who participate in a class action lawsuit.

(g) Initiating a policy requiring high-level management advance approval of overtime work in response to protected activity, or strictly enforcing such a policy which had not been enforced prior to the filing of a collective action lawsuit or other protected activity.

(h) Maintaining and enforcing a rule which prohibits employees from taking complaints about their working conditions outside their "chain of command."

(i) Taking any action to encourage employees of the Maryland Environmental Services Department to request removal of employees from a jobsite in retaliation for any suspected or actual union or other protected concerted activity.

(j) 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 from the date of the Board's Order, offer Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez and Maria Chavez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order notify the Maryland Environmental Services Department in writing that it has no objection to the reinstatement of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez and Maria Chavez to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and request their return to the Shady Grove (Derwood), Maryland facility.

(c) Within 14 days from the date of the Board's Order, offer Mauricio Bautista, Hernan Latapy and Nestor Sanchez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez Mauricio Bautista, Hernan Latapy, Nestor Sanchez and Jose Amaya whole for any loss of earnings and other benefits suffered as a result of the discrimination against them as specified in the remedy portion of this decision.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, removal from the Shady Grove jobsite and discipline of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez and Maria Chavez and within 3 days thereafter notify them in writing that this has been done and that their discharges and illegal discipline and removals will not be used against them in any way.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges or other discipline or adverse action concerning Mauricio Bautista, Hernan Latapy, Nestor Sanchez and Jose Amaya and within 3 days thereafter notify them in writing that this has been done and that their discharges and illegal discipline and lay-offs will not be used against them in any way.

(g) Within 14 days from the date of the Board's Order, restore to Norberto Araujo the use of a company vehicle comparable to the vehicle he drove prior to April 2013.

(h)Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Washington, D.C. office and the Shady Grove (Derwood), Maryland recycling facility, copies of the attached notice marked "Appendix"[37] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 5, 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 the 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, as its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 11, 2014.

(j) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which will be scheduled to ensure the widest possible attendance of employees, at which time the attached notices marked "Appendix" is to be read to its employees by a Board agent in English, Spanish and any other language spoken by more than three employees in the presence of Respondent's President/Chief Executive Office or highest ranking human resources official.

(k) 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.

[37] 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., November 4, 2014.

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Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge, lay-off or otherwise discriminate against any of you for supporting International Union of Painters and Allied Trades, District Council 51, or any other union, or for engaging in other protected concerted activity, including participating in a class action lawsuit.

WE WILL NOT coercively question you about your union support or activities or the protected activities of you or other employees.

WE WILL NOT promise you benefits if you refrain from union or other protected concerted activity, such as participating in a class action lawsuit.

WE WILL NOT otherwise coerce you with regard to your union or other protected activities by 1) threatening to withhold overtime work; 2) actually withholding overtime work or 3) instituting or strictly enforcing a rule requiring you to seek high-level management approval before working overtime.

WE WILL NOT coerce, restrain or interfere with you communicating with our clients or other third parties about your wages, hours or other terms and conditions of employment. WE WILL NOT discipline you or threaten to discipline you for doing so.

WE WILL NOT do anything to encourage employees of the Maryland Environmental Services Department, or any other entity to request your removal from a job or jobsite in retaliation for any suspected or actual union or other protected concerted activity.

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.

WE WILL rescind our rule that prohibits you from speaking to representatives of the Maryland Environmental Services Department, or any other entity regarding your wages, hours and terms and conditions of employment.

WE WILL, within 14 days from the date of this Order, offer full reinstatement to Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez and Maria Chavez their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL request in writing that the Maryland Environmental Services Department reinstate Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez and Maria Chavez to their former jobs at the Shady Grove (Derwood), Maryland recycling station and state that we have no objection to their being returned to these positions.

WE WILL, within 14 days from the date of this Order, offer full reinstatement to Mauricio Bautista, Hernan Latapy and Nestor Sanchez to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez and Maria Chavez whole for any loss of earnings and other benefits resulting from their discharges and other discrimination, less any net interim earnings, plus interest compounded daily.

WE WILL make Mauricio Bautista, Hernan Latapy, Nestor Sanchez and Jose Amaya whole for any loss of earnings and other benefits resulting from their discharges and other discrimination, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge or layoffs and discipline of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez Mauricio Bautista, Hernan Latapy, Nestor Sanchez and Jose Amaya and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges, layoffs and discipline will not be used against them in any way.

WE WILL restore to Norberto Araujo the use of a company vehicle comparable to the vehicle he drove prior to April 2013.

TITO CONTRACTORS, 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.

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-4061
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-119008 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

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, (410) 962-2864.