

Bruce Packing Company, Inc. and Laborers' International Union of North America, Local No. 296, AFL-CIO.¹ Cases 36-CA-010496 and 36-CA-010595

September 28, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On April 8, 2010, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief, and the Respondent filed a reply brief. The Charging Party filed exceptions, and the Respondent filed an answering brief. The Acting General Counsel filed limited cross-exceptions and a supporting brief. The Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision and Order, to modify her remedy,³ and to adopt her recommended Order as modified and set forth in full below.⁴

¹ We have amended the caption to reflect the reaffiliation of the Laborers' International Union of North America with the AFL-CIO effective October 1, 2010.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), we modify the judge's remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

⁴ We shall modify the judge's recommended Order to conform to the violations found and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. We shall substitute a new notice to conform to the modified Order.

The Acting General Counsel has requested that the notice be posted in both English and Spanish. The Respondent does not oppose this request. Based on the discriminatees' limited English proficiency, we find it appropriate to grant the Acting General Counsel's request, and we shall modify the Order accordingly. See *Barnard College*, 340 NLRB 934, 934 fn. 2 (2003).

The Charging Party has requested that the Board issue a broad order. A broad order is appropriate "only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB

I. BACKGROUND

The Respondent operates two custom meat processing plants. The facility at issue here is located in Silverton, Oregon. None of the Respondent's employees is represented by a union.

On June 19, 2009,⁵ Day-Shift Sanitation Supervisor Abel Esparza called employee Maria Cortez on her cell phone as she traveled home from work. Cortez is married to Jose Carmen Maciel, one of the alleged discriminatees discussed below, and is employed by the Respondent as a day-shift production worker. Esparza is not Cortez' supervisor. Esparza was a friend of Cortez and Maciel and is godfather to one of their sons.

During the phone conversation, which centered mainly on a harassment charge that another employee had filed against Esparza, Esparza asked Cortez to confirm whether employees were forming a group to get a union into the company. Esparza told Cortez that employees should "be careful" because it was a "delicate thing." Esparza suggested that Cortez talk to her husband, Maciel, and to employee Manuel Coria, saying that he had a raise for them and they should be "very careful because it was really very delicate."

The complaint alleged that by Esparza's conversation with Cortez, the Respondent violated Section 8(a)(1) of the Act in two respects: by unlawfully interrogating Cortez about employees' union activities, and by impliedly threatening unspecified reprisals because of employees' union activities. At the close of the hearing, the Acting General Counsel moved to amend the complaint to add an allegation, based on Esparza's statement that he had a raise for Maciel and Coria, that the Respondent violated Section 8(a)(1) by promising benefits to employees if they ceased union activity. The Respondent objected, and the judge reserved ruling on the motion.

1357, 1357 (1979). We find that a broad order is not appropriate in the circumstances presented here.

The Charging Party has additionally requested that a responsible management official be required to read the notice to employees in Spanish. We deny the request because the Charging Party has not shown that the Board's traditional remedies are insufficient to remedy the violations committed by the Respondent. See *First Legal Support Services, LLC*, 342 NLRB 350, 350 fn. 6 (2004).

The judge ordered the Respondent to post the notice at its facilities in Silverton, Oregon, and Woodburn, Oregon. All of the unfair labor practices that were alleged and litigated in this proceeding involved the Silverton facility. Without evidence of any violations at Woodburn, we shall follow the Board's usual practice and confine the notice-posting requirement of the Order to the facility at which the violations were committed. See *Consolidated Edison Co. of New York*, 323 NLRB 910, 911-912 (1997). Accordingly, we shall modify the judge's recommended Order to require that the notice be posted only at the Respondent's facility in Silverton, Oregon.

⁵ All dates hereafter are in 2009, unless otherwise stated.

The Respondent laid off 42 employees on June 29. The decision to lay off employees is not alleged to be unlawful. Rather, the complaint alleges that the four employees selected from the sanitation department day shift at Silverton (Manuel Coria, Jose Carmen Maciel, Daniel Luna, and Federico Nieves Rojas) were chosen because of their union activity in violation of Section 8(a)(3).

The four employees were supervised by Esparza, who reported to Assistant Sanitation Manager Osmin Martinez. Martinez testified that he alone selected Maciel, Coria, Luna, and Rojas to be laid off based on his own observations of employees' job performance and his recollection of oral supervisory reports, mainly from Esparza. Martinez claimed that he did not review personnel files for any employees and did not receive additional input from Esparza.

The judge did not credit "any of Mr. Martinez' uncorroborated testimony." She did not explain what part or parts of his testimony were corroborated, if any, or what evidence served as corroboration. But the judge specifically rejected Martinez' testimony that he alone selected employees for layoff. The judge found that Esparza "at least had substantial input into the day-shift layoff selections," based on the credited testimony of employee Mauro Navarro.

Navarro, a night-shift employee in the sanitation department, was laid off on the evening of June 29. Navarro had been friends with Esparza for many years. Following his layoff, Navarro went to Esparza's home and asked him why employees had been laid off. Navarro testified that Esparza said that he (Esparza) had chosen the day-shift sanitation workers because they were stirring things up by meeting with the Union. Esparza denied telling Navarro that he had chosen the day-shift workers for layoff, but the judge credited Navarro's testimony over Esparza's.

II. THE JUDGE'S DECISION

The judge found that Esparza unlawfully interrogated Cortez by asking her to confirm whether employees were forming a group to support the Union. The judge also found that Esparza impliedly threatened employees with unspecified reprisals through his warnings to "be careful." The judge denied the Acting General Counsel's motion to amend the complaint to include an allegation that the Respondent unlawfully promised employees benefits if they ceased engaging in union activity.

The judge analyzed the layoff selections under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The judge found that the Acting General Counsel had carried his initial burden with respect to all four employees. In ad-

dition to Esparza's comment to Navarro that he had chosen the day-shift workers for layoff because they were stirring things up by meeting with the Union, the judge relied on what Esparza said to Cortez during their telephone conversation to demonstrate the Respondent's knowledge of employees' union activity and its animus toward that activity.

Turning to the Respondent's *Wright Line* defense, the judge found that the Respondent had not established that it would have selected Maciel, Coria, and Luna for layoff even absent their union activity. The judge dismissed the 8(a)(3) allegation as to Rojas, however, finding that the Respondent did demonstrate that it would have selected Rojas even absent his union activity because of his poor attendance record.

III. DISCUSSION/ANALYSIS

A. Alleged 8(a)(1) Violations

We affirm the judge's finding that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Maria Cortez about her union activity and the union activities of others.⁶ In the absence of relevant exceptions, we also adopt the judge's finding that the Respondent violated Section 8(a)(1) by threatening employees with unspecified reprisals because of their union activity. We find, however, that the judge should have granted the Acting General Counsel's motion to amend the complaint to allege an unlawful promise of benefits.

A judge has wide discretion to grant or deny motions to amend complaints under Section 102.17 of the Board's Rules and Regulations. But when a matter has been fully litigated and the amendment simply conforms the complaint to the evidence, the Board has held that the judge should grant the motion. See *Pincus Elevator & Electric Co.*, 308 NLRB 684, 685 (1992), enfd. 998 F.2d 1004 (3d Cir. 1993).

Here, the promise-of-benefit allegation was fully litigated. Cortez testified that Esparza promised a raise for Maciel and Coria, and the Respondent introduced its own witness, Esparza, who denied making the statement—testimony that the judge discredited. Although the judge did not find the promise-of-benefit violation, she did find, as a fact, that Esparza impliedly promised raises for Maciel and Coria in determining that the Acting General Counsel had met his initial burden under *Wright Line* with respect to the 8(a)(3) selections for layoff. This factual finding was adverse to the Respondent on an issue of law that was framed by the complaint, and the Respondent did not except to it. Thus, the Respondent

⁶ Member Hayes agrees that the interrogation was unlawful in the context of a conversation in which Esparza also made an undisputedly unlawful threat.

has conceded that the statement was made, under circumstances where the concession is legally consequential. Moreover, although the Respondent vaguely asserts that it would have “solicited more substantive testimony” from Esparza and “explored this issue further” with Maciel had the 8(a)(1) promise of benefit been alleged earlier, it has not identified any evidence or defense that it would have presented if the allegation had been included in the complaint or had the motion to amend been made earlier. Finally, we note that the Respondent did not seek to recall any witnesses, or to present any new ones, after the Acting General Counsel moved to amend the complaint.

In these circumstances, we find that the Acting General Counsel’s motion to amend the complaint seeks to conform the pleadings to the proof and that granting the motion will not prejudice the Respondent. Accordingly, we grant the Acting General Counsel’s motion to amend the complaint. As the record establishes that Esparza impliedly promised raises for Maciel and Coria if they stopped engaging in union activity, we also find that the Respondent violated Section 8(a)(1) by promising benefits to employees if they ceased union activity. See *Grouse Mountain Lodge*, 333 NLRB 1322, 1325 (2001), enfd. 56 Fed. Appx. 811 (9th Cir. 2003).⁷

B. Alleged 8(a)(3) Violations

We affirm the judge’s finding that the Respondent violated Section 8(a)(3) by selecting Manuel Coria, Jose Carmen Maciel, and Daniel Luna for layoff. Although we agree with the judge’s ultimate conclusions as to these 8(a)(3) violations, we do so only for the following reasons, which further lead us (contrary to the judge) to find that the Respondent also violated Section 8(a)(3) by selecting Federico Nieves Rojas to be laid off.

⁷ Member Hayes would affirm the judge’s ruling denying the Acting General Counsel’s untimely motion to amend the complaint to include the additional implied promise of benefit allegation. He does not view the motion as merely conforming the complaint’s allegation of 8(a)(3) layoffs to the evidence of an unalleged 8(a)(1) violation. More importantly, the issue of an unlawful promise of benefits was *not* fully litigated. The complaint itself gave the Respondent no notice that it would have to defend against any such allegation. Although testimony was given that would be relevant to this issue, at no time prior to the close of hearing did the General Counsel indicate that he was alleging an additional unrelated violation based on this evidence. Until then, the Respondent had no idea that it might need to introduce additional evidence, either through more extensive and specific questioning of Cortez and Esparza about this aspect of their phone conversation, or by questioning Maciel about whether Cortez mentioned the implied promise of raises to him when they subsequently discussed Esparza’s call. The Respondent was not given any opportunity thereafter to introduce additional evidence. Due process requirements clearly preclude finding a violation in these circumstances.

Our analysis is governed by the test articulated in *Wright Line*, supra. Under that test, a violation of Section 8(a)(3) is established here if the Acting General Counsel showed that the employees’ union activity was a motivating factor in the Respondent’s selection of them for layoff, unless the Respondent proved, as an affirmative defense, that it would have made the same selections even in the absence of their union activity. To establish this affirmative defense, the Respondent “cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.” *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996).

We agree with the judge that the Acting General Counsel has shown that animus toward employees’ union activity was a motivating factor in the Respondent’s selection of Coria, Maciel, Luna, and Rojas for layoff. The judge found that Esparza at least had “substantial input” into the layoff selection decisions, and Esparza admitted that his selections were motivated solely by antiunion animus. It is true, of course, that Martinez also played a role in the layoff selections and was the ultimate decisionmaker, and that the Acting General Counsel did not claim or prove that Martinez shared Esparza’s antiunion animus. But the Board’s case law is clear that the antiunion motivation of a supervisor will be imputed to the decision-making official, where the supervisor has direct input into the decision.⁸ Taken together, the judge’s “substantial input” finding and Esparza’s admission demonstrate that the employees’ union activity was a motivating factor in their layoffs, under *Wright Line*.

The burden therefore shifted to the Respondent to show that it would have selected the same four employees for layoff even absent Esparza’s tainted input to the selection decisions. Martinez’ participation introduces this possibility, but the Respondent has failed adequately to support it with credited record evidence.

Martinez testified that he selected employees for layoff based on his recollection of disciplinary, attitude, and attendance issues, and that *he alone* made the sanitation day shift layoff selections. The judge discredited the latter claim, finding that Esparza had at least substantial input. Further, no credited evidence was introduced that would even tend to show that Martinez would have made the same decision, even without Esparza’s input. The Respondent did not demonstrate, for example, that Mar-

⁸ See *Parts Depot, Inc.*, 332 NLRB 670, 672 (2000), enfd. mem. 24 Fed. Appx. 1 (D.C. Cir. 2001) (per curiam); *Springfield Air Center*, 311 NLRB 1151, 1151 (1993); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117–118 (6th Cir. 1987); *Boston Mutual Life Insurance Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982).

tinez engaged in any independent investigation when determining which employees to select for the layoff. Nor did the Respondent demonstrate that Martinez applied his selection criteria in a consistent manner that would have led to Coria, Maciel, Luna, and Rojas being selected in any event. It did not show, for example, that all sanitation employees with comparable disciplinary, attitude, or attendance issues were selected for layoff. It certainly did not show that Coria, Maciel, Luna, and Rojas had the worst discipline, attitude, and/or attendance problems on the sanitation day shift.

The dissent finds that the Respondent met its *Wright Line* defense burden as to Rojas because Rojas did have poor attendance, and reports to that effect had been made to Martinez for over a year. We certainly acknowledge that Rojas had a poor attendance record. However, as explained above, the Respondent only demonstrated that particular legitimate reason for selecting Rojas for layoff existed. It did not show that Martinez would have selected Rojas because of his poor attendance even absent Esparza's unlawfully motivated input into the decision.

For the foregoing reasons, we find that the Acting General Counsel showed that antiunion animus was a motivating factor in the Respondent's selection of Coria, Maciel, Luna, and Rojas for layoff, and that the Respondent failed to prove that these employees would have been laid off even in the absence of their union activity. As a result, we conclude that the Respondent violated Section 8(a)(3) and (1) of the Act, as alleged.⁹

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3 in the judge's decision.

"3. The Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities, by impliedly threatening employees with unspecified reprisals if they engaged in union activities or supported the Union, and by promising to grant wage in-

⁹ For the reasons stated in the judge's *Wright Line* analysis, Member Hayes joins his colleagues in affirming the judge's findings that the selection of Coria, Maciel, and Luna for layoff violated Sec. 8(a)(3). However, Member Hayes would also affirm the judge's finding that the Respondent met its *Wright Line* rebuttal burden of showing that it would have selected Rojas for layoff even in the absence of union activities. In this respect, Martinez testified that he selected Rojas based on Esparza's reports concerning Rojas' attendance and tardiness issues. Martinez testified that Esparza provided such reports for over a year. Esparza corroborated Martinez's testimony, stating that he reported to Martinez that Rojas had poor attendance and he complained about Rojas' problems to Martinez every 2 to 3 months. The judge notes that the record shows that Rojas was late seven times between January 26 and March 19. Thus, because the judge has credited Martinez' corroborated testimony, the evidence supports the Respondent's defense on this allegation.

creases to employees in order to discourage employees from supporting the Union."

Substitute the following for Conclusion of Law 4 in the judge's decision.

"4. The Respondent violated Section 8(a)(3) and (1) of the Act by terminating employees Manuel Coria, Jose Carmen Maciel, Daniel Luna, and Federico Nieves Rojas because they engaged in union or other concerted, protected activities."

ORDER

The National Labor Relations Board orders that the Respondent, Bruce Packing Company, Inc., Silverton, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities, sympathies, and/or support.

(b) Threatening employees with unspecified reprisals if they engage in activities on behalf of the Union.

(c) Promising to grant wage increases or other benefits to employees in order to discourage employees from supporting the Union.

(d) Selecting employees for layoff or otherwise discriminating against employees for supporting the Union or any other labor organization.

(e) 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 this Order, offer Manuel Coria, Jose Carmen Maciel, Daniel Luna, and Federico Nieves Rojas 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) Make Manuel Coria, Jose Carmen Maciel, Daniel Luna, and Federico Nieves Rojas whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful selection of Coria, Maciel, Luna, and Rojas for layoff, and within 3 days thereafter, notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its Silverton, Oregon facility copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be translated into Spanish, and both Spanish and English notices 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 19, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 19 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.

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.

¹⁰ 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."

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 coercively question you about your union activities, sympathies, or support.

WE WILL NOT threaten you with unspecified reprisals if you engage in activities on behalf of the Union.

WE WILL NOT promise to give you wage increases or other benefits in order to discourage you from supporting the Union.

WE WILL NOT select you to be laid off or otherwise discriminate against any of you for supporting the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Manuel Coria, Jose Carmen Maciel, Daniel Luna, and Federico Nieves Rojas full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed.

WE WILL make Manuel Coria, Jose Carmen Maciel, Daniel Luna, and Federico Nieves Rojas whole for any loss of earnings and other benefits resulting from their layoff, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful selection for layoff of Manuel Coria, Jose Carmen Maciel, Daniel Luna, and Federico Nieves Rojas, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

BRUCE PACKING COMPANY, INC.

Irene Botero and Daniel Mueller, for the General Counsel.
Bryan P. O'Connor (Jackson Lewis LLP), of Seattle, Washington, for the Respondent.

DECISION

I. STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. Pursuant to charges filed by Laborers' International Union of North America, Local No. 296 (the Union), the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued an Order Consolidating Cases, Consolidated Amended Complaint,

and notice of hearing (the complaint) on January 14, 2010. The complaint alleges that Bruce Packing Company, Inc. (Respondent) violated Sections 8(a)(3) and (1) of the National Labor Relations Act (the Act). This matter was tried in Portland, Oregon, on February 8–10, 2010.¹

At the close of the hearing, counsel for the General Counsel moved to amend the complaint to include a promise-of-benefit allegation. The Respondent opposes the amendment on grounds that the alleged conduct is outside the 10(b) period and that such an amendment would infringe on the Respondent's due process rights. Counsel for the General Counsel argues that the proposed amendment is not precluded by 10(b), as it meets the factors set out in *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988), with which position I agree. However, the Respondent was not noticed of the proposed allegation until after the Respondent had rested its case even though the testimony upon which the proposed amendment was based had been given a day earlier.² The delay raises a due process question. See Section 102.17 of the Board's Rules and Regulations: an amendment to a complaint may be granted "upon such terms as may be deemed just;" *Folsom Ready Mix, Inc.*, 338 NLRB 1172 (2003) (amendments made at the beginning of the hearing were not so late as to prejudice the respondent); *New York Post Corp.*, 283 NLRB 430, 431 (1987) (amendment not ruled on until just before close of the hearing prejudiced the respondent). Given the lateness of the proposed amendment and since any remedy for existing 8(a)(1) allegations would substantially rectify any violation stemming from the proposed amendment, I deny the General Counsel's request.

II. ISSUES

Did the Respondent violate Section 8(a)(1) of the Act by interrogating employees about their union activities and those of other employees and by threatening and/or impliedly threatening employees with unspecified reprisals because of their and/or other employees' union activities.

Did the Respondent violate Sections 8(a)(3) and (1) of the Act by terminating employees Manuel Coria, Jose Carmen Maciel, Daniel Luna, and Federico Nieves Rojas on June 29, 2009.³

¹ All dates are 2009, unless otherwise specified.

² Counsel for the General Counsel argues, essentially, that the Respondent thoroughly challenged the General Counsel's evidence of a telephone conversation between Abel Esparza and Maria Cortez wherein unlawful promises were allegedly made and is thus not prejudiced by the amendment. At the hearing, the Respondent cross examined Maria Cortez as to her recollection of the conversation and presented Abel Esparza to contradict her account. While it is difficult to see what additional witness examination the Respondent might have conducted or what additional evidence the Respondent might have adduced had the Respondent known of the proposed amendment earlier, it is undeniable that the Respondent was not given that opportunity.

³ The complaint alleges that Manuel Coria, Jose Carmen Maciel, Daniel Luna and Federico Nieves Rojas were "discharged," and witnesses variously describe the terminations as "layoff," "discharge," and "firing." The Respondent distinguishes the June 29 terminations from discharges because, although the employees were laid off with no rights of recall, the employees were not designated on company records as ineligible for employment and, thus, could apply for employment at a

III. JURISDICTION

At all relevant times, the Respondent, an Oregon corporation, has been engaged in the business of food processing with offices and places of business in Silverton and Woodburn, Oregon (respectively, the Silverton facility and the Woodburn facility and collectively, the Respondent's facilities). During the 12-month period preceding the complaint, which period is representative of all material times, the Respondent, in conducting its business operations, purchased and received at its facilities goods valued in excess of \$50,000, directly from points located outside Oregon. I find Respondent has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I find, the Union has at all relevant times been a labor organization within the meaning of Section 2(5) of the Act.

IV. FINDINGS OF FACT

Unless otherwise explained, findings of fact are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings:

A. Employee Terminations at the Silverton Facility

At all relevant times, the Respondent's operations in the Silverton facility consisted of custom meat processing, wherein the Respondent cooked raw meats, including chicken, beef, pork, turkey and some fish products, to customer specification for component inclusion in customers' finished products. The Respondent maintained a sanitation department at the Silverton facility, which was responsible for facility cleaning. All workers in the Silverton sanitation department were furnished initially by Express Personnel (Express), a temporary employment agency. Upon completion of a 2-month or 500-hour contractual period of employment, Express employees so furnished could be hired directly by the Respondent. The issues centered on persons employed in the Silverton sanitation department.

Relevant employee supervision at the Silverton facility included the following individuals in the following positions, who were supervisors within the meaning of § 2(11) of the Act, and/or agents within the meaning of § 2(13) of the Act, acting on behalf of Respondent:

Jacobo de Soto (Mr. de Soto)	Human Resources Director
Jorge Mesa (Mr. Mesa)	Sanitation Manager
Osmin Martinez (Mr. Martinez)	Assistant Sanitation Manager
Juan Rodriguez (Mr. Rodriguez)	Night Shift Sanitation Supervisor

future date through a temporary employment agency. I find the terminations, whether designated layoffs or discharges, were de facto discharges.

Abel Esparza (Mr. Esparza) Day Shift Sanitation
Supervisor

Jose Flores (Foreman Flores) and Juan Briones (Foreman Briones) were nonsupervisory foremen of the day shift sanitation department.

The Respondent employed about 200 workers at the Silverton facility, operating Monday through Thursday. The Silverton facility ran one production shift from 6:30 a.m. to 7:30 p.m., and two sanitation shifts: a day shift: 5 a.m. to 3:30 p.m. on Monday and 5:30 a.m. to 4 p.m. Tuesday through Thursday, and a swing shift: 7:30 p.m. to 6:30 a.m.⁴ Mr. Esparza supervised sanitation employees on the day shift, as did Mr. Rodriguez on the night shift.

Tasks in the sanitation department included assuring that all production and storage areas were clean, floors were dry, and garbage cans were placed properly; cleaning area-separation curtains, production machines, floors, and freezer and refrigeration shelves, hosing off and/or scrubbing equipment and cooking pans, and collecting garbage. Sanitation workers utilized such power equipment as pressure washers, pallet jacks, and forklifts.⁵

In May, Mr. Coria and Mr. Maciel began supporting the Union in its attempt to organize the Respondent's employees. Mr. Coria encouraged coworkers to support the Union and hosted three union meetings at his home, two in May and one on June 20, all of which union representatives and Mr. Maciel attended. Mr. Luna also attended meetings. At work, Mr. Coria daily spoke to coworkers about the Union during breaks in the company lunchroom, sitting in an area that could be seen from Mr. Esparza's office about 20–25 feet away.⁶ Between June 20 and 22, Mr. Coria distributed to coworkers a union-created, red-fronted pamphlet bearing the heading: STOP[:] 35 THINGS YOUR EMPLOYER CANNOT DO.

In mid-June Mr. Rojas learned of the Union by talking with Mr. Coria and Mr. Maciel during lunchroom breaks. Although Mr. Rojas supported the Union and discreetly discussed it with coworkers, he attended no union meetings prior to his discharge. When Mr. Rojas participated in union-related lunchroom conversations with coworkers, he observed Mr. Esparza

in his office.

On June 19, Mr. Esparza telephoned Mr. Maciel's wife, Maria Estelle Cortez (Ms. Cortez), on her cell phone as she traveled home with coworker Lauda Cordova (Ms. Cordova) after shift end.⁷ According to Ms. Cortez, in the course of the conversation, Mr. Esparza asked her to confirm whether employees were forming a group to get the Union into the company, telling Ms. Cortez that employees should be careful because it was a "delicate" thing. Mr. Esparza suggested that Ms. Cortez talk to her husband, Mr. Maciel, and to Mr. Coria, saying he had a raise for them, and they should be very careful because it was really very delicate. He told Ms. Cortez not to worry about the Union because he was with the employees. Mr. Esparza said he knew a union meeting was to be held the following day (Saturday) and that on Monday, he "would know."⁸

Mr. Esparza testified that prior to the terminations of Mr. Coria, Mr. Maciel, Mr. Luna, and Mr. Rojas, he had no knowledge any of them had engaged in union activities or supported the Union. Mr. Esparza said employee Marcelina Vargas had told him of Ms. Cortez' union involvement although he could not recall when she did so or how long their conversation had lasted. Mr. Esparza said that in his extended telephone conversation with Ms. Cortez, he told her that he knew she was in the Union, that he could do something, and that she should not worry because he would not tell anybody anything about it. Mr. Esparza denied asking Ms. Cortez about her union activities or saying he knew a union meeting was scheduled for the next day. He said he could not recall if he told her she should be careful with such delicate things. He denied telling anyone else about Ms. Cortez' union sympathies.

I credit Ms. Cortez' account where it differs with Mr. Esparza's. Her testimony was clear and detailed and demonstrated good recall. Mr. Esparza's testimony was, on the contrary, occasionally vague and his recall was patchy, particularly regarding whether he had warned Ms. Cortez to be careful about "delicate" union matters and in recounting Marcelina Vargas' report of Ms. Cortez' union activity.⁹

In mid 2009, because of a continuing business downturn that had begun in 2007, company executives determined that eco-

⁴ The Monday shift began half an hour earlier than the Tuesday through Thursday shifts to permit additional machine cleaning before production started.

⁵ Forklift and pallet jack operation was limited to employees who had passed qualifying tests. In June, Mr. Coria and four other day-shift sanitation workers who were not laid off in a June layoff were authorized to operate forklifts. Mr. Coria, Mr. Luna and three other day-shift sanitation workers who were not laid off were authorized to operate pallet jacks.

⁶ The lunchroom was L-shaped with one row of four tables extending end-to-end down the relatively narrow stem of the "L," broadening into a larger area in the short base of the "L" that contained four tables. Mr. Coria and coworkers generally sat at one of the tables situated in the base of the "L." Mr. Esparza's office windows fronted the top of the long stem of the "L." Because of the configuration of office and large lunchroom windows, tables located in the short base could be seen from Mr. Esparza's office. There is no evidence or contention that Mr. Esparza or any other supervisor could hear the lunchroom conversations.

⁷ At the time of the hearing, Ms. Cortez had been employed by the Respondent as a day-shift production worker for 11 years. Mr. Esparza was not Ms. Cortez' supervisor; he was a friend and godfather to her and Mr. Maciel's son. Ms. Cortez regularly commuted to work and back with Ms. Cordova. The ostensible purpose of Mr. Esparza's call was to ask Ms. Cortez what she knew about a harassment charge Ms. Cordova had filed against him, the substance of which is not relevant to the issues.

⁸ In the context of the conversation, it is reasonable to infer that when Mr. Esparza said "he would know," he meant that by the Monday following the union meeting to be held at Mr. Coria's house on June 20, he would know what had occurred and who had attended.

⁹ Conflicting testimony was adduced as to whether, after the layoffs, Ms. Cortez told Mr. de Soto she believed Mr. Esparza had nothing to do with Mr. Macial's termination. I find it unnecessary to resolve the question of whether she did or did not make such a statement. Ms. Cortez' opinion is not material to the issues before me, and I find the possibility that she may not have been candid in describing her conversation with Mr. de Soto to be too tangential to diminish her overall credibility.

conomic conditions required a general reduction in force.¹⁰ On Thursday, June 25, Chief Executive Officer/President Glen Golomski and Mr. de Soto met with department managers, including Mr. Mesa, who was over the sanitation department, and directed them to reduce staff by approximately 10 percent in each department.¹¹ The department managers were instructed to base layoff selections on attitude, enthusiasm, departmental needs, and discipline with the goal of laying off the bottom 10 percent performers and keeping the best workers. Selections were to be made in the next day or two by the managers themselves, if possible, but in any event by no lower a managerial employee than assistant manager in the hope of keeping the layoff decision secret as long as possible. The Respondent sought secrecy in order to avoid potential reprisals and/or workplace unrest that might follow knowledge of impending layoffs.

Following the June 25 meeting, Mr. Mesa told Mr. Martinez, Mr. Esparza's direct supervisor, to choose employees for layoff among the Respondent's morning and swing shift sanitation workers in both the Silverton and Woodburn facilities. According to Mr. Martinez, Mr. Mesa gave him no numerical guidelines; Mr. Martinez arrived at the following layoff numbers based on "experience . . . from experience, I could see what was the number of people with which we could get the job done":

Silverton Facility Day Shift
Pre-layoff Complement: 16. Selected for Layoff: four.
Silverton Facility Swing Shift
Pre-layoff Complement: 26–28. Selected for Layoff: five.
Woodburn Facility Morning Shift
Pre-layoff Complement: 8–9. Selected for Layoff: two.
Woodburn Facility Swing Shift
Pre-layoff Complement: 24–26. Selected for Layoff: two.

The four employees selected for layoff from the Silverton Facility sanitation day shift were the four alleged discriminatees, Mr. Coria, Mr. Maciel, Mr. Luna, and Mr. Rojas. At the time of the layoffs, the following 13 employees, excluding Mr. Esparza and Foremen Flores and Briones, were day-shift sanitation employees at the Silverton facility employed since the following dates:

Jose Carmen Maciel	02/23/1998
Manuel Coria	11/27/2000
Matias Rodriguez-Hernandez	02/04/2003
Federico Nieves-Rojas	09/10/2003
Hipolito Claudio	02/10/2004
Agustin Carmona Perez	06/11/2004
Nicanor Luna	04/01/2005

¹⁰ The General Counsel does not contend the decision to effect a general reduction in force was unlawfully motivated. The General Counsel's theory is that union animus tainted the selection of the four alleged discriminatees.

¹¹ The following departments were affected: operations, sanitation, accounting, quality assurance, and maintenance. The Respondent planned to keep the total layoff count under 50 in order to avoid the employee-notification requirements of the Worker Adjustment and Retraining Notification Act (WARN) 29 USC §2101 et seq.)

Rufino Gomez	09/01/2005
Eduardo Montiel Jimenez	02/26/2007
Daniel Luna	05/22/2007
Lupe Trevino	12/29/2008
Eduardo Velasco	01/05/2009
Gregorio Esparza Velasco	03/04/2009

Mr. Martinez testified that he alone selected the number of employees to be laid off in each shift and location as well as the specific individuals. Other than citing his years of experience, Mr. Martinez did not explain how he arrived at the layoff count for each shift and location or why retained-to-laid-off-employee ratios varied so greatly among shifts and locations. As to individual employee selections, Mr. Martinez said he relied on his recollection of oral supervisory reports, specifically those of Mr. Esparza for the Silverton day shift sanitation employees, and on his own observation of workers' job performances. He reviewed no personnel files and sought no formal input from lower level supervisors.¹²

According to Mr. Martinez, he selected the individual Silverton facility day shift employees for layoff for the following reasons:

Mr. Maciel: Mr. Esparza had reported that Mr. Maciel's "performance wasn't as good, that he seemed upset . . . And a few months before . . . he pushed this one table really hard, and it hit a lady, and she ended up hospitalized." Mr. Martinez had received reports as to Mr. Maciel's subpar performance and being "upset" for at least a year. Mr. Esparza also relayed reports from lead employees about Mr. Maciel two to three times a month, every month for about a year. The reports were about Mr. Maciel's "attitude, that he was like upset . . . that he worked less than other coworkers." Mr. Martinez observed that Mr. Maciel took longer to do things than his coworkers, and he could see from Mr. Maciel's expression that "he was upset, [that] he wasn't the same person he used to be."

Mr. Coria: Foreman Briones reported that Mr. Coria complained when asked to do something, saying he knew how to do the job better than the foreman and that he did not need to be checked up on. Foreman Briones reported that on one occasion several months before the layoff, Mr. Coria pointed to another coworker and asked why foreman Briones did not send that person to do the job. During the entire two years that Foreman Briones oversaw Mr. Coria's work, Mr. Esparza also reported to Mr. Martinez that Mr. Coria complained that Foreman Briones checked up on him.¹³

Mr. Luna: Mr. Martinez observed that Mr. Luna "liked to talk a lot. And when he realized that I was there, he would try to work, but sometimes he didn't see me." Mr. Esparza reported

¹² Specifically, Mr. Martinez testified:

Q: Did you talk to anybody and get their input as to how many positions they could do without?

A: Well, no . . . I'm on almost daily communication with the supervisors, and from the verbal information I received from them regarding the performance of the workers.

¹³ The Respondent neither called Foreman Briones as a witness nor explained its failure to do so.

to Mr. Martinez that Mr. Luna complained about Foreman Briones checking up on him, which reports Mr. Martinez had received for over a year before the layoffs.

Mr. Rojas. Mr. Martinez believed Mr. Rojas' attendance to be bad because for over a year Mr. Esparza frequently reported that Mr. Rojas called to say he would not be in to work or came in late. Mr. Martinez did not recall receiving any reports from Mr. Esparza about Mr. Rojas' work performance.¹⁴

As to seven of the Silverton day-shift sanitation workers who were not laid off, Mr. Martinez' testimony was laconic: the work performance of each was "good." Prior to the June 29 layoffs, the Respondent imposed the following discipline on day-shift sanitation workers, including the alleged discriminatees:

Mr. Coria. March 6, 2001, written warning for "taking too much time washing the equipment." July 21, 2004, written warning for unspecified reason.¹⁵ September 1, 2004, written warning for "addressing your supervisor with foul words."

Mr. Maciel. February 4, written warning for having, a month earlier, "shoved a table that struck another team member and injured [her]."

Mr. Luna. November 11, 2008, written warning because "since you were given your first official verbal warning on 10/15/08, your attitude began to change. And every time you are given an order, you answer back with foul language, and you say you are not going to do it even though we review it...[you are] behaving in an intolerable manner, and every time [you are] given an order, [you] argue, and [you have] begun to do this more frequently. And if [you do] not change [your] attitude . . . [you] will be given a written warning with three days suspension without salary."

Mr. Rojas. November 19, 2008, oral warning for being late to work too often and missing too much time from work. February 19, written warning for, inter alia, "not treating team members with respect such as harassment."

Agustin Carmona. February 19, written warning for not treating team members with respect such as harassment, not complying with company rules, and "also for having a heated discussion with his coworker, Nicanor Luna."

Nicanor Luna. July 13, 2006, written warning for entering a cook room through the wrong door instead of using the main door and boot wash. February 13, written warning for repeatedly disregarding instructions not to remove the water gun from the hose, which wastes water. February 19, written warning for not treating team members with respect such as harassment, not complying with company rules, and "because of having heated argument with his coworker, Agustin Carmona."

¹⁴ Evidence showed that Mr. Rojas was late seven times between January 26 and March 19, 2009, including 3 days when he was more than 2-1/2 hours late.

¹⁵ Handwriting on the warning stated that it was given for "the reasons marked," but none of the 13 pre-printed optional reasons was marked.

I do not credit any of Mr. Martinez' uncorroborated testimony. Mr. Martinez's direct testimony was often vague, and he seemed defensive if not resistant on cross examination.¹⁶ Some of his testimony was implausible, e.g., that he took only half an hour to decide how many positions would be eliminated at the Respondent's two facilities and no more than another half hour to decide on the employees to be terminated, that he received no input whatsoever from frontline supervisors and relied wholly on memory as to lower-level supervisory oral reports of poor workers made during the past year without bothering to review personnel files. Moreover, when questioned about the performance of employees who were not laid off, Mr. Martinez' memory proved deficient. He did not recall that Mr. Esparza had told him about work problems of sanitation employee Niconar Luna until shown Niconar Luna's February written warning (detailed below), whereupon he recalled that Mr. Esparza had told him "something" about "this sort of thing," of which he did not "really remember the details." He did not recall that Matias Rodriguez reported late to work eight times in 2008. Even as to a laid-off employee, Mr. Martinez could not recall specifics, i.e. he did not recall that Mr. Maciel had received a February written warning for shoving a table into an employee.

After choosing employees for layoff, Mr. Martinez took his selection list to Mr. Mesa. Thereafter, on Friday morning, June 26, Mr. Mesa and Mr. Martinez met with Mr. de Soto and orally gave him the layoff names. Logistical problems prevented the Respondent from processing termination checks until Sunday, June 28, which delayed layoff announcement until the following day.

On the morning of Monday, June 29, Respondent terminated 42 Silverton facility workers in its general employee layoff. At the beginning of their shifts that day, Mr. Flores told Mr. Coria, Mr. Maciel, Mr. Luna, and Mr. Rojas to go to Mr. Esparza's office where Mr. Esparza and Mr. de Soto were present. Mr. de Soto told the four employees they were terminated because of the economy and because production was low. He told them that over 40 employees were being laid off, and he encouraged them to apply for unemployment. Mr. Maciel protested that the company should first terminate employees with less seniority. Mr. de Soto said the company had made its decision, and there was no reason to debate it. Mr. Coria protested that the employees being laid off had legal work documents whereas employees being retained did not. Mr. de Soto said all employees' papers were in order. Mr. Rojas said he could "kind of" understand because he knew he had occasionally been absent. Mr. de Soto said that any who wanted could reap-

¹⁶ For example, Mr. Martinez initially accepted June 25 as the date when Mr. Mesa instructed him to select employees for layoff but in later cross-examination sparred with Counsel for the General Counsel as to the date. In cross examination, Mr. Martinez bridled at another question:

Q: You evaluated more than 70 employees in 30 minutes and decided in that time period who would be fired? . . .

A: Okay . . .

Q: the question is yes or no.

A: Is that what I have to answer? I can't say what I—

Q: [question repeated].

A: Yes.

ply through Express.¹⁷

Along with other Silverton night-shift sanitation workers, Mauro Navarro (Mr. Navarro) was laid off on the evening of June 29. Following his layoff, Mr. Navarro went to the home of Mr. Esparza, with whom Mr. Navarro had been friends for 15 years. Mr. Navarro asked Mr. Esparza why employees had been laid off. Mr. Esparza said he had chosen the day-shift sanitation workers because they were stirring things up by meeting with the Union.¹⁸ Mr. Navarro pointed out that he had nothing to do with the Union and asked why he had been laid off. Mr. Esparza said Mr. Rodriguez had chosen the night-shift layoff candidates. In his account, Mr. Esparza agreed that Mr. Navarro came to his house after the layoffs and asked if Mr. Esparza knew why he had been laid off. According to Mr. Esparza, he said he did not know, and he denied telling Mr. Navarro that he had chosen the day-shift workers for layoff or that he had laid them off because they were stirring things up with the Union. I found Mr. Navarro to be a reliable witness who gave clear, consistent, and believable testimony. I credit his testimony over that of Mr. Esparza.

V. DISCUSSION

A. Legal Principles

Section 7 of the Act provides that employees have the right to engage in union activities. Section 8(a)(1) of the Act provides: “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” Section 8(a)(3) of the Act provides that it shall be an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

In considering the lawfulness of communications from an employer to employees, the Board applies the “objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). Communications from an employer to employees that threaten reprisal for supporting a labor organization interfere with, restrain, or coerce employees as contemplated by Section 8(a)(1). *Empire State Weeklies, Inc.*, 354 NLRB 815, 817 (2009); *Regal Health & Rehab Center, Inc.*, 354 NLRB 367, 367 (2009); *Grouse Mountain Lodge*, 333 NLRB 1322 fn. 2 (2001); *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999).

In termination cases turning on employer motivation, the Board applies an analytical framework that assigns the General Counsel the initial burden of showing that union activity was a motivating or substantial factor in an adverse employment action. The elements required to support such a showing are union activity by the employee, employer knowledge of that ac-

tivity, and employer animus toward the activity. If the General Counsel meets the initial burden, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee’s protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *Alton H. Piester, LLC*, 353 NLRB 369 (2008).

B. Independent Alleged Violations of Section 8(a)(1) of the Act

The General Counsel contends that when Mr. Esparza asked Ms. Cortez to confirm whether employees were forming a group to get the Union into the company and told Ms. Cortez that employees should be careful because union support was a “delicate” thing, the Respondent violated Section 8(a)(1) of the Act by interrogating Ms. Cortez about her and others’ union activities and by impliedly threatening employees with unspecified reprisals because of their union activities.

Supervisory questioning of employees about union activity is not a per se violation of Section 8(a)(1) of the Act. The test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with statutory rights. To support a finding of illegality, the words themselves, or the context in which they are used, must suggest an element of coercion or interference. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985).

Applying the Board’s *Rossmore* test to Mr. Esparza’s June 19 conversation with Ms. Cortez, I find his question tended to restrain, coerce, and interfere with her Section 7 rights. Asking Ms. Cortez to confirm whether employees were forming a union support group could reasonably be viewed as an attempt to discover employees’ protected sympathies and activities, which is coercive. Questions that have a coercive effect on employees protected activities are unlawful. *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 420 (2004). Consequently, I find that Mr. Esparza’s inquiry about employee union activities violated Section 8(a)(1) of the Act.

Employer warnings to “be careful” in context of a conversation about union activity “convey the threatening message that union activities would place an employee in jeopardy.” *Gaetano, & Associates*, 344 NLRB 531, 534 (2005); *St. Francis Medical Center*, 340 NLRB 1370, 1383–1384 (2003) (“be careful” statement by supervisor in context of union activity held unlawful); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995) (supervisor’s statements such as “watch out” are unlawful implied threats). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act when Mr. Esparza impliedly threatened Ms. Cortez.

C. Terminations of Manuel Coria, Jose Carmen Maciel, Daniel Luna, and Federico Nieves Rojas,

1. Manuel Coria

The General Counsel has met his *Wright Line* burden as to the termination of Mr. Coria. The General Counsel proved that Mr. Coria engaged in union activity by being a driving force in the unionization effort, encouraging coworkers to support the Union, hosting union meetings at his home, and distributing a union pamphlet. The General Counsel also proved the Re-

¹⁷ Findings of fact as to the June 29 termination meeting are a reasonable amalgamation of the participants’ credible testimony.

¹⁸ Specifically, Mr. Navarro said Mr. Esparza told him that “he had chosen the people from the dayshift that were going to be let go because they were stirring things up . . . because they were meeting with the union.”

spondent knew of Mr. Coria's activity, as demonstrated by Mr. Esparza's statements to Ms. Cortez. The Board ordinarily imputes a supervisor's knowledge of an employee's union activities to the employer unless it is affirmatively established that the supervisor who obtained such knowledge did not pass the information on to others. *Ready Mixed Concrete Co.*, 317 NLRB 1140, 1146 fn. 18 (1995); *C & L Systems Corp.*, 299 NLRB 366, 378 (1990). Mr. Esparza clearly knew of employees' union activities, and I have rejected Mr. Esparza's assertion that he did not inform anyone in management that he knew of employees' union activity. Consequently, it is appropriate to impute Mr. Esparza's knowledge to the Respondent. Finally, the General Counsel has shown that the Respondent bore animus toward its employees' union activities by the following: Mr. Esparza's warning to Ms. Cortez that employees should "be careful" about engaging in union activity, Mr. Esparza's implied promise to Ms. Cortez of raises for Mr. Coria and Mr. Maciel if they abandoned their union support,¹⁹ and Mr. Esparza's admission to Mr. Navarro that he had chosen the day-shift sanitation workers for layoff because they were stirring things up by meeting with the Union.

The General Counsel having met the initial *Wright Line* burden, the burden shifts to the Respondent to establish persuasively by a preponderance of the evidence that it would have terminated Mr. Coria even in the absence of his union activities.²⁰

The Respondent argues that Mr. Martinez, who was assertedly ignorant of any employee's union activity, was the sole selector of sanitation department day-shift layoff candidates and that the selection of Mr. Coria could not, therefore, be motivated by union animus. Rather, the Respondent argues, Mr. Martinez selected Mr. Coria for layoff because he complained and resisted oversight from Foreman Briones.

As explicated earlier, I do not credit Mr. Martinez' testimony that he alone selected employees for layoff. Given Mr. Martinez' unreliable description of his solitary and hasty selection of layoff candidates and Mr. Esparza's admission to Mr. Navarro that he had chosen the day-shift sanitation workers for layoff, I find that Mr. Esparza at least had substantial input into the day-shift layoff selections. Mr. Esparza had both knowledge and animus and admitted to Mr. Navarro that he had selected for layoff those day-shift employees who were stirring things up with the Union. Further, although Mr. Coria's alleged misbehavior to Foreman Briones was purportedly the primary basis for Mr. Coria's selection, Foreman Briones was not presented as a witness to corroborate the misbehavior, which, without explanation for his nonappearance, casts further

¹⁹ Although I have denied the motion to amend the complaint to allege promise of benefit by Mr. Esparza during this conversation, his promises of raises may be considered in determining animus and in showing specific knowledge of Mr. Coria and Mr. Maciel's union involvement.

²⁰ A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676-677 (1st ed. 1954).

doubt on the Respondent's claims.²¹ Finally, although Mr. Coria's alleged misconduct at work had assertedly persisted for 2 years prior to the layoffs, the Respondent never disciplined Mr. Coria by so much as an oral warning in the nearly 5 years before his termination, which is incongruous with the Respondent's claim that Mr. Coria was a poor worker. In these circumstances, the proffered proofs fail to satisfy the Respondent's burden.

Inasmuch as the Respondent has not met its burden to show that it would have selected Mr. Coria for layoff notwithstanding his union activity, I find the Respondent terminated Mr. Coria in violation of Sections 8(a)(3) and (1) of the Act.²²

2. Jose Carmen Maciel

The General Counsel has met his *Wright Line* burden as to the termination of Mr. Maciel for the reasons detailed in the above discussion of Mr. Coria's termination: Mr. Maciel engaged in union activity; Mr. Esparza knew it, as evidenced by his June 19 conversation with Mr. Maciel's wife, Ms. Cortez; Mr. Esparza bore animus toward Mr. Maciel's union activity, and Mr. Esparza was involved in selecting day-shift sanitation employees for layoff.²³

The General Counsel having met the initial *Wright Line* burden, the burden shifts to the Respondent to establish persuasively that it would have terminated Mr. Maciel even in the absence of his union activities. The Respondent argues that Mr. Maciel's performance was poor and that the day-shift foremen had, for about a year, repeatedly commented on Mr. Maciel's "attitude, that he was like upset . . . that he worked less than other coworkers," which behavior Mr. Martinez also personally observed. Further, the Respondent argues that Mr. Maciel's conduct in shoving a table that struck a coworker about 5 months before the layoffs made him a logical choice for layoff.

As to Mr. Martinez assertions about Mr. Maciel's attitude and decreased work efforts, no evidence exists that any super-

²¹ The Respondent's failure to call Foreman Briones to testify gives rise to an adverse inference that he would have testified against the Respondent's interest. *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 fn. 1 (1977) (where respondent offered no explanation as to why supervisors did not testify, the drawing of an adverse inference against respondent is proper); *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding any factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference against [a respondent]" regarding any such fact).

²² Counsel for the General Counsel argues that the Respondent's failure to follow seniority or to regard the higher experience level of the terminated employees in making its selections evidences discriminatory intent. As there is no evidence the Respondent ever based any employment decision on seniority or that the terminated employees were so skilled that disregarding their experience could reasonably suggest a discriminatory motive, I have not relied on those factors in reaching my decision. See *Dai-Ichi Hotel Saipan Beach*, 337 NLRB 469, 472 fn. 14 (NLRB).

²³ As noted above, I have declined to accept Mr. Martinez' assertion that he alone, in ignorance of any union activity, selected day-shift sanitation employees for layoff. Mr. Esparza's admission to Mr. Navarro that he selected day-shift sanitation employees for layoff extends to all four of the alleged discriminatees.

visor counseled or warned Mr. Maciel about unsatisfactory attitude or performance during the year in which his deficiencies assertedly persisted. Had supervisory displeasure been so significant as to generate several comments a month, it is reasonable to expect the Respondent would at least have mentioned the problem to Mr. Maciel. While utilizing subjective criteria such as “attitude” is not by itself evidence of union animus, accusing an employee of having a “bad attitude” has long been considered a veiled reference to the employee’s protected concerted activities. See *Climatrol, Inc.*, 329 NLRB 946 fn. 4 (1999). In the absence of a clear and credible explanation to the contrary, Mr. Martinez’ nonspecific reference to Mr. Maciel’s “upset” attitude is a veiled reference to his union activities. In these circumstances, I cannot find that dissatisfaction with Mr. Maciel’s attitude or performance contributed significantly to the Respondent’s decision to lay him off.

Mr. Maciel’s intemperate conduct in February that resulted in an injury to a coworker and earned him a written warning is a different matter, and the Respondent could reasonably consider such behavior as a major factor in layoff selection. However, the existence of a valid reason for discharge cannot, in and of itself, expunge an unlawful reason; the Respondent “cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.” *Yellow Ambulance Service*, 342 NLRB 804, 804 (2004), (citations omitted).

In assessing the Respondent’s assertion that Mr. Maciel’s intemperate conduct prompted his selection for layoff, it is useful to consider reasonably comparable incidents involving other employees. Agustin Carmona and Nicanor Luna received written warnings for not treating team members with respect and for engaging in a heated “discussion” or “argument” on February 19. Agustin Carmona and Nicanor Luna’s confrontation had no physical component, but it is clear the Respondent considered the two employees to be so immoderately angry and intemperate in their interaction as to justify written warnings. As to Mr. Maciel’s January behavior, there is no suggestion he intended to injure anyone. Rather, the table-shoving appears to have been a physical manifestation of inappropriate anger, which incidentally resulted in an injury. There is no evidence the Respondent deemed Mr. Maciel’s conduct to have been more volatile and potentially dangerous than that of the heated arguers: all three received the same discipline, i.e. written warnings, a fact that Mr. Martinez did not remember in Mr. Maciel’s case. Although Mr. Martinez professed to recall the table incident from Mr. Esparza’s oral report, his failure to recall its disciplinary documentation supports an inference that the Respondent did not consider Mr. Maciel’s conduct to be more opprobrious than Agustin Carmona or Nicanor Luna’s. These facts permit a conclusion that the Carmona/Luna and Maciel incidents were reasonably comparable. Yet Mr. Maciel was terminated while the other two were retained, a disparity the Respondent has not clearly explained.

In sum, the evidence shows the Respondent arbitrarily selected Mr. Maciel for termination. It is not, of course, unlawful for an employer to be arbitrary or even capricious in terminating employees, but arbitrary or capricious selections cannot

constitute proof sufficient to outweigh the General Counsel’s prima facie case. Inasmuch as the Respondent has not met its shifted burden to show that it would have selected Mr. Maciel for layoff notwithstanding his union activity, I find the Respondent terminated Mr. Maciel in violation of Section 8(a)(3) and (1) of the Act.

3. Daniel Luna

The General Counsel has also met his *Wright Line* burden as to the termination of Mr. Luna. Although there is no direct evidence the Respondent was aware specifically of Mr. Luna’s union activity, knowledge can be inferred from Mr. Esparza’s statements to Ms. Cortez and to Mr. Nevarro, as can animus.²⁴ The General Counsel’s prima facie case having been established, the Respondent must assume the burden of proving that it would have terminated Mr. Luna even in the absence of his union activities.

The Respondent argues that it selected Mr. Luna for layoff because he demonstrated resentment of Foreman Briones’ oversight. In October 2008 and November 2008, Mr. Luna received, respectively, an oral and a written warning for resisting orders with “foul language,” the latter of which threatened a suspension if the conduct continued. There is no evidence Mr. Luna received any further discipline, and it is reasonable to infer that he corrected the problem to supervisory satisfaction.²⁵ In circumstances where Mr. Luna had apparently corrected a problem for which he was disciplined more than 8 months earlier, the Respondent does not meet its *Wright Line* burden by contending, without further explication, that Mr. Luna’s past discipline warranted layoff notwithstanding Mr. Luna’s union activity. Accordingly, I find the Respondent terminated Mr. Luna in violation of Sections 8(a)(3) and (1) of the Act.

4. Federico Nieves Rojas

Mr. Rojas’ union activity came relatively late and was relatively passive, consisting of no more than worktime conversation with union activists. Although there is no evidence the Respondent was specifically aware of Mr. Rojas’ discreet union activity, employer perception that he was allied with the union supporters can be inferred from Mr. Esparza’s admission that he selected for layoff those who were stirring up things by meeting with the Union, which statement also evidences animus. Having inferred from this admission that Mr. Esparza lumped Mr. Rojas with those who were “stirring things up,” it is unnecessary to explore the factual basis of Mr. Esparza’s perception. The General Counsel meets the knowledge criterion of his burden simply by establishing that the perception existed. Thus, the General Counsel has met the *Wright Line* burden as to the termination of Mr. Rojas, and the Respondent must establish that it would have terminated Mr. Rojas even in

²⁴ As detailed above, Mr. Esparza told Ms. Cortez that he knew of the upcoming June 20 union meeting, a meeting that Mr. Luna attended. He later told Mr. Nevarro that he had selected for layoff those who were stirring up things with the Union.

²⁵ The Respondent’s failure to call Foreman Briones to testify or to adduce through Mr. Esparza that Mr. Luna’s disrespectful behavior continued beyond his written warning gives rise to an adverse inference that either or both would have testified against the Respondent’s interest.

the absence of his union activities.

The Respondent contends that Mr. Rojas was selected for layoff because of poor work attendance. In November 2008, Mr. Rojas received an oral warning for lateness and absenteeism.²⁶ There is no evidence Mr. Rojas was ever again warned about attendance, but the record shows that Mr. Rojas was late seven times between January 26 and March 19, including 3 days when he was more than 2-1/2 hours late. In spite of the Respondent's failure to impose further discipline on Mr. Rojas for attendance, it is reasonable to accept that the Respondent remained dissatisfied with Mr. Rojas' continued tardiness. Attendance is an integral component of good work performance, the Respondent's paradigm for layoff selection, and Mr. Rojas' attendance had not met that standard. Mr. Rojas himself appeared to have recognized that slipshod attendance could fairly be held against him when he told Mr. de Soto upon termination that he could "kind of" understand his selection because he knew he had occasionally been absent. In these circumstances, the Respondent has shown, as required by *Wright Line*, that it would have selected Mr. Rojas for layoff notwithstanding his union activity. Accordingly, I shall dismiss the complaint allegation relating to the termination of Mr. Rojas.

VI. CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of

²⁶ Although Mr. Rojas also received a warning in February for not treating team members with respect, that was apparently not considered, as Mr. Martinez stated he did not recall any negative work performance reports about Mr. Rojas.

Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities and by impliedly threatening employees with unspecified reprisals if they engaged in union activities or supported the Union.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by terminating employees Manuel Coria, Jose Carmen Maciel, and Daniel Luna because they engaged in union or other concerted, protected activities.

5. The unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found the Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully terminated employees Manuel Coria, Jose Carmen Maciel, and Daniel Luna, it must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the dates of their discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987). The Respondent will be ordered to make appropriate emendations to Manuel Coria, Jose Carmen Maciel, and Daniel Luna's personnel files. The Respondent will be ordered to post appropriate notices.

[Recommended Order omitted from publication.]