

MIRON &amp; SONS, INC.

**Miron & Sons, Inc. and Laundry, Dry-Cleaning & Allied Workers Joint Board.** Case 02-CA-039597

July 3, 2012

## DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES  
AND GRIFFIN

On December 17, 2010, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

## AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 1.

"1. By warning and advising its shop steward not to provide information about bargaining to employees, and by warning and advising employees not to provide information to the Union, the Respondent violated Section 8(a)(1) of the Act."

Delete the judge's Conclusion of Law 13 and renumber the remaining paragraphs accordingly.

<sup>1</sup> 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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

Although we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally ceasing all payments to the Union's Health Fund, Retirement Fund, and Education and Legal Assistance Fund from November 27, 2009, to about April 27, 2010, and by failing to make full payments to the funds thereafter, we find it unnecessary to pass on his additional finding that the Respondent independently violated Sec. 8(a)(5) and (1) based on the Respondent's November 25, 2009 letter informing the Union that it would cease making contributions to the Union's funds upon the expiration of the collective-bargaining agreement.

<sup>2</sup> We shall modify the judge's conclusions of law and substitute a new Order and notice to conform to the violations found and the Board's standard remedial language. We also amend the judge's remedy to provide that, to the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Miron & Sons, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning and advising its shop steward not to provide information about bargaining to employees, and warning and advising employees not to provide information to the Union.

(b) Warning its employees not to speak to employees about the Union at all times during the workday, including break and lunchtimes.

(c) Threatening its employees that they would be discharged because they participated in activities on behalf of the Union or other protected, concerted activities.

(d) Threatening its employees that the shop would be closed and they would be discharged if the Respondent had to accept the Union's contract proposals.

(e) Threatening its employees that they would be discharged and not permitted to return to the facility if they went on strike against the Respondent.

(f) Promising its employees a wage increase or promising that it would maintain benefits and implement new benefits if the Union no longer represented them.

(g) Polling its employees by having them indicate in writing, in the presence of its agent, whether they supported the Union or the Employer.

(h) Interrogating its employees about their union membership, activities, and sympathies.

(i) Continuing to deduct union dues from its employees' paychecks, but failing and refusing to remit those funds to the Union from November 27, 2009, to about April 19, 2010.

(j) Issuing written warnings to, discharging, or otherwise discriminating against Miguel Figueroa, or any other employee, for supporting Laundry, Dry-Cleaning & Allied Workers Joint Board, or any other labor organization, or for engaging in other protected concerted activities.

(k) Failing and refusing to bargain in good faith with Laundry, Dry-Cleaning & Allied Workers Joint Board, as the exclusive collective-bargaining representative of the employees in the following unit:

Included: All production employees, drivers, engineers, washroom employees, mechanics and helpers employed by the Employer at its facility located at 220 Coster Street, Bronx, New York. Excluded: All other employees, including office clerical employees and su-

pervisors, guards and professional employees as defined in the Act.

(l) Conditioning further bargaining with the Union upon the commitment of the Union to refrain from hand-billing the Respondent's customers or from engaging in any strike or picketing activity.

(m) Stopping all payments to the Union's Health Fund, Retirement Fund, and Education and Legal Assistance Fund from November 27, 2009, to about April 27, 2010, and failing to make full and complete payments to the funds thereafter without providing the Union notice and an opportunity to bargain.

(n) Granting a wage increase of 30 cents per hour to its unit employees about December 10, 2010, without providing the Union notice and an opportunity to bargain.

(o) Refusing to bargain with the Union because the Union's shop steward is present.

(p) Implementing new rules regarding the Union's access to unit employees at the facility in about January 2010, without providing the Union notice and an opportunity to bargain.

(q) 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) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit set forth above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request, cancel and rescind all terms and conditions of employment which it unlawfully implemented on and after November 27, 2009, but nothing in this Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees, such as the 30 cents-per-hour wage raise.

(c) Make whole the Union Health Fund, Retirement Fund, Education and Legal Assistance Fund in the manner set forth in the Remedy section of this decision.

(d) Make whole the employees for any expenses, if any, resulting from its failure to make the required payments to the Funds set forth above.

(e) Within 14 days from the date of this Order, offer Miguel Figueroa full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(f) Make Miguel Figueroa whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning issued to Miguel Figueroa on September 17, 2009, and his discharge, and within 3 days thereafter notify him in writing that this has been done and that the warning and discharge will not be used against him in any way.

(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 Bronx, New York facility, copies of the attached notice, in English and Spanish, marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2009.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

<sup>3</sup> 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."

## 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 warn and or advise our shop steward not to provide information about bargaining to you, or warn or advise you not to provide information to the Union.

WE WILL NOT warn you not to speak to employees about the Union at all times during the workday, including break and lunch times.

WE WILL NOT threaten you that you would be discharged because you participated in activities on behalf of the Union or other protected, concerted activities.

WE WILL NOT threaten you that the shop would be closed and you would be discharged if we had to accept the Union's contract proposals.

WE WILL NOT threaten you that you would be discharged and not permitted to return to the facility if you went on strike against us.

WE WILL NOT promise you a wage increase or promise that we will maintain benefits and implement new benefits if the Union no longer represented you.

WE WILL NOT poll you by having you indicate in writing, in the presence of our agent, whether you supported the Union or us.

WE WILL NOT question you about your union membership, activities, and sympathies.

WE WILL NOT continue to deduct union dues from your paychecks and then fail or refuse to remit those funds to the Union.

WE WILL NOT issue written warnings to you, discharge you, or otherwise discriminate against you for supporting Laundry, Dry-Cleaning & Allied Workers Joint Board, or any other labor organization, or for engaging in other protected concerted activities.

WE WILL NOT fail or refuse to bargain in good faith with Laundry, Dry-Cleaning & Allied Workers Joint

Board as the exclusive collective-bargaining representative of the employees in the following unit:

Included: All production employees, drivers, engineers, washroom employees, mechanics and helpers employed by the Employer at its facility located at 220 Coster Street, Bronx, New York. Excluded: All other employees, including office clerical employees and supervisors, guards and professional employees as defined in the Act.

WE WILL NOT condition further bargaining with the Union upon the commitment of the Union to refrain from handbilling our customers or from engaging in any strike or picketing activity.

WE WILL NOT stop all payments to the Union's Health Fund, Retirement Fund, and Education and Legal Assistance Fund, or fail to make full and complete payments to those funds thereafter without providing the Union notice and an opportunity to bargain.

WE WILL NOT grant wage increases to you without providing the Union notice and an opportunity to bargain.

WE WILL NOT refuse to bargain with the Union because the Union's shop steward is present.

WE WILL NOT implement new rules regarding the Union's access to you without providing the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit set forth above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request, cancel and rescind all terms and conditions of employment which we unlawfully implemented on and after November 27, 2009, but we are not required to cancel any unilateral changes that benefited you, such as the \$.30-per-hour wage raise.

WE WILL make whole the Union Health Fund, Retirement Fund, and Education and Legal Assistance Fund.

WE WILL make you whole for expenses, if any, resulting from our failure to make the required payments to the Funds set forth above.

WE WILL within 14 days from the date of the Board's Order, offer Miguel Figueroa full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Miguel Figueroa whole for any loss of earnings and other benefits resulting from his discharge, 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 warning issued to Miguel Figueroa on September 17, 2009, and to his discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warning and discharge will not be used against him in any way.

MIRON & SONS, INC.

*Karen Newman, Esq.*, for the General Counsel.  
*Regina E. Faul, Esq. (Rivkin Radler, LLP)*, of Uniondale, New York, for the Respondent.  
*Elizabeth Vladeck, Esq.*, *Workers United*, of New York, New York, for the Union.

## DECISION

### STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge, a first amended charge, a second amended charge, and a third amended charge filed on November 24 and December 14, 2009, January 25 and February 25, 2010, respectively by Laundry, Dry-Cleaning & Allied Workers Joint Board (Union), an amended complaint was issued against Miron & Sons, Inc. (Respondent or Employer) on May 28, 2010.

The complaint, as amended at the hearing, alleges essentially that the Respondent committed numerous violations of Section 8(a)(1) of the Act, including warnings, threats of discharge and shop closure, promises of wage increases and benefits, and interrogations.<sup>1</sup> The complaint also alleges that the Respondent unlawfully issued a written warning to Miguel Figueroa and discharged him.

In addition, the complaint alleges that in violation of its obligation to bargain in good faith with the Union, the Respondent advised the Union that it would make no financial contributions to the Union Funds; conditioned bargaining with the Union; threatened to fire employees who engaged in a strike; deducted union dues from employees paychecks but failed to remit those funds to the Union; eliminated all payments to the Union's health and welfare and pension funds; informed the Union that if it continued its picketing, the Respondent would assume that the Union was unwilling to bargain for a renewal agreement; granted a wage increase to its employees; refused to bargain with the Union unless employee Figueroa ceased to act as its collective-bargaining agent; and implemented new rules regarding the Union's access to employees at the facility. The Respondent's answer to the complaint denied the material allegations of the complaint.

On August 20, 2010, U.S. District Judge Barbara S. Jones issued a Consent Judgment pursuant to Section 10(j) of the Act, in which counsel for the General Counsel and the Respondent

<sup>1</sup> Counsel for the Acting General Counsel's motion, in her brief, to withdraw par. 16 of the complaint because it is duplicative of par. 10(a), is granted.

agreed that "pending the final disposition of this matter by the National Labor Relations Board, the Respondent . . . was enjoined and restrained" from engaging in the conduct alleged in the complaint, and the Respondent agreed to take certain affirmative action to remedy the allegations of the complaint. Pursuant to that agreement, Miguel Figueroa was reinstated.

On October 13, 14, and 18, 2010, a hearing was held before me in New York, New York.<sup>2</sup> On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the counsel for the General Counsel and the Respondent, I make the following<sup>3</sup>

### FINDINGS OF FACT

#### I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a New York corporation having its facility in the Bronx, New York, has been engaged in the operation of a commercial laundry servicing hotels in Manhattan and other boroughs. The Respondent annually derives gross revenues in excess of \$1 million, and performs services in excess of \$50,000 for hotels located within New York State, including the Helmsley Midtown Hotel. The 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.

The Union was first known as the Amalgamated Clothing and Textile Workers Union (ACTWU). In 1996, the ACTWU merged with the International Ladies' Garment Workers Union to form UNITE. Thereafter, UNITE merged with the Hotel Employees and Restaurant Employees (HERE) and became UNITE HERE. In 2009, the Union disaffiliated from UNITE HERE and formed Workers United, and that year affiliated with the Service Employees International Union. The Union is now known as Laundry, Dry Cleaning & Allied Workers Joint Board, Workers United, affiliated with SEIU. Wilfredo Larancuent, the Union's manager, testified that the Union represents the same industry as it had historically, and has continued its collective-bargaining relationships with many of the same employers throughout the changes in affiliations. He further stated that the structure of the Union, its staff, and members are the same as it had been during the various name changes.

On March 9, 2009, the Union wrote to the Respondent advising that on March 7, the Laundry, Dry Cleaning & Allied Workers Joint Board disaffiliated from UNITE HERE and became an independent union, but that the Joint Board remains the employees' bargaining representative, and that the contract between the Respondent and the Union "remains effective." The letter further advised that the Joint Board will continue to enforce the contract, and that the shop stewards and Joint Board staff representative would continue to represent the employees. "We are the same organization which you have recognized and with which you have dealt in the past." The Union's letter the following month stated that "a mere change in international

<sup>2</sup> General Counsel's unopposed Motion to Correct Transcript is granted. I have received it in evidence as GC Exh. 54.

<sup>3</sup> After the hearing closed, pursuant to a procedure agreed upon during the hearing, the Respondent submitted certain timecards which have been received in evidence as R. Exhs. 3(a), (b), and 4.

affiliation does not change anything about our continuing representational rights of bargaining unit employees of your company.”

It thus appears that there was substantial continuity between the predecessor unions and the current Union with which the Respondent has been bargaining. *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143, 147 (2007).

Union Manager Larancuent testified that the Respondent never refused to bargain with the Union because it did not believe that it was the collective-bargaining representative of its employees. The Respondent’s answer admits that the Union, as set forth in the complaint as Laundry, Dry-Cleaning & Allied Workers Joint Board, is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Background

For at least 20 years, the Respondent and the Union have had a collective-bargaining relationship, with their last contract running from November 28, 2006, to November 27, 2009, at which time the Union was known as Laundry, Dry Cleaning & allied Workers Joint Board, UNITE HERE. Pursuant to that contract, the Union is the exclusive collective-bargaining representative of the employees in the following appropriate collective-bargaining unit:

Included: All production employees, drivers, engineers, washroom employees, mechanics and helpers employed by the Employer at its facility located at 220 Coster Street, Bronx, New York.

Excluded: All other employees, including office clerical employees and supervisors, guards and professional employees as defined in the Act.

The Respondent’s president is Miron Markus. Its admitted manager and supervisor is Jose Lopez. The Employer’s admitted agent who has acted as the “translator and conduit of information for Respondent’s managers and supervisors’ communications with its employees” is Cecilia Valderrama. The Union’s manager is Wilfredo Larancuent, and its representative is Jorge Deschamps. The Respondent employs about 80 workers.

### B. Setting the Stage for Bargaining

Markus testified that in 2008, the Employer lost about \$3 million. On December 15, 2008, Markus wrote to Larancuent, advising that due to the decline in the economy, hotels have suffered from low sales and have asked their laundries to cut their rates. In addition, according to the letter, the Respondent’s nonunion competitors lowered their prices to levels in effect more than 25 years ago. The letter further advised that the Respondent was experiencing “severe financial difficulty,” was charging less money for its work, and needed to cut its expenses further. Markus informed the Union that it would not give its employees the scheduled contract wage increases “until such time when this crisis passes . . . and the economy stabilizes and starts strengthening” and will also be unable to hire at the contract’s hiring wages in 2009, or pay the benefit fund increases or any other increases in the union contract for the

calendar year 2009. He offered to keep the wages and benefits at the 2008 levels.

On December 18, Larancuent wrote to Markus, refusing to agree to Markus’ proposals but offering to meet with him to discuss the “current economic crisis and its implications to the laundry industry.” In order to ensure that the Respondent was honoring its contract, he asked for a list of all the unit employees, their date of hire, the amount of their increase on December 1, 2008, and their current rate of pay. Markus and Valderrama, who opens all the Employer’s mail, denied receiving that letter. Markus testified that later, in March or April, 2009, he told Larancuent that he never received an answer to his December 15 letter. Larancuent said he replied, and showed him the December 18 response.

The Union’s bargaining committee consisted of Manager Larancuent, Representative Jorge Deschamps, and employee members Modesta Alvarez, Cordova, Miguel Figueroa, and Juan Peguero.

Bargaining for a renewal collective-bargaining agreement began in about July 2009, and about six sessions were held before the contract expired on November 27, 2009.

### C. Shop Steward Miguel Figueroa

Miguel Figueroa was employed by the Respondent since June 2006, as a washer.

He, Deschamps, and Larancuent testified concerning the manner of Figueroa’s “unusual” election as shop steward. Apparently, no one was willing to occupy the position, and Figueroa nominated himself. An election was held at the shop at which those employees present ratified his nomination, and he became the steward in about June 2009, serving in that capacity for about 5 months before his termination.

Figueroa represented at least one employee who was accused of misconduct in meetings with Supervisors Carlos Vasquez and Jose Lopez. Employees spoke to him about problems with their employment, including medical insurance, vacation, and hours of work. Figueroa called Union Agent Deschamps for assistance, and Deschamps inquired into the matter. Deschamps confirmed that Figueroa, acting as the steward, made inquiries of the Union concerning problems that employees were having at work.

Markus denied knowing that Figueroa was a shop steward before he was discharged. However, in her pretrial affidavit, Respondent agent, Valderrama, stated that “Figueroa started talking a lot about the union right after he was named the shop steward.” She added that everyone in the shop believed that he was the steward because he was talking about the Union “more and more.” However, she denied being notified by the Union as to the identity of the steward, and Figueroa never told her that he was the shop steward.

Figueroa stated that in July 2009, when bargaining for a new contract began, he attended negotiation sessions and gave the workers information about the progress of the bargaining. They asked him questions, including whether there would be a change in their medical benefits.

Figueroa testified that in July, he was told by Markus, in Markus’ office that “I was working for him and not for the union, and that I shouldn’t give information about the Union.”

Figuroa responded “that’s my right.” Markus added that Figuroa could not meet with the employees during work hours when he or the employees were working, or during lunch hours. Valderrama translated this conversation for Markus.<sup>4</sup> A few days later, Valderrama told him that he should not speak to the workers during work hours or on lunch- or breaktimes, and that he should not speak about the Union at all.

Valderrama denied restricting Figuroa’s talking to co-workers during breaktime because he was permitted to speak with them during his personal time.

Figuroa stated that about 2 months later, in September, employee Jose Ramos told him that he had not received his health insurance card. Figuroa advised him to speak to Valderrama. Ramos did so, and he later advised Figuroa that Markus told him that he was paying for his health benefit fund. Figuroa then told Ramos that he would check with the Union.

Figuroa testified that he asked Union Agent Deschamps about the matter, and Deschamps advised him that Ramos’ name was not listed as being a benefit fund recipient. Figuroa so advised Ramos. Deschamps testified that when Figuroa asked why Ramos did not receive his card, he called the insurance department which told him that they did not see any payment by the Employer for Ramos. He then told Figuroa that the system shows no payment for Ramos.

Figuroa stated that he did not tell Ramos that he was not getting health benefits because Markus was not paying for them.

Ramos testified that he never received a health benefit card from the Union. He asked Figuroa about the matter because he believed that he was the steward. Figuroa said that he would check with the Union. Ramos stated that Figuroa told him that Markus was not paying for his health benefits. Ramos asked Markus, who showed him proof that he was paying his health insurance benefits.

Markus testified that when Ramos asked him why he did not pay health insurance benefits for him, he asked from whom he received that information. Ramos replied that Figuroa told him. Markus showed Ramos proof that he had paid for his health insurance. Markus then told Figuroa that he could not lie or give misinformation to employees.

I cannot credit Figuroa’s testimony that he only told Ramos that his name was not listed. Rather, it seems likely that he told Ramos that the Employer had not paid for Ramos’ health insurance. I make this finding because Deschamps so advised Figuroa, and Ramos also testified that Figuroa relayed that information to him, and he told Markus the same thing.

According to Figuroa, thereafter, assistant to the supervisor, Carlos Vasquez, told him that Markus wanted him to cease speaking with employees about their medical benefits, and that Markus wanted him to know that he was paying for the medical benefits of the workers. Figuroa understood that Vasquez’ advice to him was a verbal warning.

On September 17, Figuroa was issued a notice of violation signed by Manager Jose Lopez and Acting Supervisor Jose Ramos which stated:

Miguel was telling other employees that the reason they don’t get medical benefits is because Miron is withholding money from their paychecks and keeping it for himself. Miguel said that everyone should complain to the union against Miron. Miguel was told that what he was saying was a lie, he was told to stop spreading lies, he was told that he had verbal warnings and this will be 1st written warning and that he was placing his job in jeopardy.<sup>5</sup>

Figuroa stated that on October 18, Markus told him that on October 21, he would be meeting with employees to discuss the Union, and that he must attend the meeting. Markus added that if Figuroa “was still continuing the attack against him he was going to fire me.”

#### *D. The October 21 Meeting*

On October 21, Markus conducted a meeting with his employees. Figuroa testified that at the meeting, Markus said that everyone was aware that the union contract was about to expire and that he “wasn’t going to sign one because the Union was asking too much. And if he agreed [to the Union’s terms] he was going to fire about 50%, and if the company went on strike he was going to open the doors to anybody who wanted to come aboard and whoever didn’t want to was going to get fired. If this continued like this he was going to close the facilities.” Figuroa also noted that Markus promised the employees a \$1 raise.

Employee Juan Peguero testified that at the meeting, Markus said that he was going to give the employees a raise in pay and a better medical plan, adding that “he didn’t want the Union there.” He also said that if he signed a contract with the Union, he would have to lay off 15 percent of the work force, and that if the workers went on strike, he would lay off or get rid of anyone who went on strike. He also quoted Markus as saying that he “would close the factory if the contract was signed.”

Employee Rodrigo Vaquero testified that Markus said that he did not want the Union in the shop and that he would pay for a medical plan and holiday pay. He asked the employees to ask their nonunion coworkers about their benefits.

In his pretrial affidavit, Markus stated that on October 21, he conducted a meeting with employees to explain “where we were in bargaining.” He stated that he told the workers that he expected to sign a contract with the Union. His affidavit stated that “I said that I would give a 30 cent per hour raise whether the union was there or not. I did not talk about holidays, and I did not say that if the Union was not there I would treat employees better. I told the employees that we could not afford to pay 16 or 17 percent of gross salary for the Union’s benefit fund. I said that if we did we would have no choice but to close the shop in 3 months. The above was said to the union manager in front of employees during a bargaining meeting.” Markus explained that he told the Union that if he had to comply with the contract’s provisions, the Employer would be bankrupt. Nevertheless, Markus denied, at hearing, telling the workers that he would have no choice but to close the shop in 3 months if the Union continued to make certain proposals. He also de-

<sup>4</sup> Whenever he addressed his Spanish-speaking employees, Markus’ conversations were translated by Manager Lopez or Agent Valderrama.

<sup>5</sup> Quotations from the Respondent’s letters in this Decision are verbatim.

nied telling the employees that they would be fired if they went on strike, or that if the Union was not in the shop he would give them a raise in pay.

Valderrama denied that Markus told the workers that things would be better without the Union. She also denied that he told them that he did not want the Union, or that they would receive a raise if the Union did not represent them. Rather, he told the employees that he wanted to sign a contract with the Union, but that if he and the Union did not reach agreement, he would provide health insurance for them.

#### *E. Further Bargaining*

On October 31, Markus wrote to Larancuent, advising that the current contract was due to expire in 1 month. He noted that “this company will do everything in its power to come to an amicable agreement with the union for a new contract. If the terms for a new contract will not be agreed to and signed before the expiration of the existing contract, this company will consider the contract with the union and all of its past affiliates to be completed. The automatic renewal option of the contract will not be exercised; our joint contractual obligations will be considered as satisfied.”

On November 4, 2009, the Respondent submitted bargaining proposals. The Union tendered its proposals on November 16, and the Respondent presented its counterproposal on November 19, which stated that “the current contract term is expiring at the end of this week and this company sent you a written notice stating that if a new contract is not signed this company will not work with the union without a contract. Also, please be advised that due to the current market conditions and because of nonunion competitors in this industry the terms stated in this company’s proposal are extremely firm. This company cannot afford the Union’s proposals and will stand fast by the terms set forth in our proposal.”

#### *F. The Events of November 23–25*

##### 1. The letter of November 23

A letter dated November 23, 2009 on the Respondent’s letterhead was received in evidence. Written in Spanish and bearing the signature of Markus, it states as follows:<sup>6</sup>

#### TO ALL THE EMPLOYEES OF THIS COMPANY

We are now renegotiating your union contract. The terms that were proposed by the union are extremely unreasonable. If we have to sign the contract the union proposes, this company will be closed and every person will be left without a job. We proposed what we think to be a reasonable contract but the union does not even want to show it to you. At this point we need to know how many of our employees wish to be in the union and how many do not.

If the union is not in the company you will continue to receive all your benefits including vacations, holidays and for everyone that needs it we are in the course of getting medical coverage. For the employees that do not need medical coverage,

those employees will receive additional monies with their check. The exact information about this medical insurance and/or additional money will be available in a few weeks.

Please take a moment and analyze your vote with the union, yes/no. It does not matter how you vote, your employment will not be affected by this vote in any way.

Thank you.

[signed] Miron Markus

Figuroa stated that on about November 24, employee Santos Rosario told him that Markus was distributing a document, and he gave Figuroa a paper which mentioned “all the benefits.” Later that day, Valderrama offered him a paper which was the same that Rosario had given him. Figuroa asked why she was handing it out. She replied that “this paper was for if I wanted the union in the company” and also included information about the benefits Markus was proposing. Figuroa refused to accept the paper and told her he would not sign it. Figuroa gave a copy of the letter he received from Rosario to Deschamps, and brought it to the hearing.<sup>7</sup> It was the November 23 letter, in Spanish, set forth in full, above.

Deschamps testified that he received a call from Figuroa that Markus or his representative was distributing the letter at the shop. On cross-examination, he stated that Figuroa did not tell him who gave him the document or how he got it, and also stated that he did not recall if Figuroa said that Markus was distributing the letter to employees. Deschamps stated that he saw the document in the shop that day.

Deschamps asked Figuroa to keep a copy for him. Deschamps visited the shop and Figuroa gave him the letter. Deschamps confirmed Figuroa’s testimony that he (Figuroa) asked, in the office for a copy in English and was told by Valderrama that he should ask Markus for an English copy.

Employee Vaquero also stated that on about November 25, he was given the same letter by Carlos Vasquez, an assistant to the supervisor. Vaquero said that Deschamps was in the shop that day and he asked Deschamps what it meant. Deschamps asked Vaquero to obtain a copy written in English, and Vaquero asked Valderrama for a copy in English. Vaquero testified that Valderrama asked him why he wanted an English version if he speaks Spanish. Vaquero replied that he wanted to give a copy to the “Union people” so that they could look into the matter. Valderrama told him to ask Markus or Deschamps for one. Vaquero did not ask Markus for an English copy. Rather, he kept the letter and showed it to Deschamps.

Vaquero testified that upon his arrival at work the following day at 7 a.m., Markus called him into his office where Manager Jose Lopez translated. Markus asked him if he requested a copy of the letter in English for the Union. Vaquero replied that he had. Markus replied “why did [you] ask for that, if he was the one that put the plate of food on my table?” Vaquero replied that the Employer was “not giving me anything free, that I worked for everything that I got.” Markus responded that “whatever problem they had with the union, I would be the one of the first to be let go from the company.”

<sup>6</sup> The letter was translated into English by a Board interpreter. The Respondent has not challenged the accuracy of the translation. Copies of the Spanish and English versions were received in evidence.

<sup>7</sup> It was received in evidence as ALJ Exh. 1.

Markus denied speaking to Vaquero at 7 a.m., stating that, although Markus begins work at 5:30 a.m., he is too busy with start-up procedures until 8 a.m. to speak to anyone.

I reject Markus' testimony that he was too busy to speak to Vaquero at 7 a.m. when this conversation occurred. I believe that, when an opportunity arose to threaten Vaquero for supporting the Union, Markus found the time to speak to him.

Markus denied in his testimony and pretrial affidavit, that he drafted or distributed the November 23 letter, and he also denied authorizing its preparation or distribution. As set forth below, I find that the letter was issued by the Respondent.

Vaquero stated that in late November, he heard Manager Jose Lopez asking the workers why they were supporting the Union. Vaquero approached and told Lopez to "leave them alone," adding that if they make a mistake they would make it on their own, and that no one should tell them which side "they should choose."

### 2. The meetings of November 23–25

Juan Peguero testified that he attended two meetings on November 23 or 25, one which was held during his lunch hour at 11 a.m., and the next one during the second shift's lunch hour at 1 p.m. Present were Markus and Valderrama. At both meetings, Markus told the employees essentially the same things that he mentioned at the October 21 meeting—that he was going to close the laundry if he signed the contract, he did not want the Union, and the Union wanted to "rob" their money. Markus also told those assembled that he was going to give them a better medical plan than the Union could provide, and "whoever didn't want the medical plan, he would give them money in cash," and, "if the Union was not there," he would provide enhanced pay for holidays and vacation.

Vaquero stated that at the meeting, which he believed was held on November 24, Markus said that he did not want the Union there, and that he was going to pay for a medical plan and overtime. Vaquero replied to these promises by telling Markus at the meeting that since Markus did not respect the Union or the workers by not paying them overtime wages or giving them raises in pay, he could not be expected to provide those benefits if the Union was not in the shop. Markus responded that he would give a raise "but it wasn't for [Vaquero] and that I had to choose whether I was going to pick the union or be on his side." Markus told him "to go straight to the Union."

Markus denied telling employees that they would receive a better holiday benefit if they did not have the Union.

### 3. The polling of employees

Markus testified that he told Union Agent Larancuent that certain employees are not using the health insurance benefits that he is paying for because they receive Medicaid benefits or coverage through their spouse. He also told Larancuent that he would ask the workers whether they needed medical insurance coverage paid for by the Employer.

Markus stated that he told his employees that the Employer would "make a list of who needed medical coverage and who did not. I did this because I had learned from 13 employees that only 2 people were using the union's health benefit plan. I was looking around to see what other coverage options were

available and I called certain health benefit companies. I needed to know how many employees needed medical coverage. I explained that we were going to make a list to see who needed medical coverage and who did not." Markus asked Valderrama to prepare a list of the names of all employees and, when they pick up their paycheck, ask them whether they need Employer-provided medical insurance. She did so, and wrote down their answers.

Valderrama testified that each Thursday she distributes paychecks to the employees. Her procedure is that she asks the workers to sign a paper signifying that they received their check. She denied showing a letter to employees which asked whether they wanted the Union or not and asking them to sign it. Nor did she distribute a letter to the workers regarding health insurance.

Valderrama further stated that the actual document she posted was no longer available. She recreated another document with the same information.<sup>8</sup> That paper lists the names of all the employees, and has two columns next to the list stating "Don't Need" and "Need." She stated that she did not ask any of the workers to sign a letter. However, she conceded that the document listed the workers' names, and she asked them if they needed health insurance or not "if Miron and the Union didn't get to an agreement" or "if you know for any reason the Union is not here no more." She put a check mark next to their name depending on whether they said that they needed insurance. Some employees made their own mark on the paper, and some did not give her an answer.

Vaquero testified that in late November, when he reported to Valderrama for his paycheck, she told him that before he received his check he had to write on the document whether I was on "Miron's side or on the Union's side." Vaquero marked that he was on the Union's side and gave the paper to Valderrama. He then received his paycheck. Vaquero testified that he saw two other employees mark the paper. The paper listed the names of the employees and on two columns said "Miron Markus" and the "Union."

Figueroa stated that on November 25, Rosario told him that he had to sign a document in order to receive his paycheck in addition to the usual receipt for the check he normally signs. Figueroa immediately asked Valderrama whether employees had to sign a document as a condition to their receiving their pay. Valderrama asked him who told him that and he identified Rosario.

Ramos testified that on November 24 or 25, he was the acting supervisor when he noticed a paper near the office window which had a list of names. He testified that he "understood" that the document asked whether the employee was "for or against the Union," but in fact the question on the paper was whether he needed health insurance or not. He wrote that he needed health insurance. On the re-created form that Valderrama produced at hearing, Ramos' name is listed, but there is no mark next to it indicating whether he needed or did not need health insurance.

Ramos' pretrial affidavit was clearer. In it he stated that the question "was on a paper . . . it asked whether you [were] for

<sup>8</sup> GC Exh. 13.

the Union or against the Union. I recall that I indicated that I did not want the Union.”

Employee Peguero testified that on November 25, he was told by Figueroa that Valderrama would not give coworker Santos Rosario his paycheck unless he signed a paper. Peguero and Figueroa then approached Valderrama and asked for their paychecks. Peguero stated that Valderrama asked him to sign a paper. Peguero refused to sign unless he was told its meaning. She then said that the paper asked “whether I was on Miron’s side or on the Union’s side,” but did not give him the paper to sign. Valderrama called Markus and told him that they refused to sign the paper. After speaking with Markus, Valderrama said “okay” and gave Peguero his check for which he signed the usual receipt. He then left, and told a coworker not to sign the paper.

Valderrama testified that Figueroa stood outside the plant door telling all the employees that they would be required to sign a letter in order to receive their paychecks, and that the letter asked whether they wanted the Union. He advised them not to sign it. Then the employees entered her office and asked her about the letter and she told them that there was no letter. Rather, she had a paper which asked whether they wanted health insurance or not. She stated that she was told by Markus that he was considering buying health insurance for them if they needed that benefit. She marked the employees’ responses on the paper and if they refused to answer they received their paycheck anyway. Valderrama reported Figueroa’s actions to Markus.

Figueroa denied standing outside Valderrama’s office and telling employees that they had to sign a letter for or against the Union in order to receive their paychecks. In fact, when he picked up his check there was no document to sign other than the usual receipt for the check. Similarly, he received his check without having to tell Valderrama whether he was for or against the Union.

Valderrama further stated that when Rosario came for his paycheck, she asked him if he needed health insurance “if the Union is no longer here.” When Rosario questioned her, she said “just in case if we stay without a union, Mr. Miron was going to look for . . . health insurance to provide them.” Figueroa then approached Valderrama and said that the workers were being required to sign a letter, which she denied. She denied asking employees if they wanted the Union.

Markus stated that an employee told him that Figueroa said that they would not be paid unless they signed a document in which they indicated their support for the Union or Employer. He told Figueroa that he could not lie to the workers, and asked who gave him such information. Figueroa did not respond. Markus told him that if he had a problem he should speak with Markus, to which Figueroa responded “I know what I’m doing. I know my right.” Markus replied “Oh, you know what to do, that’s the end of conversation. It was his third violation.”

Markus denied that such a document existed, nor were employees required to sign it before they received their pay. Markus further denied asking employees whether they wanted him or the Union.

Valderrama testified that she translated a meeting between Markus and Figueroa concerning the accusation that Figueroa

was advising the workers not to sign a letter in order to receive their paycheck. Figueroa asked Markus who told him that he was so informing the employees, and Markus said that Rosario told him. Markus called Rosario into the office, and he said that Valderrama was telling the employees that they had to sign a letter to receive their pay. Valderrama denied doing so, adding that she just asked the workers whether they needed health insurance. After Rosario left, Markus told Figueroa to stop “spreading lies.” Valderrama stated that Figueroa continued to tell lies and when confronted said that he was “right” and would not stop. She advised Markus of his remarks.

Later, Rosario argued with Valderrama and then told Figueroa that he argued with her because Figueroa told her that Rosario said that he had to sign a paper specifying whether he wanted the Union or not.

#### *G. The Discharge of Figueroa*

Later that day, Markus called Figueroa into his office. Valderrama was present. Figueroa stated that Markus told him that if he “again continues with these attacks he’s going to fire me.” Figueroa replied “I knew my rights.” Markus left the room and Valderrama told him she was going to give him a tip—that he “shouldn’t talk about the Union with the employees because they were never going to thank me for that. You would end up fired if you continued to speak to employees about the Union.” He told Valderrama “okay, I’m aware of my rights,” and then left the office.

On November 24, a notice of violation was issued by Valderrama as follows:

Miguel Figueroa was telling to the employees that the people from the office was saying that if they don’t sign against the Union they was not going to get pay. This lie gets to Mr. Miron attention. He call Miguel to the office and told him that everything that he was saying was false and if he doesn’t stop all lies he was going to be terminated. Mr. Figueroa respond that he know his rights and he don’t care what Miron do.”

Figueroa heard Markus call Vasquez to his office and immediately thereafter, Vasquez told him that Markus fired him. Later that day, Figueroa told Peguero that he had been fired. Peguero stated that the following day, Markus asked him who told him to sign the paper before he could receive his paycheck. Peguero said that it was Santos Rosario. Markus called Rosario in and asked him the same question. Rosario said that Valderrama told him to sign. Markus said that he fired Figueroa because of Rosario.

Figueroa denied telling any employees that they would not receive their paycheck if they did not sign a document in which they were asked to state whether they were for or against the Union, or that they wanted health insurance from the Union or Employer.

On December 14, 2009, Markus wrote to Deschamps, explaining that Figueroa was “warned several times about disseminating lies about the Company and its management. During the latest incident Mr. Figueroa was telling Company’s employees that the reason that they are not receiving medical benefits is because ‘Miron is not paying for them.’ Mr. Figueroa

was called to the office and was warned that his actions are inflammatory and dissemination of lies is harmful to a healthy and tranquil work environment. Mr. Figueroa was told to cease dissemination of lies or his employment would be terminated. Mr. Figueroa replied by stating 'I know my rights and will say whatever I want.' At that point the company had no choice but to inform Mr. Figueroa that his employment was terminated with no possible recourse with the company. Being that Mr. Figueroa was warned on at least three separate occasions about the same behavior on his part this company has terminated Mr. Figueroa properly. . . ."

Figueroa applied for unemployment insurance benefits. In its December 14 response to the New York State Department of Labor inquiry about his claim, Michael Markus, vice president of the Respondent, stated that Figueroa was discharged for misconduct: "Dissemination of lies against management; multiple warnings against such behavior; multiple incidents of instigating employees against this company."

In a further response dated January 2, 2010, Michael Markus completed the Department of Labor form as follows:

Markus stated that the final incident resulting in his discharge was his "instigating other employees against company management by spreading blatant lies. The claimant was told that he was warned in the past for same problem and that if he continued he would be terminated. The claimant stated that he knows his rights and will say what he wants. At that point he was terminated. Claimant was purposely causing problems between management and other employees. By his actions claimant was causing and creating a harsh work environment. The claimant was expected not to spread various lies about company's management and if he believed that a problem existed, said problem had to be brought to company's management. Claimant acted similarly in the past and was specifically told by the management that if he did not stop, his employment would be terminated.

Claimant was given warnings by Jose Lopez, manager, and Carlos Vasquez, supervisor, first in September, 2009, second in September, 2009 and final in October, 2009.

Claimant was told that his actions can lead to termination and in October was told that he received a final warning; 1 more infraction and he would lose his job.

Claimant stated that he knows his rights and that he will say whatever he wants to say.

In this particular case, considering that the claimant was warned numerously in the past, the decision was made not to grant him any more chances.

Markus stated in his pretrial affidavit that Figueroa was fired for telling other employees lies, specifically, "because he told employees that people in the office were saying that if they didn't sign against the union they were not going to get pay." Markus stated that "Figueroa was warned that the information he was spreading was false and that if he did not stop he would be fired. Figueroa said 'I know my rights. I know what I am doing.' On September 17, 2009, Figueroa was warned for telling other employees that the reason they don't get medical

benefits is because I was withholding money from their paychecks and keeping it for myself. Miguel said that everyone should complain to the union against me. I told Miguel that what he was saying was a lie. I told him that he was to stop spreading lies. I told him that he was getting a verbal warning and that he was placing his job in jeopardy. I had found out that Figueroa was spreading these lies because supervisor Jose Ramos . . . told him this. Figueroa did not stop so he was fired. He was not fired because he refused to sign any document. He was fired because he was spreading lies to employees and he was told to stop and he refused. Employees were never made to sign a paper. I just wanted to know who needed health benefits. I was not asking employees whether they supported the Union."

Valderrama testified that Figueroa was fired because he was warned "several times" about "talking in the shop during working hours and because he was saying things that was not true." She stated that Figueroa was orally warned because he told an employee that he had no health insurance because Markus was not paying for his insurance.

She further stated that Figueroa engaged in misconduct by speaking about the Union during working hours, and not during his lunchtime or personal time.

Markus denied firing Figueroa because he spoke to his co-workers about the Union. Rather, he was discharged because he first refused to follow the direction of a supervisor and received a warning. He also testified that he discharged him because this was his third violation, and because Figueroa spoke to him in a "rude manner because, after being told nicely that he was not supposed to lie to the workers, he said that "I know what I'm doing. I know my rights" to which Markus responded "Oh, you know, so go, go do your rights, sorry. I own company, not [you]."

#### *H. The Leafleting and its Threatened Consequences*

On November 25, Larancuent wrote to Respondent's customer, the Intercontinental Barclay Hotel, advising that it may experience a "potential disruption" of linen service due to a labor dispute with the Respondent. Larancuent wrote "I ask that until this labor dispute is resolved you use your managerial discretion and stop doing business with Miron & Sons." The letter also advised that the Respondent's employees may strike to protest the Employer's unfair labor practices, and if they do, the Union may engage in picketing against the Employer at the Hotel, and engage in leafleting the Hotel's customers.

Larancuent denied that the Union engaged in picketing at any customer locations of the Respondent, but conceded that the Union leafleted the Intercontinental Barclay Hotel in order to "put pressure" on the Respondent. The leaflet stated:

Attention Guests of the Intercontinental Barclay Hotel.

The Intercontinental Barclay Hotel is Supporting the Abuse of Workers.

The Barclay uses Miron & Sons Laundry to wash its sheets & other linens.

Miron & Sons Laundry has committed serious unfair labor practices in violation of Federal labor law.

Miron & Sons is trying to force its immigrant workforce to labor under sweatshop conditions.

Help put an end to the abuse of immigrant workers.  
Tell the Intercontinental Barclay Hotel that:

When you lie down with dogs, you wake up with fleas.

You don't want your money used to support sweatshop labor.

You demand that the Hotel stop using Miron & Sons.

On the same date, the Union wrote to a number of the Employer's customers advising them of a "potential disruption of your linen service" due to a labor dispute with the Respondent because of its "bad faith bargaining" and its being the subject of charges filed with the Board. The letter asked that the companies stop doing business with the Respondent, and advised that the Union may engage in picketing, including ambulatory picketing when the Respondent's employees were present at the customer's facility.

On November 25, the Respondent submitted a bargaining counterproposal. In its submission, Markus stated that leaflets that the Union distributed that day were "full of lies and were defaming the character of the management of this company . . . ." The letter demanded "an immediate retraction of all lies printing in the . . . leaflets" and threatened legal action for defamation of character. The letter added that no financial contributions would be made to the Union until a new contract was signed, noting that the Respondent would continue to negotiate in good faith after the contract's expiration, "but only as long as there is no strike and/or picketing of this company at this company's location or any other location. If the union will choose to picket or strike against this company, all negotiations on behalf of the company will immediately stop." The letter further stated that "since our disagreements are strictly of economic nature any employees who are currently employed by this company who chooses to strike against this company will be terminated immediately and will be replaced with new employees," noting that any unlawful picketing would be prosecuted.

In his pretrial affidavit, Markus stated that "while I did say in a letter to the Union that I would not negotiate with the Union until they stopped picketing the hotels I do business with, I did not enforce that. I continued to send proposals to the Union and met with the Union on January 21 2010. I refused to continue to meet on that day because Figueroa was with the Union and I refused to meet with him present."

In the Union's reply of November 27, Larancuent proposed four specific dates and times for negotiations during the first week in December.

On December 2, Markus wrote to Larancuent stating that by picketing the Employer at its customer locations, the Union is responsible if the customer no longer used the Respondent and instead began dealing with a nonunion laundry which may result in "union members losing their jobs." Markus requested that the Union negotiate in good faith by immediately stopping the current picketing, and ceasing the unlawful picketing. The letter concluded that "this company expects your and the union's reply and stoppage of all picketing within twenty-four hours of receiving a fax of this correspondence. If you do not reply and stop all picketing against this company it will be as-

sumed that you and the union do not chose to continue negotiating."

On December 3, Markus wrote to Larancuent stating that the leaflets contained "false and disparaging assertions," including its statements concerning the Employer's violation of Federal law, and its remark about "sweatshop conditions." The letter accused him of attempting to undermine the Employer's business. Markus stated that he heard that the Union was engaging in illegal picketing of his customers. The letter concluded that "notwithstanding your inflammatory tactics, the company will attempt to negotiate with the union in good faith and expects the same in return. Before negotiations recommence, we ask as a sign of good faith that any illegal picketing cease and that the Union cease and desist from harassing of the Company's customers through your dissemination of defamatory flyers. The lies which you started and are spreading about this company and its management must be retracted and signed letters of apology must be sent to our customers. Upon meeting the above criteria, if the Union has a further proposal for the Company to consider please forward it to my attention in advance of setting dates of our next meeting."

Larancuent replied on December 4, denying that it was engaged in any illegal activities, stating that "on the one hand you propose to gut the CBA on holidays, vacation, sick days, salaries, health insurance, job rate and other matters. On the other hand you don't want to take responsibility for your own proposals. I think that any reasonable person would assert that you are attempting to force immigrant workers to toil under sweatshop conditions." Larancuent again offered to meet on four days in early December.

On December 7, Markus replied, disagreeing with Larancuent's response, and stating:

Even though your actions make it very difficult, but it is the intent of the Company to negotiate with the Union in good faith. As was stated before:

1. Send the Company a written and reasonable contract proposal.
2. Stop unlawfully harassing, trespassing and/or loitering on the Company's customers' properties.
3. Stop all unlawful picketing of the Company.
4. Send to the Company's customers signed letters of apology for Union's unlawful tactics.
5. Stop dissemination of lies about the Company and its management.

The Company will gladly set a date to recommence contract negotiations with the Union, but not before the Union stops unlawful actions against the Company and a reasonable, written contract proposal is submitted to the Company by the Union; another copy of previous proposal(s) will not be deemed reasonable by the company. The Union must negotiate with the Company in good faith.

#### *I. The Scheduled Bargaining Session of January 21, 2010*

On January 21, 2010, a collective-bargaining session was scheduled to be held at the Employer's facility. Those present for the Union were Larancuent, Deschamps, and Figueroa. They were stopped at the office by Valderrama who told them

that Markus would not permit them to enter the production area. Larancuent protested that he had to summon the Union's bargaining committee for the negotiation session. He asked her to get Markus. Markus told Larancuent and Deschamps that they could not enter the shop because there was no contract, but he would request that Plant Manager Lopez ask the Union's committee to come forward. Larancuent protested that he did not want Lopez to speak to the committee and offered that he, Larancuent, would get them. Markus refused, and asked Lopez to get the committee. Lopez returned shortly after and reported that the committee said that it did not want to attend negotiations. Markus again refused Larancuent's request to get the committee himself.

Larancuent, Deschamps, and Figueroa then agreed to negotiate with Markus without the committee and so notified Markus, who then asked why Figueroa was present. Larancuent replied that he was a member of the committee. Markus answered that Figueroa was not allowed in the building because he is a liar, and does not speak or read English. Larancuent repeated that Figueroa was a committee member and the Union was prepared to bargain with the three agents present. Markus said that Figueroa must get out. Larancuent answered that if Figueroa could not attend the negotiations he would not negotiate with Markus, and they left. Deschamps essentially corroborated Larancuent's version of the meeting.

According to Figueroa, Markus asked what he was doing there if he did not represent the employees as shop steward anymore, adding that Figueroa did not understand English. Larancuent replied that if Figueroa could not be present they would not conduct negotiations that day, and they left. Larancuent said that that was the first time he had been refused access to the production area.

In his pretrial affidavit, Markus stated that he refused to meet with the Union on January 21, because Figueroa was with the Union and he refused to meet with him present. He testified that he told Larancuent that Figueroa was not welcome in the shop because he was a liar, and he was no longer employed by the Respondent. On January 26, Markus wrote to Larancuent, stating that he refused to permit Figueroa to be present "on my property because he is a factually proven problem instigator."

In his reply, Larancuent wrote to Markus stating that "it is unfortunate that you did not want to negotiate with the Union last week. We have the "right to select the members of our committee, you don't."

Answering on January 28, Markus wrote that it was the Union, not the Respondent who "chose to leave instead of negotiating. It was you who intentionally brought Figueroa to the meeting while knowing that he is a trouble instigator and liar whose employment at this company was terminated for that very reason; Mr. Figueroa's actions and words were repeated to you by several of the company's employees. It is you who decided to leave when you were told that Mr. Figueroa was not permitted to be on the Company's property." Markus wrote that the Union must provide a "realistic proposal" which must be submitted to the Employer for review at least 3 days before any scheduled meeting, and must also provide, 3 days in advance, the names of employees who it wanted to be present at the session. Markus warned that the Union should not choose

"those people . . . that would negatively intensify the already difficult situation."

#### *J. An Arbitrator's Award and Declaration of Impasse*

On January 27, 2010, an arbitrator issued an award finding that the Employer violated the 2006–2009 contract by "failing to pay proper wage increases, vacation benefits, holiday benefits, minimum guaranteed hours for wage rates as required by the contract, holiday pay, vacation and other benefits." The arbitrator directed that the Employer pay all money due plus interest.

On February 9, 2010, Markus wrote to Larancuent, stating that since July 2009, the Respondent has attempted to negotiate a renewal contract, but recently it appears that Larancuent was not interested in bargaining in good faith. Markus further stated that on November 25, 2009, he sent the Union a "best and final contract proposal," and that the Union must accept the proposal in 2 weeks or continue bargaining with a reasonable counterproposal and bargain in good faith. "Failure on the Union's part to either accept the company's contract proposal or to offer a reasonable counterproposal will leave the Company with no choice but to declare an impasse. I further want to remind you that most of Company's employees do not want Union to represent said employees in the future and the management of the Company is trying very hard to persuade Company's employees not to continue with their petition to vote the Union out. The ball is in your court; come to an agreement with the Company or the last unionized hotel laundry in New York City will become a non-union shop."

On March 1, 2010, Markus wrote to the Union, stating that since it did not reply to his February 9 letter, the Respondent was declaring an impasse in the negotiations.

The following day Larancuent replied, denying that the parties reached an impasse and rejecting Markus' "preconditions for negotiations" set forth in his January 28 letter. In addition, Larancuent noted that Markus refused to meet on January 21 with Figueroa present and denied him the opportunity to speak to the Union's bargaining committee prior to meeting when they were summoned by Lopez. In his March 2 letter, Larancuent rejected Markus' declaration that the November 25 proposal was his last and final proposal. He offered four dates in March for bargaining.

No bargaining sessions were held between the contract's expiration in November 2009, and Markus' March 1 letter, and none were held until late April or May 2010. The only scheduled session was on January 21, which did not take place because Markus refused to bargain with Figueroa present.

Larancuent further stated that prior to the expiration of the contract, Markus had not threatened to declare an impasse, never presented any of his proposals as his last, best, and final offer, and that the first mention of an alleged impasse was in Markus' February 9 letter.

Larancuent testified that prior to the expiration of the contract most of the major issues, including wages, health insurance, holidays, sick leave, pension benefits, legal assistance and nearly all the fund issues, remained to be resolved. Indeed, Markus testified that, in October or November 2009, the parties were "very far apart on the contract."

#### K. Failure to Remit Dues Payments to the Union

Markus conceded that for the period December 2009 through March 2010, the Respondent collected dues from the employees, but did not remit those dues to the Union until April 2010, when he was told by the General Counsel and his attorney that he must do so. Thereafter, as alleged in the complaint, the Respondent made periodic remission of dues to the Union, and was current in its dues remissions as of the date of the issuance of the complaint.

On March 9, the Union wrote to Markus advising that its dues department informed it that the Respondent did not submit dues payments for December 2009, and January, February, and March 2010. Markus stated in his pretrial affidavit, that “beginning in December 2009 and continuing to date [February 8, 2010] the Employer deducts the union dues from the employees’ paychecks, but I have not sent the money to the Union. Employees have complained to me that they don’t want to pay the union anymore. I don’t know what to do with the money.”

#### L. The Failure to Make Payments to the Union’s Funds

As set forth above, the collective-bargaining agreement expired on November 27, 2009. It provided that the Respondent was obligated to make contributions to the Union’s Health Fund, Retirement Fund, Education and Legal Assistance Fund for the period beginning December 1, 2009, at a rate of 16.3 percent of the total gross earnings of its bargaining unit payroll. That figure is comprised of 15.9 percent for the Health Fund, 1.6 percent for the Retirement Fund, and .4 percent for the Education and Legal Services Fund.<sup>9</sup>

Fund contributions are due on the 15th of the month following the month in which they accrue. Thus, the December 2009 fund contributions were due on January 15, 2010.

Timothy Clark, the manager of collections for Amalgamated Life, the organization which oversees contributions to the Union’s benefit funds, credibly testified that no fund contributions were received from the Respondent when they were due for the months of December 2009 through April 2010.

Markus admitted in his pretrial affidavit that the Respondent “ceased making contributions to the Union’s benefit funds upon the expiration of the CBA. We could not afford those payments anymore and since the CBA expired we no longer had to give it to the benefit fund.”

On April 27, 2010, the Employer sent a check for the December 2009 fund contribution. However, the check was in the amount of 8 percent of its payroll, instead of 16.3 percent of payroll. Similarly, beginning in May 2010, the Employer sent checks for the months of January 2010 through July 2010, in the amount of 8 percent of payroll. In September 2010, the Respondent sent a payment of 15 percent for the month of August 2010.

On June 21, 2010, notices were sent to the Respondent and its employees that fund benefits would be suspended on July 7 due to the Employer’s delinquencies in paying its fund contributions from January 2009 through April 2010. The benefits were later suspended. On September 27, the benefits were

reinstated with the understanding that the Respondent would make its contributions at the correct rates.

In addition, Markus’ letter of December 15, 2008, complaining that he had to cut his prices to his customers, noted that the Respondent would be “unable to pay the benefit fund increases or any other increases in the union contract for the calendar year 2009.” He offered to keep the benefits at the 2008 levels but he did not do that, since he paid no Fund benefits at all from December 2009 through April 2010, and then paid at a rate of only 8 percent for the period January through July 2010 although the contract provided for a Fund contribution of 15.4 percent of payroll. In September, the Respondent made a payment of 15 percent for the month of August 2010, which itself was lower than the contractual payment required.

As set forth above, Markus’ letter dated November 25, 2009, set forth above, that “no financial contributions would be made to the Union until a new contract was signed.” Further, Markus conceded that he paid into the Fund “up to November 28, 2009” for the period until the contract expired.

#### M. Access to the Shop

The expired contract provides that “the Employer shall recognize and deal with such representatives as the Manager of the union may designate and shall permit such designated representatives to visit the plant at any time during working hours provided that there shall be no interference with production.”

On November 27, 2006, the Union and the Respondent entered into an agreement extending the contract to November 27, 2009. The agreement provided for certain minimum wage rates and other financial terms. In addition, it stated that the parties should “see side letter/access—Article 2B.” According to Larancuent, no agreement had been reached during negotiations concerning access to the shop, and it was his recollection that the attorneys were supposed to have drafted a clause concerning access but never did.

Figuroa stated that before his discharge, union representatives frequently visited the shop, with Deschamps coming once per week. When there, Deschamps spoke to employees in the production area.

Union Agents Larancuent and Deschamps testified that it was their practice to enter the shop, announce their presence by telling Markus, Valderrama, or another official that they were there, and “walk the shop” speaking to the employees on the production floor while they were working. They visited the shop at any time, and stayed from 1 to 2 hours. They had never been asked to obtain permission from management to enter the production floor, and they had never given advance notice of a visit.

Deschamps testified that in January 2010, after the expiration of the contract in November 2009, he visited the facility and announced himself at the office as he normally does. He approached Markus in his office, and was told that he was not supposed to be in the shop because “we don’t have a contract.” Deschamps replied that even if the parties did not then have a contract, they were negotiating a new agreement, and he continued to represent the employees. Markus then permitted Deschamps to speak to employees as he normally did.

<sup>9</sup> GC Exh. 5, pp. 62, 68, and 73.

Deschamps stated that 1 or 2 months later, he visited the shop and was told by Markus' son Boris that Markus said that he could not enter the shop when he was not present. They went to the conference room where Boris offered to bring to the conference room any employees he wished to speak to. Deschamps gave him the names of two employees who Boris brought to the room, but Deschamps did not ask for other workers because he did not want them singled out.

On June 11, Deschamps visited the shop for a negotiation session attended by him, Larancuent, and Figueroa. He had been told by the Respondent's attorney that they would receive access to the shop on the condition that they do so during the lunchbreak. The Union agents were permitted access to the production floor during the lunchbreak.

#### Analysis and Discussion

##### I. CREDIBILITY

I cannot credit the testimony of Markus. The most glaring instance of his lack of credibility is his denial, in his testimony and pretrial affidavit, that he drafted or distributed the November 23 letter. He also denied authorizing its preparation or distribution, and Valderrama denied giving the letter to any worker.

However, in his affidavit, Markus stated that "it appears that my signature is on the letter." A signature comparison may be made by the trier of fact. Federal Rules of Evidence, Rule 901(b)(3). I have done so and find that the signature on the November 23 letter is identical to that of Markus on other letters admittedly authored by him which were received in evidence.

Markus acknowledged that the signature looks like his, but noted that the letter must have been "doctored." Who doctored it? The Union did not have to manufacture the letter because there were other writings admittedly authored by Markus, such as the November 25 bargaining proposal, which contained evidence of unfair labor practices. Moreover, the consistent, credible and plausible testimony of Figueroa, Rosario, and Vaquero that they received the letter at the shop, and were questioned by Markus and Valderrama as to why they wanted copies in English, serve to undermine Markus' testimony that he was unaware of the letter and did not write it.

The Respondent's brief states that the letter is dissimilar to other letters admittedly authored by Markus, a Russian immigrant for whom English is his second language. The important distinction is, however, that those other letters were written in English and were addressed to the Union. The November 23 letter, in contrast, was directed to the Respondent's Spanish-speaking employees and was in Spanish. Consistent with his practice when addressing his employees, Markus always had a Spanish speaking person, either Supervisor Lopez or Agent Valderrama, translate for him.

Thus, the November 23 letter represents Markus' statements but the precise wording was that of the Spanish translator.

Moreover, the letter's statement that the plant would close if the Employer had to sign the contract the Union proposed, is consistent with Markus' pretrial affidavit, referred to above, in which he told the employees that the Employer could not afford to pay 16 or 17 percent of gross salary for the Union's benefit

fund, and that if it paid that amount the Employer would "have no choice but to close the shop in 3 months." Further, the letter presents the same view of the Union's proposals—that they are extremely unreasonable—as that stated in Markus' November 19 counterproposals—"this company cannot afford the union's proposals."

In addition, the letter's advice that if the Union "is not in the company" it would provide medical coverage, is the same as Valderrama's testimony, set forth above, that she informed the workers that the Employer would provide health insurance if "for any reason the Union is not here no more."

The statement in the letter that the Respondent would give its employees "additional monies" if they did not want Employer-provided medical coverage, is consistent with Peguero's testimony, above, that at about the same time, Markus told the workers at two meetings that "whoever didn't want the medical plan, he would give them money in cash."

Further, the letter was given to at least two employees, Rosario and Vaquero, with Vaquero testifying that he received his from Assistant to the Supervisor Vasquez. Vaquero's detailed testimony that he requested an English version from Valderrama, and that Markus thereafter asked him why he asked for a copy for the Union, accompanied by a threat to discharge him, strongly supports a finding that Markus was not only aware of the letter, but was its author. Markus' retort that, by asking for the letter, Vaquero was disloyal to the Employer who puts food on his table establishes that Markus resented Vaquero's request. It is clear that Markus would not have asked Vaquero why he wanted a copy of the letter if Markus did not authorize its issuance.

In finding that the testimony of Figueroa and Peguero are credible, I note that their testimony that Markus told them at the October 21 meeting that anyone who went on strike would be fired is consistent with Markus' November 25 bargaining proposal in which he wrote that any employee who "chooses to strike against this company will be terminated immediately."

Markus further exhibited his lack of credibility by, first stating in his pretrial affidavit that he told the employees on October 21 that if he had to pay the Union's requested benefit fund amounts he would have to close the shop, but then at hearing, Markus denying making that statement to the workers at the meeting.

The employee witnesses testified in a straightforward, consistent manner and their testimony concerning statements made to them by Markus were corroborated by other employee witnesses and, as set forth above, by Markus' admitted writings. On the other hand, Markus testified in an excited, agitated manner, raising his voice at times to General Counsel and counsel for the Union, addressing them in a harsh, hostile manner.<sup>10</sup> That did not serve to bolster his credibility.

<sup>10</sup> "MS. VLACKECK [Union Counsel]: His testimony is, I don't have time—

THE WITNESS: Stop to play game. If you play game all day, don't think that everybody play game. I have to make money to support you. I work 15, 18 hours a day. I'm 71 years old. Stop to make bullshit to me. You get your salary from my pocket. I pay for this.

II. THE ALLEGED INTERFERENCE WITH EMPLOYEE RIGHTS  
UNDER THE ACT

A. *The Respondent's Comments to Shop Steward  
Miguel Figueroa*

First, I find that Miguel Figueroa was the Union's shop steward from about June 2009. Although his election was "unusual," it is clear that he was selected as the steward and acted as such. Thus, he credibly testified that he represented at least one employee who was disciplined and he acted as a conduit between workers having questions and the Union.

Although Markus denied knowledge that Figueroa was the steward, his attitude toward Figueroa belies that claim. Thus, Figueroa credibly testified that only about 1 month after his election, Markus told him that he was working for the company and not for the Union, and that he should not give information "about the Union." Clearly, Markus regarded him as acting in behalf of the Union. Whether Markus was formally notified by the Union that Figueroa was its steward is beside the point. Further, Valderrama testified that everyone in the shop believed that he was the steward because he spoke about the Union "more and more."

Markus' warning to Figueroa that he should not give information about the Union to the employees or to the Union about employee complaints violated the Act. The Act prohibits such interference with a union representative's right to speak to employees or to report on working conditions to the union which represents employees. *C.P. Associates, Inc.*, 336 NLRB 167, 172 (2001); *DaimlerChrysler Corp.*, 331 NLRB 1324, 1324 (2000).

In addition, Markus' warning to Figueroa that he could not meet with the employees during lunch hour, and Valderrama's warning that he could not speak to coworkers during lunch or breaktimes, and that he could not speak about the Union at all, also violate the Act. This was not a valid no-solicitation rule because Figueroa was barred from speaking to employees while on break or at lunch. The Act protects the right of employees to solicit in nonworking areas or during nonworking times. Because these rules prohibited all solicitation, including that which the Act protects, it is overly broad and violates Section 8(a)(1) of the Act. *Earthgrains Co.*, 351 NLRB 733, 751 (2007); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983).

In addition, I find that Figueroa credibly testified that Markus told him on October 18 that he must attend an employee meeting on October 21 at which he would address union matters, and that if Figueroa was "still continuing the attack against him he was going to fire me." Clearly, Markus regarded Figueroa's providing information to the Union and his acting

on its behalf as an "attack" against the Respondent. This is proven in Markus' comment that Figueroa was working for him, not for the Union. In making the threat of discharge, Markus was attempting to intimidate Figueroa into being silent at the meeting, or at least not contradicting Markus' statements to the workers. This constitutes an unlawful threat to discharge Figueroa for engaging in activities in behalf of the Union. Markus' demand that Figueroa attend the meeting but not "attack" Markus threat, put Figueroa, as the steward, "in a sharp conflict of interest by pitting [his] interest in representing the bargaining unit . . . to the fullest extent, against [his] interest in protecting [his] own job by complying with the company's demand." *Hospital Linen Service*, 316 NLRB 1151, 1153 (1995).

B. *Markus' Comments at the October 21 Meeting*

Employees Figueroa and Peguero credibly testified that Markus said that the Union's demands were unreasonable and if he had to sign a contract on the Union's terms he would have to fire a certain percentage of the workers and close the shop. Such a threat, in the absence of objective evidence that if the Respondent could not meet the Union's demands it had to close its business, violated the Act. *Yearbook House, Inc.*, 223 NLRB 1456, 1463 (1976). Supporting the employees' testimony is Markus' pretrial affidavit in which he stated that he told the workers' that if he had to pay the amounts the Union demanded for its benefit funds he would close the shop.

Employees Figueroa and Peguero also quoted Markus as saying that if the employees went on strike, he would fire the strikers.<sup>11</sup> Their credibility is supported by Markus' November 25 bargaining proposal which stated that any employee who "chooses to strike against this company will be terminated immediately and will be replaced with new employees." Markus' threat to discharge any employee who struck violates the Act. *Dayton Newspapers*, 339 NLRB 650, 652 (2003).

Employee witnesses also testified that Markus promised the workers a raise in pay, a better medical plan and holiday pay. Markus admitted promising and giving the employees a 30 cent raise at the meeting. His promises of such benefits violates the Act, particularly where the promises were made in the context of his saying that he did not want the Union, and threatened to close if he had to agree to its terms. These promises were therefore conditioned on the employees' withdrawing their support for the Union. *Wilshire Plaza Hotel*, 353 NLRB 304, 339-340 (2008).

C. *The November 23 Letter*

As set forth above, I find that the Respondent issued the November 23 letter to its employees. As such, the Respondent is

JUDGE DAVIS: All right. I think—

THE WITNESS: Okay? So, don't tell me with bullshit. I don't have time to breathe even during the day. A employee come to meet him, let them sweat all day. Do you know what it mean to get sweat? Do you know what it mean working in 60 degrees?

JUDGE DAVIS: Mr. Markus.

THE WITNESS: Do you what—It's bullshit, Judge.

JUDGE DAVIS: Mr. Markus.

THE WITNESS: Don't play stupid game with me."

<sup>11</sup> The Respondent disputes that Peguero was at the meeting, producing his timecard for October 21, which indicates that he was not at work that day. There was some confusion regarding the date of the meeting. Figueroa believed that it took place on the prior day, October 20. Regardless of the date of the meeting, I find that the mutually corroborative testimony of Figueroa, Peguero, and Vaquero establishes that a meeting took place on or about October 21, at which Markus made the statements attributed to him. In addition, Markus' November 25 bargaining proposal corroborates the employees' testimony.

responsible for its contents. It states that if the Respondent had to agree to the Union's proposals it would be closed and the employees left without jobs. By making this statement, the Respondent violated the Act. Such a prediction of its actions must be supported by "objective fact [sufficient to] convey an employer's belief as to demonstrably probable consequences beyond his control. . . ." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). The Respondent has not supported its prediction of plant closure with any objective facts, other than Markus' unsupported belief that the Employer would go out of business if it agreed to the Union's demands.

The letter also said that Markus "wanted to know how many of our employees wish to be in the union and how many do not, and promised that if the union was "not in the company" they would continue to receive all their benefits, and the Employer would obtain medical coverage for those who needed it. The letter asked employees to "analyze your vote with the union, yes/no. It does not matter how you vote, your employment will not be affected by this vote in any way."

The above statements constitute an unlawful promise to maintain benefits and introduce new benefits if the Union no longer represented the employees, and an unlawful request that employees identify whether or not they support the Union. The letter's request that the employees "vote yes/no" was acted upon by Valderrama, as discussed below, when employees picked up their checks. As such, her actions constituted an unlawful poll. The Board, citing *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), stated that "an employer may poll its employees concerning their support for the incumbent union only if the employer has a good-faith doubt, based on objective considerations, as to the Union's majority status." *Wisconsin Porcelain Co.*, 349 NLRB 151, 151 (2007). Here, the Respondent has offered no objective considerations whatsoever that it had a good faith doubt as to the Union's majority status. Accordingly, the poll was unlawful. *Wisconsin Porcelain*, above.

#### D. The Threat to Vaquero

Vaquero credibly testified that he was asked by Markus at 7 a.m. why he wanted an English copy of the November 23 letter if he [Markus] was the one who "put the plate of food on my table?" Vaquero responded that he worked for whatever he received from the Respondent, whereupon Markus told him that if he had any problem with the Union, he would be the first employee discharged. In contrast to the rich detail given by Vaquero, Markus simply denied having the time to speak to him at 7 a.m. In addition, Manager Lopez who translated for Markus, was not called to testify.

I accordingly credit Vaquero's testimony and find that Markus' comment to him was an unlawful threat of discharge for his activity of requesting an English copy of the November 23 letter which he informed Valderrama he wanted to show to the Union.

#### E. Polling of Employees

The Respondent's November 23 letter set the stage for its request of employees to identify their support for or against the Union. As set forth in the letter, Markus announced that the

Union's proposals were "extremely unreasonable" and if forced to sign a contract with those terms, the shop would close. On the other hand, he told them that if the Union was "not in the company" the workers would continue to receive all their benefits, and the Employer would provide medical coverage for those needing it. The letter then asked the workers to "analyze your vote with the union, yes/no. It does not matter how you vote, your employment will not be affected by this vote in any way."

Clearly, the Respondent was establishing a mechanism by which employees would have to vote for or against the Union. The mechanism was put in place, according to employees Peguero, Ramos, and Vaquero, by Valderrama's presenting them with a form and asking them whether they were on "Miron's side or the Union's side." Whether they were asked to actually sign the form as a condition to receiving their paycheck is irrelevant.

Both Markus and Valderrama denied preparing or presenting a form to employees asking them whether they supported the Union. Rather, according to the Respondent, Valderrama simply asked whether they wanted Employer-provided medical coverage if the Employer failed to reach agreement on a renewal contract with the Union. I do not credit their testimony. First, as set forth in the November 23 letter, Markus specifically asked them to vote for or against the Union. Second, Valderrama could not produce the original form, but instead re-created a form which she stated conformed exactly to the original form. But the recreated form was not accurate. For example, Ramos and Vaquero both testified that they wrote on the form as to their choice, but the recreated form did not bear any marks next to their names.<sup>12</sup>

The evidence supports a finding that Valderrama asked employees to indicate their choice as to whether they supported Markus or the Union. Thus, I credit Ramos' pretrial affidavit over his testimony, and the testimony of Peguero who both stated that they were asked by Valderrama whether they were "for or against the Union" or on "Miron's side or on the Union's side."

I accordingly find and conclude that the Respondent's polling of its employees as to their support for the Union violated the Act. *Allentown Mack; Wisconsin Porcelain*, above.

#### F. The Interrogation of Employees

As set forth above, employee Vaquero stated that in late November, he heard Manager Jose Lopez asking the workers why they were supporting the Union. Vaquero approached and told Lopez to "leave them alone," adding that if they make a mistake they would make it on their own, and that no one should tell them which side "they should choose." Lopez did not testify, and I credit Vaquero's testimony. Lopez unlawfully asked the workers why they were supporting the Union, which constitutes an unlawful interrogation. *Convenience Food Systems, Inc.*, 341 NLRB 345, 350 (2004).

<sup>12</sup> Ramos' attempt to contradict his pretrial affidavit did not succeed. The affidavit was quite clear. He stated that the paper asked whether the employee was for or against the Union.

### G. The Failure to Remit Dues Payments to the Union

It is undisputed that for the period December 2009 through March 2010, the Respondent collected dues from the employees but did not remit those dues to the Union until April 2010. Thereafter, as alleged in the complaint, the Respondent made periodic remission of dues to the Union, and was current in its dues remissions as of the date of the issuance of the complaint.

“An employer interferes with, restrains, or coerces employees . . . where it retains for itself dues that it checked off from employees’ paychecks after the expiration of a collective-bargaining agreement.” *Duane Reade, Inc.*, 342 NLRB 1016, 1030 (2004); *Able Aluminum Co.*, 321 NLRB 1071, 1072 (1996). I accordingly find and conclude that the Respondent violated Section 8(a)(1) of the Act by failing to remit dues it collected to the Union following the expiration of the contract.

### H. The Warning to and Discharge of Miguel Figueroa

The complaint alleges that on about September 17, 2009, the Respondent unlawfully issued a written warning to Figueroa, and that on November 25, it discharged him.

#### 1. Legal principles

The question of whether the Respondent unlawfully discharged Figueroa is governed by *Wright Line*, 251 NLRB 1083 (1980). Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the employment actions taken. Counsel must show union activity by Figueroa, employer knowledge of such activity, and union animus by the Respondent.

Once the General Counsel has made the requisite showing, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have discharged Figueroa even in the absence of his union activity.

To establish this affirmative defense “an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have been taken even in the absence of the protected activity.” *L.B.&B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006). “The issue is, thus, not simply whether the employer ‘could have’ disciplined the employee, but whether it ‘would have’ done so, regardless of his union activities.” *Carpenter Technology Corp.*, 346 NLRB 764, 773 (2006).

Accordingly, the Respondent may present a good reason for its actions, but unless it can prove that it would have issued such discipline absent his union activities, the Respondent has not established its defense. “The policy and protection provided by the Act does not allow the employer to substitute ‘good’ reasons for ‘real’ reasons when the purpose of the discipline is to retaliate for an employee’s concerted activities. Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for taking the action in question; rather it “must show by a preponderance of the evidence that the action would have taken place even without the protected conduct.” *North Carolina Prisoner Legal Services*, 351 NLRB 464, 469 fn. 17 (2007).

#### 2. The General Counsel’s prima facie case

Figueroa was the Union’s shop steward. He participated in at least one grievance session and also acted as a member of the Union’s bargaining committee in its negotiations for a new contract before his discharge. He relayed information to and from the Union to his coworkers. He was also insistent, when disciplined by Markus, that he knew his rights.

I have found, above, that the Respondent unlawfully told Figueroa not to speak with his fellow employees and warned that he was working for the Respondent and not for the Union.

I find, below, that Figueroa was unlawfully issued a warning on September 17. Further, he was told on October 18 that if he continued his attack against Markus at the October 21 meeting he would be fired. Moreover, immediately before his discharge, Valderrama gave him a “tip” that he should not speak about the Union or he would “end up fired.”

Finally, Figueroa was fired abruptly, immediately after he was warned by Markus for allegedly lying to his coworkers, when he mentioned that he knew his rights. Markus’ testified that upon hearing that, he responded “oh, you know, so go, go do your rights, sorry. I own company, not [you].” Thus Markus fired Figueroa for affirming his right to engage in concerted activity.

Figueroa’s discharge came in the immediate context of the Respondent’s unfair labor practices, which I have found, including Markus’ unlawful warning that he could not speak to employees at any time and that he worked for the Employer and not the Union, the Respondent’s threat to close the shop, interrogations of employees, polling of the workers, promises of better benefits, and illegal conditioning of bargaining. With respect to the September 17 warning and the discharge, as set forth below, he was exercising his right, under the Act, to speak with his coworkers about their working conditions.

I accordingly find and conclude that the General Counsel has proven that union animus was a substantial or motivating factor in the Respondent’s issuance of a warning to him on September 17, and his discharge 2 months later. *Wright Line*.

#### 3. The Respondent’s case

Figueroa was discharged for two reasons. The first was that he failed to follow the directions of a supervisor. I cannot find that this reason was supported, in any way, by any credible evidence. No facts were adduced as to what direction he failed to follow, or the identity of the supervisor. Moreover, there was no written evidence that he was given a warning for this alleged offense. I accordingly find that this reason has not been substantiated.

The other reason for the discharge involves the Respondent’s taking issue with remarks Figueroa made to his coworkers. The Respondent alleges that Figueroa lied to them on two separate occasions by telling them that they (a) were not receiving medical benefits because Markus kept the money that he was supposed to pay to the Union for such benefits and (b) would be asked to sign a form, before they received their paycheck, in which they had to indicate their support for or against the Union.

As to the first alleged instance of lying, Figueroa was told by employee Ramos that he did not receive his health insurance

card. Figueroa checked with Union Agent Deschamps who told him that the Respondent had not made payments toward the Union's health insurance fund. Figueroa relayed this information to Ramos, who told Markus. Markus then warned Figueroa for lying to employees.

Figueroa's remarks occurred in the context of activity clearly protected by Section 7 of the Act. Thus Figueroa, as shop steward, was speaking to a coworker about working conditions, a clearly protected activity. Figueroa's remark is protected unless it was "so offensive, defamatory or opprobrious as to remove it from the protection of the Act. A statement which is alleged to be libelous or defamatory will not lose its protection unless it is made with knowledge of its falsity, or with reckless disregard of whether it was true or false." *Mediplex of Wethersfield*, 320 NLRB 510, 513 (1995). *KBO, Inc.*, 315 NLRB 570, 570-571 (1994). In *KBO*, a case very similar on its facts, employee Barnhart was told by a union agent that a tape recording had been made in which the employer stated that it was financing its antiunion campaign from the employees' profit-sharing accounts. Barnhart repeated the comment to other employees and was disciplined for lying. The Board, in finding that the discipline violated the Act, stated that Barnhart "was simply relaying to [his coworkers] in good faith what he had been told by the union agent, and that he reasonably believed the report to be true. Neither the fact that Barnhart had not himself heard the tape nor that the information may have been inaccurate removes Barnhart's remark from the Act's protection."

Thus, Figueroa simply relayed to Ramos information he received from the union agent, which he reasonably believed to be true. His advice to Ramos thus did not lose the protection of the Act.

Similarly, the second alleged instance of lying, telling an employee that Valderrama required him to sign a letter indicating his interest in or against the Union, was protected. Figueroa denied giving that advice to Peguero, but nevertheless, even if he so informed Peguero, he reasonably relied on Rosario's statement to him that he was asked to sign a letter. As set forth above, there is ample evidence that the Respondent polled employees about their interest in remaining members of the Union. Accordingly, Figueroa's advice to employees was not improper, and did not lose the protection of the Act.

Under a *Wright Line* analysis, I find that the General Counsel has proven that the Respondent was motivated in issuing a written warning to Figueroa on September 17, 2009, and discharging him by his activities in acting as shop steward in speaking to his coworkers about the Union. The Respondent was aware of his activities in behalf of the Union and bore animus against him because of those activities. I accordingly find and conclude that the General Counsel has met his *Wright Line* burden of proof.

I further find that the Respondent has not met its burden of proving that it would have discharged Figueroa even in the absence of his union activities. *Wright Line*, above.

#### *I. The Alleged Refusals to Bargain with the Union*

The complaint alleges that the Respondent unilaterally changed the terms and conditions of its employees' employ-

ment without prior notice to the Union and without having given it an opportunity to bargain about such changes.

The Board has held that "when, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole." *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995).

Regarding the Respondent's claim that impasse was reached, in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), the Board defined impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." As later set forth in *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), the Board stated that a genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

The burden of demonstrating the existence of impasse rests on the party claiming impasse—here the Respondent. *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 97 (1995). The question of whether a valid impasse exists is a "matter of judgment" and among the relevant factors are the "bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft*, above at 478.

The evidence establishes that no impasse was reached. In fact, very few negotiation sessions took place. Although the parties met six times and exchanged proposals prior to the contract's expiration, it does not appear that the parties had committed enough time to genuinely explore the issues. Thus, no agreement had been reached on the major economic items by that time, and both sides stated that they were very far apart. It thus cannot be said that good faith negotiations have exhausted the prospects of reaching an agreement.

Indeed, no negotiations had taken place between the contract's expiration in November 2009, and the Respondent's March 2010 letter declaring impasse. In addition, the Respondent undertook a campaign to undermine the Union in its employees' eyes by threatening plant closure and mass discharge, warning its shop steward not to speak to employees, and then discharging him, promising benefits if the employees rejected the Union, asking employees to choose whether they favored the Employer or the Union, and then refusing to continue in effect those terms and conditions of the contract which survived the contract's expiration.

#### 1. The pay raise

Markus testified that on December 10, 2009, he gave a pay raise of 30 cents per hour to each unit employee. The answer to the complaint admits that the Respondent granted a wage increase of 30 cents per hour to unit employees in about the second week of December 2009. The answer also admits that the subject of wages is a mandatory subject for the purposes of collective bargaining.

There is no evidence that the Respondent notified the Union about the wage increase or sought to bargain with it before granting such a raise. Rather, Markus testified that he granted it because the workers had not received a raise in 2 years and he felt sorry for them.

The Board has held that an employer violates Section 8(a)(5) of the Act by unilaterally increasing employees' wages in the absence of agreement or impasse with the Union, and without providing an opportunity for the union to bargain with it over its action. *Northwest Graphics, Inc.*, 342 NLRB 1288, 1288 (2004). The Respondent's granting of a wage increase also served to undermine the Union since it would appear to the employees that the Union was not effective in securing the wage raise. Here no impasse was reached since impasse was not even declared until March 2010, 2 months after the raise was implemented.

## 2. The failure to make fund payments

It is undisputed, as set forth above, that, following the expiration of the contract on November 27, 2009, the Respondent failed to make any contributions to the Union's Health Fund, Retirement Fund, Education and Legal Assistance Fund which were due pursuant to the expired contract for the period December 2009 through April 2010. Thereafter, the Respondent sent checks representing amounts of contributions which were lower than that owed.

On October 31, 2009, Markus advised the Union that if a new contract was not reached before the expiration of the old one, "this company will consider the contract with the union and all of its past affiliates to be completed. The automatic renewal option of the contract will not be exercised; our joint contractual obligations will be considered as satisfied."

In addition, as set forth above, Markus' letter dated November 25, 2009, stated that "no financial contributions would be made to the Union until a new contract was signed."

It cannot be said that the Respondent, through its letters of December 15, 2008 and November 25, 2009, gave proper prior notice to the Union and an opportunity to bargain with it concerning its cessation of benefit contributions or its intent to pay at a reduced rate. The two letters simply announced that the Employer would not pay the contractual benefit fund increases for the calendar year 2009, and it did not. The Union did not waive its right to bargain about the matter, even assuming that the Union did not send its December 18 letter rejecting the Respondent's statement that it would not honor its contractual obligations. The Union's funds repeatedly notified the Respondent that the fund contributions were overdue, and demanded payment.

The Respondent did not offer to bargain with the Union concerning this matter. Markus did not believe that he was obligated to bargain with the Union concerning changes he wanted to make. Indeed, Markus testified that he did not speak to the Union about his failure to make contributions to the Funds until March or April 2010.

"An employer may not cease paying employee benefits after the expiration of a collective-bargaining agreement unless the parties have reached an impasse." *Cibao Meat Products v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008). I therefore find and

conclude that the Respondent violated Section 8(a)(5) of the Act by ceasing to pay the proper amount of health fund benefits following the expiration of the contract on November 27, 2009.

## 3. Change of rules concerning access

The complaint alleges that in or about January 2010, the Respondent implemented new rules regarding the Union's access to unit employees at its facility.

As set forth above, the contract provides that the Respondent shall permit the Union's designated representatives to visit the plant at any time during working hours provided that there shall be no interference with production.

A union access provision in a collective-bargaining agreement is a term and condition of employment that survives the agreement's expiration. Union access to the employer's premises is a mandatory subject of bargaining, which requires notice to the union and an opportunity to bargain prior to any change. *Turtle Bay Resorts*, 353 NLRB 1242, 1275 (2009); *T.L.C. St. Petersburg*, 307 NLRB 605, 610 (1992). It is a violation of Section 8(a)(5) of the Act if the employer alters that provision.

In addition, a unilateral change in the past practice of permitting union access is a material change about which the Respondent would be obligated to bargain. *Ernst Home Centers*, 308 NLRB 848, 849 (1992). Here, the Union's past practice had been to enter the premises and talk, at will, with the employees while they were working. In January 2010, the Respondent restricted the Union's agents to visiting with employees in the conference room after having identified who they wish to speak with. This procedure necessarily, as Deschamps testified, would cause the employees to be singled out, and was a significant change from the prior practice. There was no evidence that the Respondent gave any advance notice of this change or offered to bargain with the Union about it.

I accordingly find that the Respondent unilaterally altered the contractual rule and the parties' past practice regarding access to the facility by union agents.

## 4. Conditioning bargaining on the Union's cessation of picketing and leafleting

The Union wrote to the Respondent's customers threatening to picket its facilities. It did not, in fact, engage in picketing but it did leaflet those customers, and sent letters to the Respondent's clients.

I accept the union agents' testimony that picketing did not take place, and there is no evidence that the Union engaged in unlawful activity in leafleting the Respondent's customers. *Gibson Greetings*, 310 NLRB 1286, 1288 (1993).

The Respondent's letters of November 25 and December 2 stated that it would not negotiate with the Union while the Union picketed its customers. The letters demanded that the picketing stop immediately. The November 25 letter, in addition, stated that the Employer would not bargain as long as the Union conducted a strike against it.

Generally, a union has a right to strike, picket, and handbill. These are rights protected by Section 7 of the Act and affirmed in Section 13 thereof—"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to

strike, or to affect the limitations or qualifications on that right.”

Markus attempted to withdraw from that condition by stating, in his pretrial affidavit, that he did not “enforce” his threat to stop bargaining until the picketing ceased, adding that he continued to submit proposals and meet with the Union thereafter. While that is true, the violation is established in the two letters which made bargaining conditional on the Union ceasing its lawful activity. I accordingly find and conclude that the Respondent unlawfully conditioned bargaining on the Union’s cessation of its picketing and leafleting, and its agreement not to engage in a strike.

#### 5. Refusal to bargain with Figueroa present

The complaint alleges that since about January 21, 2010, the Respondent refused to bargain with the Union unless Miguel Figueroa, the Union’s agent for purposes of collective-bargaining, ceased to act as the Union’s agent for such purposes.

As set forth above, on January 21, 2010, Markus refused to bargain with the Union if Figueroa was present. He reiterated his refusal in documentary form, thereafter. His reasons were that Figueroa was a discharged employee, a liar, could not read English, was a “proven problem instigator” and no longer represents any employees.

“Both unions and employers can freely choose their representatives to deal with the other in bargaining. . . .” *Long Island Jewish Medical Center*, 296 NLRB 51, 71 (1989). An employer has the right to refuse to deal with a particular union representative only when he “engages in conduct directed at the employer or its representatives which engenders such ill will that it weakens the fabric of the relationship to the extent that good-faith bargaining is impossible.” *Sahara Datsun*, 278 NLRB 1044, 1046 (1986). The union agent’s conduct must be “sufficiently egregious to make bargaining impossible.” *Fitzsimmons Mfg. Co.*, 251 NLRB 375, 382 (1980); *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976).

Here, there is no evidence that Figueroa’s presence would make bargaining impossible. The Respondent does not assert that he was loud, abusive, or hostile toward Markus. He was accused of making false statements concerning benefits, and urging employees not to sign a letter proffered by Valderrama in which they were required to state their support for the Employer or the Union.

In addition, Figueroa remained a statutory employee, and, inasmuch as I have found that he was unlawfully discharged, the Respondent’s objection that he no longer was employed by the Employer is without merit. In any event, a discharged employee and even a nonemployee may be a member of a union’s bargaining committee. *Vibra-Screw, Inc.*, 301 NLRB 371, 377 (1991). *Colfor, Inc.*, 282 NLRB 1173, 1179 (1987).

I accordingly find that the Respondent’s refusal to bargain on January 21, 2010, because Figueroa was present violated Section 8(a)(5) of the Act.

#### CONCLUSIONS OF LAW

1. By warning and advising its shop steward not to provide information to the Union, the Respondent violated Section 8(a)(1) of the Act.

2. By warning its employees not to speak to employees about the Union at all times during the workday, including break- and lunchtimes, the Respondent violated Section 8(a)(1) of the Act.

3. By threatening its employees that they would be discharged because they participated in activities on behalf of the Union and other protected, concerted activities, the Respondent violated Section 8(a)(1) of the Act.

4. By threatening its employees that the shop would be closed and they would be discharged if the Respondent had to accept the Union’s contract proposals, the Respondent violated Section 8(a)(1) of the Act.

5. By threatening its employees that they would be discharged and not permitted to return to the facility if they went on strike against the Respondent, the Respondent violated Section 8(a)(1) of the Act.

6. By promising its employees a wage increase, and that it would maintain benefits and implement new benefits if the Union no longer represented them, the Respondent violated Section 8(a)(1) of the Act.

7. By polling employees by having them indicate in writing, in the presence of its agent, whether they supported the Union or the Employer, the Respondent violated Section 8(a)(1) of the Act.

8. By interrogating its employees about their union membership, activities and sympathies the Respondent violated Section 8(a)(1) of the Act.

9. By continuing to deduct Union dues from employees’ paychecks, but failing and refusing to remit those funds to the Union from November 27, 2009, to on about April 19, 2010, the Respondent violated Section 8(a)(1) of the Act.

10. By issuing a written warning to Miguel Figueroa on about September 17, 2009, and by discharging him, the Respondent violated Section 8(a)(3) of the Act.

11. The following employees constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

Included: All production employees, drivers, engineers, washroom employees, mechanics and helpers employed by the Employer at its facility located at 220 Coster Street, Bronx, New York.

Excluded: All other employees, including office clerical employees and supervisors, guards and professional employees as defined in the Act.

12. At all times material herein the Union has been the exclusive collective-bargaining representative of the employees in the above unit.

13. By informing the Union that upon the expiration of the contract on November 27, 2009, it would make no financial contribution to the Union funds, the Respondent violated Section 8(a)(5) and (1) of the Act.

14. By conditioning further bargaining with the Union upon the commitment of the Union to refrain from handbilling the Respondent’s customers or from engaging in any strike or picketing activity, the Respondent violated Section 8(a)(5) and (1) of the Act.

15. By stopping all payments to the Union's Health Fund, Retirement Fund, Education and Legal Assistance Fund, from November 27, 2009, to on about April 27, 2010, and by failing to make full and complete payments to the funds thereafter without notice to the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

16. By granting a wage increase of \$.30 per hour to its unit employees on about December 10, 2010, without notice to the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

17. By refusing to bargain with the Union on about January 21, 2010 because Miguel Figueroa, the Union's shop steward was present, the Respondent violated Section 8(a)(5) and (1) of the Act.

18. By implementing new rules regarding the Union's access to unit employees at the facility in about January, 2010, without notice to the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

#### REMEDY

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

The Respondent must make whole the Laundry, Dry Cleaning Workers and Allied Industries Health Fund, Retirement Fund, Education and Legal Assistance Fund, Workers United, for its failure to make contributions from December 1, 2009 as required by the parties' November 28, 2006, to November 27, 2009 collective-bargaining agreement, including any additional amounts due to the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). The Respondent

shall also reimburse unit employees for any expenses resulting from its failure to make such required payments or contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), 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, 9-10 (2010).

The Respondent having discriminatorily discharged Miguel Figueroa, it must offer him reinstatement and shall make him whole for any loss of earnings and other benefits suffered as a result of the unlawful action against him. 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*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above. The Respondent shall also be required to remove from its files any and all references to the unlawful warning issued to Figueroa and to his discharge, and to notify him in writing that this has been done and that the warning and discharge will not be used against him in any way.

I shall order that the Respondent be ordered to rescind the unilateral changes it made on or after November 27, 2009, but nothing in the Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the employees, such as the 30-cents per-hour wage raise.

Inasmuch as many of the Respondent's employees are Spanish-speaking, I shall order that the Notice be posted in Spanish and English.

[Recommended Order omitted from publication.]