

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

GREATER OMAHA PACKING CO., INC.

Cases 17-CA-085735  
17-CA-085736  
17-CA-085737

and

HEARTLAND WORKERS CENTER

*Lyn R. Buckley, Esq.*

for the General Counsel.

*Roger J. Miller and Ruth A Horvatic, Esqs.*

(*McGrath, North, Mullin & Kratz, PC LLO*), Omaha, Nebraska,  
for the Respondent.

*James Walter Crampton, Esq.*, Omaha, Nebraska,

for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Omaha, Nebraska on October 31 and November 1, 2012. The Heartland Workers Center filed the initial charges in these cases on July 20, 2012 and the General Counsel issued a consolidated complaint on September 28, 2012.

Respondent terminated the employment of Jorge Degante Enriquez (hereinafter referred to as Degante), its employee for 12 years; Susana Salgado Martinez (hereinafter referred to as Salgado), its employee for 4 years and Carlos Zamora, its employee for 3 years, on May 14, 2012.<sup>1</sup> The General Counsel alleges that it did so because these three employees engaged in concerted activity protected by Section 7 of the Act and/or that Respondent believed that the employees were about to engage in such protected activity and to discourage employees from engaging in protected concerted activity. Thus, the General Counsel alleges that Respondent violated Section 8(a)(1) in the Act in terminating the three employees. He also alleges that Respondent interrogated employees regarding their protected activities on May 14 and created the impression that Respondent was monitoring these activities.

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

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<sup>1</sup> At the time of the discharges, Zamora had been working for Respondent continuously for about three years, although he had worked for Respondent prior to that.

## FINDINGS OF FACT

## I. JURISDICTION

5 Respondent slaughters cattle, processes, sells and distributes beef products from its facility in Omaha, Nebraska. It annually sells and ships goods valued in excess of \$50,000 to points directly outside of Nebraska. 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.

## 10 II. ALLEGED UNFAIR LABOR PRACTICES

15 On April 3, 2012, the United States Department of Homeland Security sent Respondent a letter stating that pursuant to an inspection initiated on October 17, 2011, that it was unable to verify the identity and employment eligibility of 179 of Respondent's employees. About 440 employees work in the fabrication area of Respondent's facility. Within a few weeks of Respondent's receipt of this letter, agents of the Immigration and Customs Enforcement Bureau of the Department (ICE) entered Respondent's plant and arrested 15 employees. Many other employees quit their employment voluntarily.

20 Respondent attempted and may have been successful in replacing these employees as they left its employment. However, due the departure of many employees and their replacement by assumedly less experienced employees, a number of the remaining employees complained to Respondent about the speed of the conveyor belts on which meat came to them for processing.

25 Sometime in mid-April 2002, 10-12 employees, including alleged discriminatee Carlos Zamora, walked off the production lines at Respondent's facility and went to the plant's cafeteria.<sup>2</sup> Plant Manager Jose Samuel Correa met with these employees. The employees complained that the production line was too fast, Tr. 29. Correa told the employees to go back to work, but that he would meet with them at the end of the work day.

30 At the end of the work day, Correa met with these employees, including Zamora, again, Tr. 29. At this meeting Zamora and others complained about their compensation and other matters, Tr. 30.

35 *The discharge of the three alleged discriminatees*

40 In this case the legal principles are fairly straightforward. Either these discriminatees were fired in retaliation for engaging or planning to engage in protected activity in violation of the Act, or they were fired for non-discriminatory reasons. However determining the facts relating to the three discharges requires credibility resolutions between the diametrically different accounts of Plant Manager Correa and Eliseo Garcia, the fabrication manager, on the one hand, and the three discriminatees on the other.

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<sup>2</sup> In 2008, the entire workforce at the plant walked off the job and refused to return to work until addressed by Respondent's owner.

*Zamora's discharge*

5 On Monday, May 14, 2012, shortly after the employees' morning break,<sup>3</sup> at about 9:35 a.m., Fabrication Manager Eliseo Garcia, at Correa's direction, called Zamora's immediate supervisor, Saturnio "Tony" Mora and instructed Mora to send Zamora to the plant supervisors' office. Zamora arrived a few minutes thereafter.

10 Correa testified that he summoned Zamora to counsel him because Garcia had come to him during the break and told him that during the prior week Zamora had left his work station during work time to speak to Garcia, Tr. 34, 63-65. Respondent fired Zamora on June 30, 2008 for leaving his work station without permission, Tr. 169. He was rehired the next year.

15 Correa also testified that Garcia told him that in the incident during the week prior to May 14, 2012, Garcia immediately told Zamora to return to his work station, that his absence presented a safety hazard and that if Zamora wanted to speak to Garcia, he could do so at the end of the day.

20 Garcia testified that Zamora approached him during the previous week and said he needed to talk to Garcia about the speed of the production conveyor. Garcia testified further that he told Zamora that he must speak to him after working hours.

25 Correa and Garcia testified that on May 14, Correa told Zamora that he must let his supervisor know that he is leaving his work station whenever he does so.<sup>4</sup> Zamora immediately responded by saying that Correa and Garcia were picking on him and that they were assholes. Correa fired Zamora for being disrespectful. Afterwards, Zamora threatened to kill Correa and his family.

30 Zamora testified that he took his break on May 14 at 9:00, rather than 9:15 and that while he was on break other employees told him that they were planning to walk off the job at 10:00. As soon as he returned from break, his supervisor, Tony Mora, sent him to the supervisor's office. Correa and Garcia were present and Correa addressed him in Spanish.

35 According to Zamora, the conversation was very short. Garcia did not speak. Correa asked Zamora what he wanted. Zamora replied he wanted a wage increase and then Correa said, "That I was fired, just to leave my stuff there because I had left my line twice," Tr. 160. Zamora denied that there was any effort to counsel him or that he complained of being picked on or that he called Correa and Garcia assholes. He also testified that he did not threaten anybody. He also denied leaving his work station to talk to Garcia during the week prior to May 14. Rather, Zamora testified, he complained to his supervisor Tony Mora, about the conveyor line speed during that week.

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<sup>3</sup> Zamora testified that he took his break between 9:00 and 9:15, but from the record as whole I infer that all employees took their break between 9:15-9:30 on May 14.

<sup>4</sup> Tony Mora testified that he had observed Zamora leave his work station without permission a couple of times in the two months prior to his discharge. Other employees also left their work station without permission. There is no evidence that other employees were disciplined or even counseled as a result.

Correa or Garcia called the plant security office to escort Zamora out of the facility at about 9:30. Kek Malwul, a security guard, went to the plant cafeteria and waited a few minutes outside the supervisor's office. When the door to the supervisor's office opened, Zamora and Correa were shouting at each other in Spanish. Malwul stepped between them and escorted Zamora out of the plant. Malwul does not understand Spanish.

Malwul filed an incident report with his supervisor on May 15, R. Exh. 2. In that report he stated that he arrived at the supervisor's office at 9:37. His report states that Zamora was shouting at Correa in a threatening manner. However, there is no documentation in the report that Zamora threatened Correa. There is also no other documentary support for Correa's testimony regarding threats, such as a police report. Also, Respondent's exit interview form, filled out by supervisor Mora, on June 1, does not mention that Zamora threatened Correa, G.C. Exh. 4.

#### *Degante's discharge*

Almost immediately after discharging Zamora, sometime between 9:40 and 10:00 a.m., Correa and/or Garcia summoned Jorge Degante to the supervisor's office. Degante was working on the trim or butts line, which was adjacent to the loin line where Zamora had been working, R. Exh. 3, Tr. 113, 197-99, 203-04, 222-23. Tony Mora, who supervised both Degante and Zamora, told Degante to go to the supervisors' office.

Correa testified during the 9:15 to 9:30 break, Garcia told him that he had observed Degante putting on his hair net early that morning when he should already have been at his work station. Correa testified that Garcia said that he wanted to counsel Degante. Correa and Garcia testified that they told Degante that he must get to work on time and be prompt in returning from breaks and when moving from one production line to another. Correa and Garcia testified that Correa fired Degante because Degante refused to acknowledge that he was doing anything improper.

According to Degante's immediate supervisor, Tony Mora, Degante was often late getting back from break and reporting to a supervisor when switching production lines, Tr. 225. Mora did not testify that Degante was late getting to his work station at the beginning of his shift on May 14, or on any other occasion. Mora did not corroborate Correa's testimony that Garcia had told him on May 14 that Degante was late. As of June 1, 2012, Mora did not know the reasons for which Degante and Zamora were terminated.

Correa testified that Degante was late returning from his break 3-4 times a week, Tr. 44-45. Garcia testified that Degante was consistently late getting to his work station for the 4 1/2 years Garcia had supervised Degante. Degante conceded that he had been warned on several previous occasions about taking unauthorized breaks. He also had been counseled previously about taking too long when switching between production lines. In 2012, prior to May 14, Respondent has issued Degante one written counseling or warning, Tr. 115-16.

Degante testified that when he entered the supervisor's office, Garcia said (in Spanish) that Degante was provoking other employees. Degante denied this and Garcia fired him. He testified that there was no discussion about his tardiness.

Prior to May 14, Degante had complained to supervisor Roberto Silva that the production line was going too fast and that it was impossible to do a good job. He also told Silva that he should be paid an extra dollar per hour because he worked on several different production lines, Tr. 85. Silva told Degante that he would speak to Correa.<sup>5</sup>

Degante also testified that in the week prior to May 14, he talked to employees on the loin line where Zamora worked about the speed on the production line, wages and why some employees switched lines and others did not. He testified that a group of employees agreed to strike over these issues.

On Saturday, May 12, Degante testified that a group of employees met and agreed to walk off their jobs at exactly 10:00 on Monday, May 14. On the morning of May 14, Degante began his shift on the rounds line. Later he was sent to the brisket line where Eliseo Garcia and Roberto Silva were working.<sup>6</sup> Degante testified that during his morning break he spoke with Susana Salgado and told her that a strike would begin at 10:00. Salgado replied that she and other employees in the packing department would walk off the job with everyone else, Tr. 90. After his break, Degante returned to the butts line, his regular work station.

*Salgado's discharge*

Salgado complained to her supervisor Alejandro Varela about the speed of the production line within about a month of her discharge, Tr. 119.<sup>7</sup> She testified that she spoke to Degante during the morning break on May 14. Further she testified that Degante told her that employees would walk off the job at 10. According to Salgado she mentioned the strike to several co-workers upon her return to work from her break. She said they told her that they were already aware of the plan to strike.

Shortly after the break, between 9:30 and 10:00, Salgado's supervisor, Alejandro Varela told Salgado to go to the supervisors' office. After waiting for about 20-30 minutes in the

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<sup>5</sup> Respondent in its Answer admitted that Roberto Silva was a supervisor and an agent of Respondent within the meaning of the Act. Silva did not testify at the hearing. Therefore, Degante's testimony about his conversation with Silva is uncontradicted. I therefore credit it.

<sup>6</sup> Employees at Respondent's plant work in very close proximity to other employees on their production line. They are within 3 feet of their closest co-worker. Supervisors often work on the production line with the rank and file employees, R. Exh. 4, Tr. 205, 243-44

<sup>7</sup> Varela, who testified, did not contradict Salgado regarding this conversation.

cafeteria, Salgado entered the supervisor's office.<sup>8</sup>

5 According to Salgado, Plant Manager Correa accused her of being one of the organizers  
of the strike and fired her. Eliseo Garcia testified that he saw Salgado on the catwalk earlier on  
the morning of May 14, and summoned her to the supervisor's office to ask her if she had  
permission to go to the restroom. Garcia testified further that Salgado denied that she had done  
anything wrong and that every other employee used the restroom without first seeking the  
10 permission of a supervisor. Garcia and Correa testified that since Salgado would not agree to  
notify her supervisor whenever she left her work station, Correa fired her. Salgado denies that  
leaving her work station was discussed in this meeting.

15 Alejandro Varela testified that Respondent had a policy that employees must let their  
supervisor know when they go to the bathroom. He testified further that Salgado violated this  
policy on a daily basis, Tr. 232. However, Salgado had not been disciplined previously in her  
four years of employment, Tr. 80.<sup>9</sup> It is apparent from G.C. Exh. 5 and Varela's testimony that  
he did not know why Salgado was terminated.

*Paperwork relating to the discharge of Zamora, Degante and Salgado*

20 On June 1, 2014, Tony Mora, the immediate supervisor of Zamora and Degante, filled  
out an employee exit form that he received from Respondent's human resources office. The  
form was mostly blank except for the Fabrication Department Number, the names of the  
employee and last day worked. Under the column labeled involuntary termination there are  
25 about a dozen boxes which can be checked as the reason for termination. Eliseo Garcia  
instructed Mora to check the box marked "Conduct-Behavior and/or Language" for both  
Zamora and Degante. He did not check any of the other potentially relevant choices;  
"Insubordination," or "Refusal to Follow Instruction." Mora did not write anything in the space  
allowed for a description of the reasons for the terminations.

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<sup>8</sup>At hearing Salgado testified that Varela told her to go to the supervisor's office before 10:00. In an affidavit given to the General Counsel she stated that she was called into the office after 10:00. In a telephonic unemployment insurance hearing, Salgado stated she went to the office around 10:45 or 11:00. Correa testified that Garcia told him that he had seen Salgado away from her work station before the morning break and that Garcia said he wanted to talk to some people, including Salgado, Tr. 48-49. I therefore conclude that the three alleged discriminatees were sent to the office one right after another. Moreover, I find that Salgado had to wait in the cafeteria because Correa was still in the meeting with Degante or busy with other matters.

<sup>9</sup>In light of Garcia's testimony at Tr. 80, that Salgado was a good performer with no previous incidents, I discredit the testimony of Samuel Correa at Tr. 54-55 that Salgado's supervisor Alejandro Varela had talked to Garcia previously about Salgado failure to acknowledge directions. Even assuming that Varela's testimony at Tr. 232-33 is truthful, there is no evidence that he spoke to Garcia about Salgado leaving her work station without permission or any other disciplinary problem regarding Salgado.

In fact, from the fact that Varela had never counseled Salgado about going to the bathroom without permission, I conclude that Respondent did not have a policy requiring an employee to do so. There is no evidence that any other employee was ever counseled or disciplined for violating such a policy. Further, there is no documentation that such a policy existed.

On June 4, 2012, Alejandro Varela signed the same form for Salgado, checking the same box without explaining further the reasons for her termination. Respondent introduced into evidence three exit interview forms for other employees. Two of these were signed on May 30 and June 2, 2012 respectively. They differ from the forms for Zamora, Degante and Salgado in that each contained a more detailed account of the reasons for termination and an employee warning form dated on the last day of the individual's employment. The third form, signed in January 2012 contains a one sentence description of the reasons for the discharge. Two of these individuals worked for Respondent for about one week and the other for about one month.

*The applicable legal principles*

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...* (Emphasis added)"

In *Myers Industries (Myers I)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action, *Whittaker Corp.*, 289 NLRB 933 (1988); *Mushroom Transportation Co.*, 330 F.2d 683,685 (3d Cir. 1964). The object of inducing group action need not be express.

Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991) that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.

Employees who strike, or plan to strike, are generally engaging in activity protected by Section 7 of the Act, *Molon Motor & Coil Corp.*, 302 NLRB 138 (1991), enfd. 965 F.2d 523 (7<sup>th</sup> Cir. 1992). An in-plant strike, however, is unprotected under certain circumstances. It is not clear from their testimony whether the discriminatees planned to leave the plant on May 14, or assemble in the cafeteria, as some employees had done previously. In *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005), the Board cited 10 factors to weigh in determining whether an in-plant work stoppage is protected. Since Respondent argues that there was no plan to strike, it did not address the issue of whether a walk-out, if it occurred, would have been protected—assuming the discriminatees did not leave the plant. However, since I conclude that Respondent fired the discriminatees for planning to refuse to work and not for any other reason, it does not matter whether the discriminatees planned to assemble inside or outside of the plant, *Molon Motor & Coil Corp, supra*. Respondent violated Section 8(a)(1) in terminating the discriminatees for planning to refuse to work.

*Burden of Proof*

5 In order to establish that an employer violated Section 8(a)(1) in discharging or disciplining an employee, the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. The discharge of an employee or employees to prevent them from engaging in activity protected by Section 7 ("a preemptive strike") violates the Act, *Parexel International, LLC*, 356 NLRB No. 82 (2011).

10 Once the General Counsel has made an initial showing of discrimination, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and animus are often established by indirect or circumstantial evidence.

20 In the instant case whether the General Counsel established a violation or even made an initial showing of discrimination depends on whether I credit the testimony of Correa and Garcia on the one hand, or the testimony of Zamora, Degante and Salgado on the other. This is somewhat difficult in that there isn't any documentary support or disinterested corroboration for the self-serving testimony of either the alleged discriminatees or the management witnesses.

25 *Credibility Resolutions*

I find no basis for resolving the credibility of the witnesses by virtue of their demeanor when testifying. Thus, I base these determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole, *Daikichi Sushi*, 335 NLRB 622 (2001). As explained below, I find the discriminatees' accounts of what transpired on May 14 to be far more credible than that of Correa and Garcia.

35 It is undisputed that Zamora engaged in protected concerted activity in mid-April 2012, when he walked off his job with other employees to protest the speed of the product line. It is also undisputed that Respondent and specifically Plant Manager Correa were aware of this protected activity. It is also undisputed that later that day Zamora and others complained about their compensation.

40 The incident for which Zamora was called to the supervisor's office, according to Respondent, constituted protected concerted activity. According to Garcia, on that occasion, a week prior to May 14, Zamora approached Garcia by the loin line, which was Zamora's work station. Zamora complained to Garcia about the speed of the conveyor chain. Tr. 210. This was a concern which had been raised concertedly to Respondent previously. Thus, under *Myers II*, Zamora's conduct was protected. Therefore, Respondent by calling Zamora to the office to counsel him for this complaint violated Section 8(a)(1).

More importantly, however, I discredit Respondent's testimony that it called Zamora into the supervisor's office to counsel him for leaving his work station. There wasn't any reason for Correa to call Zamora in for counseling. According to Garcia, he had already done so. Tr. 210-11.<sup>10</sup> On the contrary I credit Zamora's testimony that Respondent fired him without attempting to counsel him.

Degante's testimony that he complained to supervisor Roberto Silva about the speed of the production line and his compensation is uncontradicted. It is also uncontradicted that Silva promised Degante to talk to Correa about these concerns. Thus, at a minimum Respondent was aware of Degante's protected activity in this regard.<sup>11</sup> As discussed more fully herein, I credit Degante's testimony about his conversation with Correa and Garcia on May 14. Correa and Garcia knew about the planned strike and knew or suspected that Degante was behind it.

Salgado also engaged in protected activity in complaining to her supervisor, Alejandro Varela, about the speed of the production line. From the circumstances surrounding her discharge, and from her testimony, which I credit, I conclude that Respondent suspected her of playing a significant role in the plan for employees to walk off the job. I also conclude based on her testimony that this is the reason for her discharge.

I credit the testimony of Zamora, Degante and Salgado that a group of employees had discussed a plan to walk off the job at 10:00 on May 14, 2012. As Respondent's brief emphasizes, the weakest link in the General Counsel's case is the fact that no walk-out occurred at 10:00 on May 14, and that there is no corroboration for the discriminatees' testimony. However, the fact that no strike or walk-off occurred does not establish that one was not planned, as the discriminatees testified.

I infer that by 10:00 the employees who planned to strike were worried about retaliation if they did so. Due to the close proximity in which employees worked, those working with Zamora and Degante would have noticed that their supervisor, Tony Mora, had sent Zamora and Degante to the office and that by 10:00 they had not returned. Degante worked at a table with just six other employees, Tr. 113. Garcia's testimony at Tr. 65-66 and 210, establishes that the absence of Zamora and Degante from their production lines would have immediately made the job of other employees on their line more difficult and indeed more hazardous. They could hardly have not been aware of the extended absence of both. Since Degante was a leader of the planned strike, the fact that he was missing from the line at 10:00 likely dissuaded other employees from walking off the job.<sup>12</sup>

Respondent argues that since employees are routinely called to the supervisors' office, they would not have attached any significance to the absence of Zamora and Degante from their

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<sup>10</sup> Zamora testified that this conversation occurred between himself and Tony Mora; not Garcia, Tr. 151-52.

<sup>11</sup> This activity is protected because it concerned a matter which Respondent knew, from Correa's April meeting with employees, was an issue with a number of employees, not only Degante, *JMC Transport*, 272 NLRB 545 fn. 2 (1984), *enfd.* 776 F. 2d 612 (6<sup>th</sup> Cir. 1985).

<sup>12</sup> I credit Degante's testimony that Garcia told Correa that Degante was the leader of the planned strike, Tr. 93.

production lines on May 14. This is not true if employees working in close proximity to Degante believed that he was a leader of a planned walk-out, and/or was aware of Zamora's role in the prior walk-out.

5 Packing employees who were planning to strike would have noticed that nobody from the cutting floor was walking off the job from the fact that the production line did not stop, Tr. 121. Since the production line continued to run, it would have been difficult for these employees to leave their work station even if they had been planning on it.

10 Respondent's account of what occurred on May 14, 2012 is extremely implausible. It is particularly implausible that Degante and Salgado when faced with a demand from the plant manager that they abide by plant rules, would simply dig in their heels.

15 Correa did not warn Salgado that if she didn't change her behavior she'd be fired. He testified that simply discharged her without warning because she defended her conduct. Assuming that Salgado violated a company policy, given her spotless disciplinary record, Tr. 80, her precipitous discharge strongly suggests discriminatory motive. Respondent did not consider giving her a lesser form of discipline, such as a warning like the one given earlier in 2012 to Degante. This disparate treatment is another factor leading me to discredit Respondent's  
20 witnesses, credit the discriminatees and conclude that their terminations were discriminatory. Moreover, as stated previously in footnote 9, I conclude that Respondent did not have a policy requiring employees to ask permission prior to using the restroom.

25 To summarize, I draw the inference that the plan for a strike existed, that Respondent knew of it, bore animus towards the employees involved and fired the three discriminatees to prevent the strike from the following factors:

- 30 1) The virtually simultaneous discharge of three employees for ostensibly unrelated reasons; *Abbey's Transportation Services*, 284 NLRB 698, 700-701, (1987), enfd. 837 F. 2d 575 (2d Cir. 1988); *Knoxville Distribution Co.*, 298 NLRB 688 fn. 1, 696 (1990) enfd. 919 F. 2d 141 (6<sup>th</sup> Cir. 1990).
- 35 2) The implausibility of Respondent's testimony about the May 14 meetings.
- 40 3) The fact that according to Respondent, Degante and Salgado had been continuously violating the policies (or alleged policies in Salgado's case) for which they had been fired for years—without being previously discharged. The fact that Respondent suddenly found Degante's tardiness and Salgado leaving her workstation to be grounds for discharge on May 14 is evidence that these reasons are pretextual, *Churchill's Supermarkets*, 285 NLRB 138, 156 (1987); *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 198 (1995); *CWI of Maryland, Inc.*, 321 NLRB 698, 707 (1996) enfd. 127 F. 3d 319 (4<sup>th</sup> Cir. 1997); *Triangle Tool & Engineering*, 226 NLRB 1354 (1976); *G&J Company, Inc.*, 146 NLRB 1151, 1153 (1964).

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4) The precipitous discharge and disparate treatment of Salgado, who had not been previously disciplined in four years of employment. *Acme Bus Corp.*, 357 NLRB No. 82, slip op. p. 3 (2011); *Norton Audubon Hospital*, 341 NLRB 143 (2004).

5) Security Guard Kek Malwul's testimony and written report also provides circumstantial support for the accounts of the discriminatees.<sup>13</sup> Malwul testified at Tr. 181-82 that he was called to the supervisor's office at 9:30, which indicates that Respondent had decided to fire Zamora before Correa and Garcia met with Zamora. It took a few minutes for Malwul to walk from his office to the cafeteria. He then waited a few minutes in the cafeteria before going to the supervisor's office, Tr. 182-84, 192. Malwul's written report states, "At 9:37 am on May 14, 2012, I arrived at the Supervisor's office on the main floor for a termination escort." Respondent had already decided to terminate Zamora when it called security, which I infer was before Correa met with Zamora.

I rely on the pretextual nature of Respondent's proffered reasons for the discharge both in concluding that the General Counsel made his initial showing of discrimination and in concluding that Respondent did not meet its burden of proving that it fired Zamora, Degante and Salgado for non-discriminatory reasons. As to the latter, I simply discredit the testimony of Correa and Garcia. It is extremely unlikely that Respondent discharged the three employees simultaneously for non-discriminatory reasons in light of the fact that Respondent's testimony indicates that Degante and Salgado had been routinely violating the policies for which they were allegedly discharged for years.

The disparate nature of discharges of the three short-term employees, whose exit forms were introduced by Respondent, also supports a finding that Zamora, Degante and Salgado were discriminatorily discharged. All three of these forms contains an explanation for the discharge and the two issued close in time to that of discriminatees is accompanied by a warning signed on the last day of employment. Supervisor Mora indicated at Tr. 225-26 that he generally will issue written discipline to employees who do not follow Respondent's rules. Respondent has not proffered an explanation as to why there is no discipline form regarding Degante's alleged tardiness on May 14.

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<sup>13</sup> Degante and Salgado were also escorted out of the plant by security, Tr.94, 242-3, 248-50. Degante testified that he was escorted out by two security guards, one of whom was Malwul. Malwul testified that Zamora was the only person he escorted out of the plant on May 14, Tr. 185.

*Conclusions of Law*

5 Respondent violated Section 8(a)(1) of the Act in discharging Carlos Zamora, Jorge Degante and Susana Salgado on Mary 14, 2012.<sup>14</sup>

REMEDY

10 The Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No.8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>15</sup>

ORDER

20 The Respondent, Greater Omaha Packing Co., Omaha, Nebraska officers, agents, successors, and assigns, shall

25 1. Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees for engaging in and/or planning to engage in protected concerted activities, including but not limited to strikes, complaints and/or protests.

30 (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

35 (a) Within 14 days from the date of the Board's Order, offer Carlos Zamora, Jorge Degante and Susana Salgado full reinstatement to their former jobs or, if any of those jobs no

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<sup>14</sup> I conclude that the General Counsel did not prove illegal interrogations and/or surveillance as alleged in paragraph 4 of the complaint. Moreover, the alleged violative statements were integral parts of the conversations in which Respondent terminated the discriminatees. Violations, if any, would thus be duplicative of the discharges. Also, it is problematical whether the assembly of supervisors on the catwalk, allegedly in anticipation of an employee walkout, as testified to by Salgado, violates the Act.

<sup>15</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

5 (b) Make Carlos Zamora, Jorge Degante and Susana Salgado whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

10 (c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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

20 (e) Within 14 days after service by the Region, post at its Omaha, Nebraska facility copies of the attached notice marked "Appendix"<sup>16</sup> in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 30 14, 2012.

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

Dated, Washington, D.C., December 27, 2012.

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Arthur J. Amchan  
Administrative Law Judge

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<sup>16</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 discharge or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, including striking or otherwise protesting or complaining about your wages, hours and other terms and conditions of your employment.

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

WE WILL, within 14 days from the date of this Order, offer Carlos Zamora, Jorge Degante and Susana Salgado full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Carlos Zamora, Jorge Degante and Susana Salgado whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Carlos Zamora, Jorge Degante and Susana Salgado, and WE WILL,

within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

GREATER OMAHA PACKING CO., INC.  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677

(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3014.