

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**NEBRASKALAND, INC.**

and

**Case Nos. 02-CA-084052  
02-CA-090623**

**UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 342**

*Julie Rivchin Ulmet, Esq.*

Counsel for the General Counsel

*Martin L. Milner, Esq.*, Counsel for  
the Union

*Michael F. McGahan, Esq.*, Counsel  
for the Respondent

**DECISION**

**Statement of the Case**

Raymond P. Green, Administrative Law Judge. I heard these consolidated cases in New York, New York on August 8, 9 and 15, 2013. The charges in these cases were filed on June 27 and October 2, 2012. The Complaint issued on May 30, 2013 and alleged as follows:

1. That in or about May 2012, the Respondent by John McTigue, its Vice President of Operations, threatened to more closely monitor employees because they engaged in union and concerted activities.

2. That on or about June 6, 2012, the Respondent for discriminatory reasons, discharged Edward Sanchez.

On the entire record,<sup>1</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

**Findings and Conclusions**

**I. Jurisdiction**

It is admitted that the Respondent is an employer engaged in commerce within the meaning of Section 2(1), (6) and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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<sup>1</sup> I hereby grant the Joint Motion to Correct the Transcript dated October 23, 2013. As to that portion of the General Counsel's Motion to correct the transcript which is opposed by the Respondent, I am granting that motion only to the extent that page 166 line 4 is changed to "the Romanoffs had offices." The other proposed changes are not material.

## II. The Alleged Unfair Labor Practices

5 The employer is a wholesale distributor of meat and poultry for the Eastern United States. The facility involved in this case is located at the Hunts Point Market in the Bronx, New York. In essence, the operation involves the receipt from food vendors, of meat and poultry products that are organized and stored in a refrigerated warehouse. Upon receipt of orders from customers such as supermarkets, the Company then picks the produce from designated holding bins after which the products are then delivered by truck.

10 Although seemingly simple, these operations are, in fact, quite sophisticated and utilize a computer software program, coupled with RIFD bar codes to guide in the sorting, picking, delivery and accounting of the products handled. The information contained in the bar codes is handled through a software program called the Retailix System. And as a particular product  
15 moves from receipt at the company's warehouse to bin placement; from being picked for a particular customer order to being placed on a truck; and ultimately to being received by a customer, the particular unit of the product, via its bar code, is scanned by a device that transmits the data to the company's computer system. In this way, the company can track not only where a product has come from and gone to, but can also track which of its employees has  
20 handled the product on its journey. At the same time, the system allows the company to keep track of its available inventory so that as products are shipped, replacements can be ordered for delivery to the warehouse.

25 Products are typically delivered by truck to the warehouse on pallets and when delivered the first thing that is done is that a warehouse employee designated as a "receiver" puts a label on the pallet and scans it. In doing so, he has to make sure that the label correctly designates the product on the pallet so that it can be placed in the correct bin in the warehouse. In this regard, the warehouse is divided into sections, with beef in one area, pork in another and poultry in yet another. And within each area of the warehouse, it is subdivided so that bins, also  
30 called slots, for each type of product are set up. So for example, in the poultry area, there is one bin or slot for 3 pound whole chickens and still another neighboring slot for 3 ½ pound whole chickens. (More about chickens later).<sup>2</sup>

35 The next step in the process is that when a customer order comes into the office, it is transmitted to the warehouse via an automated system called "Vocollect" whereby an employee is instructed to go to the specific bin where that product is located and take the designated number of pallets of the product from the bin and deliver them by fork lift to the truck loading area. When he does this, he scans the bar code on the picked pallets. The employee who is responsible for this function is called a picker. Because the picker only knows what bin to go to,  
40 he has no way to tell if the product in the bin is correctly labeled. After this, the products are delivered to the trucks that are designated to them on a route that encompasses the customer and make the delivery. At each step, the bar code on the pallet is scanned so that the company can track its movement and the person involved in its movement.

45 Obviously, the entire process starts with the placement of the correct label on the received goods. If, in the first instance, the wrong label is affixed, then those goods will go into the wrong slot or bin and as a result, the customer will receive the wrong product. This can

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50 <sup>2</sup> Each slot has, in effect, two stories. The bottom part is where products for current orders are picked. The upper part is where inventory is kept. As products are shipped, the products move from the upper story to the lower.

5 have a number of consequences, some worse than others. At best, the customer may accept the wrong product and if it more costly than what was ordered, this may result in a relatively small cost to the Respondent, unless the customer is charitable. On the other hand, the customer may reject the goods upon delivery and this will result in the goods being brought  
back to the Respondent's warehouse. Even worse, if the mistake is discovered by the customer after taking delivery, this can cause the Respondent to send another truck to retrieve the goods and deliver the correct order. Obviously if the delivery is to Manhattan, this would not be a big deal. But if the delivery is to Boston, then the resulting cost is much higher.

10 Since errors can and do occur, the company tries to find out why a mistake has occurred and who was responsible. Because the products are scanned at each stage of their journey, it is possible to find out who handled the product from receipt to delivery and then to question those individuals who handled the product in an attempt to figure out how to correct mistakes.

15 The owner of the company is Richard Romanoff and his son Daniel is the Executive Vice President. The company's Vice President of Operations is John McTigue and he is responsible for the overall operations of the warehouse. Johnny Ortiz is the daytime Receiving Manager and he is responsible for the crew of employees who receive goods during the day time. Barbara Sarner was, at the time of these events, the company's Human Resources Director.

20 The charging party, Local 342, has been the recognized collective bargaining representative of the warehouse employees for some unspecified period of time. The last collective bargaining agreement between the parties was effective from July 1, 2005 to October 31, 2009. After its expiration, no new contract had been reached as of the time of this hearing. (Almost four years later).<sup>3</sup> Moreover, the Union, which previously had appointed a shop  
25 steward, had not done so since the previous shop steward, Luis Quiles, resigned in or about 2010.<sup>4</sup> There was no evidence presented in this case regarding the status of bargaining or the relationship between the Union and the Company from 2011 to 2013.<sup>5</sup>

30 Edward Sanchez, the alleged discriminatee, was hired on June 21, 2010 as a warehouse employee on the swing shift. (The company has three shifts, with most employees working at night and who are involved in loading trucks). After awhile, Sanchez moved to the day shift and worked primarily as a fork lift operator. As such, his main responsibility was to take pallets from the slots and deliver them to the loading area. In addition, he was asked from  
35 time to time to act as a receiver and he was given training as to how to handle received pallets in terms of inspecting them, labeling them and scanning them.

40 During his two year term of employment, Sanchez received three written warnings and three suspensions for lateness and absenteeism.

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45 <sup>3</sup> In Case No. 2-CA-39996, it was alleged that the Respondent violated Section 8(a)(5) of the Act by unilaterally ending its compliance with the dues checkoff provisions of the expired contract. This was dismissed by the ALJ on November 30, 2011 and the Board, at 359 NLRB No. 35 (December 13, 2012), upheld the decision because it decided to apply its changed view of the law on a prospective basis only.

<sup>4</sup> The company's truck drivers are represented by a different union.

50 <sup>5</sup> By letter dated April 29, 2013, the Regional Director advised the parties that she had approved the Union's request to withdraw (a) an allegation that the employer failed and refused to bargain collectively and in good faith; and (b) an allegation that the employer discharged Jaummy Miller because of his concerted or union activity.

The General Counsel offered evidence that during his time of employment, Sanchez was involved in concerted protected activity that is alleged as being the ultimate cause of his discharge on June 6, 2012.

5 In or about the Summer of 2010, Sanchez while driving his forklift, almost had an accident because his vehicle almost tipped over after hitting a pothole in the chicken area of the warehouse. Sanchez states that he talked about the unsafe condition of the warehouse with other workers. He also states that he raised the safety issue with his supervisor, Johnny Ortiz. Although the General Counsel described Sanchez as being a leader in presenting this safety issue, she did not actually show that his actions were any different than any other employees. 10 Indeed, Sanchez acknowledged that other employees complained about the condition of the floor, “all the time.” And in relation to the floor issue, the company made substantial efforts to correct the situation by spending a good deal of money to make repairs. <sup>6</sup> Assuming that the company reacted in a positive manner in response to Sanchez’s and other employees’ 15 complaints, this hardly shows some kind of animus toward Sanchez.

Sanchez testified that sometime in the Winter of 2011, he asked Ortiz why there was no shop steward for the warehouse. He asserts, and Ortiz denies, that the latter told him “not to get involved in that.” According to Sanchez, Ortiz told him that Luis Quiles had been the 20 previous shop steward but had resigned and that the position was vacant.

Sanchez testified that he then had discussions with coworkers who asked him if he was interested in becoming the shop steward. Sanchez testified that at some indeterminate time, he spoke to Sanchez and told him that he was interested in becoming the shop steward. 25 According to Sanchez, Ortiz told him this was not a good idea and said that he shouldn’t get involved. Ortiz denied these assertions.

According to Sanchez, sometime in the Spring of 2011, he had occasion to talk with two union representatives who were in the parking lot and who told him that some of the workers had mentioned his name as a candidate for shop steward. He testified that while speaking to the union representatives, he saw Daniel Romanoff drive by. According to Sanchez, later in the day, Romanoff asked “what was that outside” and “what was going on with the Union.” Sanchez states that he responded that his coworkers were suggesting that he become shop steward, to which Romanoff said that he should not get involved with them; that it wouldn’t be a good thing 35 for him.

According to Sanchez, during this same time frame, (the Spring of 2011), he spoke to other employees about the state of the negotiations and commented to them that the only way Romanoff would be fair is if the guys went on strike. He states that Ortiz, who was not in the room where the discussion took place, told him later in the day, that he should stop talking to the employees about striking and stop being vocal about “this union stuff because you’re stirring up the guys.” Sanchez asserts that Ortiz made an explicit threat that if management found out what he was saying, they would make an example of him. This is denied by Ortiz. 40

45 With respect to the shop steward question, Ortiz acknowledged that at one point Sanchez told him that he had been approached by the Union about being a shop steward.

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50 <sup>6</sup> It seems that fluids that run off from frozen chickens are acidic and can damage concrete, thereby causing potholes.

Notwithstanding any interest expressed by Sanchez in becoming a shop steward back in mid-2011, (more than a year before his discharge), the fact remains that he never followed through on this idea. Not only did Sanchez not run for shop steward, but he did not attend any union meetings that were held in the ensuing months. In short, while there was a brief flurry of discussion about Sanchez becoming a shop steward, this ceased as did his involvement with any other union activity.

The General Counsel suggests that Sanchez ceased his union or concerted activity because he was bribed to do so.

Sanchez testified that during the same conversation where Ortiz threatened that the company would make an example of him for talking about strikes and the union, he also told Sanchez that he was a good worker and that he would see what he could do for him. According to Sanchez, he asked for a \$2 per hour raise and Ortiz, at a later date told him that he had spoken to Daniel Romanoff who agreed to the raise on condition that he “come to work, do your job, stop throwing all this union stuff around and stop being so vocal and out in the open.” Needless to say, this is denied by Respondent.

The record does show that Sanchez received more money starting on June 21, 2011 and he asserts that he received this extra money, not as an increase in his wage rate, but by being credited with overtime that he didn’t actually work. In this regard Sanchez testified about a conversation he had with Sarner, the Human Resource Director, who told him that the company, being in negotiations with the union, could not change wage rates and therefore his increased earnings was done by adding 5½ hours of overtime.<sup>7</sup> For its part, the company asserts that the increased earnings for Sanchez was for extra work that he did before the commencement of the swing shift where he was then assigned. It also asserts that Sanchez continued to receive the extra money after he stopped doing the extra work because of a payroll mistake.

As to this matter, the entire incident occurred in or about June 2011, more than a year before Sanchez was terminated and well beyond the 10(b) statute of limitations period. It therefore is pretty remote for consideration as a causative factor in his discharge. And if the increase in his pay was the result of a “bribe” it clearly worked because Sanchez did not engage in any more union activities and seems to have kept quiet on other issues.

In or about March 2012, there was a meeting for the day shift employees where they were told by Ortiz that the company was implementing a new policy regarding lateness because this had been a continuing problem from the beginning of the year. Sanchez states that the employees were told that the policy would be that if an employee came in late four times in a month, the company would conduct a review of that person. Sanchez testified that he and about seven or eight of the employees present expressed their disapproval and refused to sign a paper acknowledging their receipt of the policy. He also testified that some of the employees unzipped their uniforms as if to leave the premises. From his testimony, it does not seem to me that Sanchez was any more vocal than several of the other employees; albeit he did testify that he did mention that if the company wanted to change a policy it should show it to the Union.

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<sup>7</sup> To support the version of events as testified to by Sanchez, the General Counsel noted that in a charge filed on June 30, 2010, the Union had alleged that the employer had unilaterally increased wages. Although that allegation was dismissed, she opines that this would explain why it is likely that Sarner would have told Sanchez that the company could not give him a wage rate increase but would work around this by giving him overtime pay.

Given the opposition to the policy, Ortiz asked McTigue to come down to the meeting, and after hearing the complaints of the employees, he took the paper and tore it up. After this meeting, the new policy was not implemented and no disciplinary actions were taken against any of the employees in attendance.

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I note that this incident took place three months before Sanchez was discharged and the General Counsel did not offer evidence of any further incidents that could be construed as constituting union or concerted activity on his part.

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Sanchez testified that sometime in May 2013, McTigue told him that he had learned that Sanchez was given a “perk,” referring to the extra money that Sanchez was receiving. According to Sanchez, McTigue said that he was surprised that the company was taking care of someone who had so much to say about the company; also stating that Sanchez had a negative attitude towards the company. Sanchez states that he asked if he was supposed to bend over backwards and asked if McTigue expected him to stay quiet and not express his concerns. Sanchez claims that at the end of the conversation, McTigue told him that he would be watching.

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McTigue’s testimony was that he did have a conversation with Sanchez in May because he had heard that some of the warehouse workers were complaining about their interactions with supervisor Ortiz. He states that he asked Sanchez if he had any issues with Ortiz or with anyone else, to which Sanchez said no. According to McTigue, he told Sanchez that he was there to help and that he would keep an eye on the situation. He denied having any discussion with Sanchez about the “perk” or telling Sanchez that he thought he had a negative attitude. This version of the conversation was essentially corroborated by Ortiz who also was present at the meeting.

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The next thing to happen was the incident that led to Sanchez’s discharge on June 6, 2013.

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On May 30, 2013, Sanchez was assigned to do receiving work which, as noted above, required him to place the correct labels on the pallets of products that came into the warehouse. There is no dispute that two deliveries of chickens, (one for 3 pound chickens and the other for 3½ pound chickens) came in during his watch and that they were mislabeled. The result was that the 3 pound chickens went into the slot for 3½ pound chickens and vice versa. While seemingly not all that significant, the record shows that 3 pound chickens are those ordered by stores that sell barbecued chickens because they and not the 3½ pound chickens fit into the standard sized cooking ovens. Therefore, 3½ pound chickens are not useful for those customers and will be rejected.

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In early June, McTigue received a report that many cases of chickens were being returned by customers because it was not the product ordered. He testified that twelve customers received the 3½ pound chickens which had to be returned. The value of the returned chickens was about \$3,000.00. He then instructed Ortiz and Milton Pinto to investigate the error and it was reported to him that six pallets of chickens had been mislabeled and that the receiver on duty was Sanchez.<sup>8</sup> As a result, further deliveries of the mislabeled chickens were stopped and a larger potential damage was avoided. With respect to this incident, McTigue testified that the reason it was brought to his attention was that the error was unusual and affected a group of

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<sup>8</sup> Each pallet contains many cases.

customers and not simply a single customer. In this regard, he testified that the company would not discipline an employee for making an error involving fewer than 3 cases.

5 It should be noted here that an error by a receiver that results in a product being mislabeled so that it is placed in the wrong slot, is likely to be more severe than an error made by a picker whose responsibility is to go to a slot to pick up the product for a particular customer's order. In the latter case, the error affects only a single order whereas in the former, the receiver's mistake can, if not quickly discovered, potentially affect many orders for multiple customers.

10 On the morning of June 6, 2012, Ortiz told Sanchez to fill in as a receiver and to be careful because some labels had been switched during the preceding week. According to Sanchez he was then called into McTigue's office and told that due to his error, incorrect orders were sent to customers and that he was terminated. Sanchez testified that he was not given an opportunity to explain. He also testified that during this meeting, McTigue said that customers were upset and that he was concerned about losing accounts.

20 McTigue testified that on the morning of June 6, he had still not determined what level of discipline he was going to give to Sanchez and that he decided to meet with him before making that decision. According to McTigue, he showed the documentation to Sanchez and asked if he had any additional information as to why the pallets were mislabeled. McTigue states that Sanchez answered with a simple "no" and was nonresponsive to any other questions about the problem. McTigue asserts that it was his impression that Sanchez was unconcerned about the error and that he then decided to terminate him based on this mistake and Sanchez's prior disciplinary record. (As noted above, Sanchez had received, during his two years of employment, three written warnings plus three suspensions for lateness and absenteeism).

30 The General Counsel contends that the company treated Sanchez in a disparate manner and provided a variety of records to support that assertion. These were summarized in the General Counsel's Brief in Table 1, Table 2, Table 3 and Table 4 on pages 22 to 28.<sup>9</sup>

35 Table 1 is a list of mispicks each costing the company over \$1,000.00 that were the result of employee error and which did not lead to any employee discipline. This table shows 27 incidents from November 30, 2011 through June 28, 2012, each costing the company anywhere from a low of \$1,009 to a high of \$7,657.

40 Table 2 is a list of returns that may or may not have been caused by warehouse employee errors that each resulted in a cost to the company of more than \$3,000 for the period from January 1 through June 2012. This list contains 70 transactions. Since this table does not purport to show costs that were directly linked to errors made by the company's warehouse employees, I don't think that this has much relevance. (Errors in this table could have been attributable to office personnel or drivers).

45 Table 3 describes the total value of daily returns from June 1, 2012 to June 30, 2012. This shows that daily returns for this month ranged from a low of \$9,594 to a high of \$73,424. Many of the days show returns in the \$20,000 to \$40,000 range. The point of this is to show that the \$3,000 error made by Sanchez was trivial when compared to the total, average or median cost of returns that are typical for the company.

50 <sup>9</sup> I must say that I greatly appreciate the way that the General Counsel has summarized these materials.

Table 4 is a list of employees discharged between January 2011 and July 2013. From the company's records, it appears that during this period of 2½ years, it has discharged only seven employees. Six of these were truck drivers and one, Felix Cortijo, was a warehouse employee.<sup>10</sup> Also, two of the employees, Kurt Robinson and Manuel Padilla, were probationary employees and therefore a comparison to these employees is not as relevant. This table shows the following:

Felix Cortijo:

He received a warning on October 26, 2012 for insubordination. The documents indicate that his supervisor warned him about not properly putting two pallets away, that he denied this in a profane way and that he refused an order to go home. On December 21, 2012, he received a verbal warning that stated; "This is the second time this month Felix has been spoken to for scan errors." On December 26, 2012, he was discharged. The records state that he was fired as a result of his errors, his negative attitude, his lack of remorse and his attitude toward Ortiz and McTigue.

John Cousin

On September 21, 2012, he received a written warning because a customer complained that the driver mishandled the merchandise and would not follow directions. This warning also indicates that another customer wanted to have this driver banned from delivering to his store. He was discharged on September 22, 2012 and the reasons given were because he failed to stop at a Department of Transportation weigh station; because he got stuck in a ditch and damaged the transmission on the truck; and because of his inferior customer service.

James Fleming

On April 18, 2012, he was discharged for failing to complete his route; failing to call in after each stop; failing to remove returned items from his truck after returning to the facility resulting in spoilage in the amount of \$566.67; and "job sabotage" relating to an invoice.

Manuel Padilla

On October 5, 2012, he was a probationary employee who was discharged "due to his attitude and customer complaints."

Kurt Robinson

On October 5, 2012, he was a probationary employee who was discharged "due to his attitude and customer service interactions."

Jason Rosa

On October 12, 2012, he was suspended because he gave extra boxes of chicken legs to a customer which resulted in having to send out another truck to get them back and have them delivered to the correct customer. On November 16, 2012, he was discharged for giving

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<sup>10</sup> As noted above, the truck drivers are represented by a different union.

the wrong product to customers on “numerous times,” plus having a “poor attitude” and “no commitment to improve.”

Elias Rodriguez

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He was discharged on March 13, 2013. The documents indicate that he was “terminated for demanding help from store staff.” Also, for shorting a customer of ordered goods. It states that his delivery errors were out of control and that he had a poor attitude.

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### III Analysis

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In accordance with *Wright Line*, 251 NLRB 1083 (1980), approved *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), if the General Counsel makes out a prima facie showing sufficient to support an inference that protected or union activity was a motivating factor in the decision to discharge or take other adverse action against an employee, then the burden shifts to the Respondent to demonstrate that it would have taken the same action in the absence of the protected activity.

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As far as I can see, the General Counsel is contending that the company discharged Sanchez, not because of the reasons it asserted but because of his protected concerted activity. These, according to the General Counsel consisted of (a) complaining in 2010 about the condition of the floor in the chicken area when his fork lift almost tipped over; (b) having discussions in the Spring of 2011 about the possibility of becoming a union shop steward; (c) making a statement on one occasion in the Spring of 2011 that only a strike would force the company’s owners to be fair; and (d) his protest in March 2012 regarding the proposed implementation of a new policy regarding lateness and absences.

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All of these incidents, except perhaps for the last in March 2012, were remote in time to the discharge and in my opinion were unlikely to have been a factor in the decision to discharge him.

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The first incident, occurring in or around the Summer of 2010, involved the fact that fluids from frozen chickens cause pot holes in the floor. And in response, the company has made considerable efforts, at some cost, to address this issue.

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The discussions in the Spring of 2011 about Sanchez becoming a shop steward occurred more than a year before he was fired. And in any event, any interest he had in taking that position was quickly abandoned. Indeed, he didn’t even go to union meetings thereafter. I think that it is highly unlikely that his brief and passing interest in becoming a shop steward would have inspired the company to contemplate retaliation.

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Similarly, a brief statement made more than a year before his discharge, to the effect that the company would only grant concessions if the employees engaged in a strike, is not particularly unique or noteworthy, even assuming that it was either overheard or reported to supervisor Ortiz.

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Finally and less remote in time, the protest in March 2012, regarding a newly proposed company policy did not place Sanchez in any leadership position with respect to the other employees. He did protest the proposed change and stated that the company should first show the policy to the Union. But many of the other employees present at the meeting also complained and some, according to Sanchez, demonstrated their intention to leave work in protest. At the end of the meeting, McTigue essentially caved in to the employees and

rescinded the policy. There is nothing to indicate that Sanchez’s role in this meeting was any different from the other employees or that he stood out. Also, there is no indication that any other employees suffered as a consequence of the protest at the meeting.

5           Although Sanchez testified to a number of statements allegedly made to him either by  
 Ortiz or McTigue indicating their displeasure with his outspokenness, these were denied by both  
 men. In evaluating credibility, there was nothing, either in demeanor or content that would lead  
 me to conclude that Sanchez was more credible than Ortiz or McTigue. And in situations where  
 10           credibility stands in equipoise, the Respondent, which does not have the overall burden of proof,  
 prevails. *National Telephone Directory*, 319 NLRB 420, 422 (1995). Neither the General  
 Counsel nor the Union presented any other witnesses who could testify to any statements made  
 by company management that would indicate anti-union animus. Nor were any other witnesses  
 called to corroborate the concerted activities of Sanchez or that any managers or supervisors  
 15           had anything to say regarding his asserted concerted activities. <sup>11</sup> I therefore do not conclude  
 that the Respondent threatened to more closely monitor Sanchez because he engaged in union  
 and/or concerted activities.

          In sum, although the General Counsel has skillfully marshaled the evidence that was  
 20           available to her, I don’t think that this evidence is sufficient to make out a prima facie case.

          Moreover, assuming arguendo that the General Counsel has made out a prima facie  
 case, it is my opinion that the Respondent has produced sufficient credible evidence to establish  
 that it would have taken the same action notwithstanding any alleged concerted activity by  
 Sanchez.

          There is no real dispute that Sanchez was responsible for the labeling error that resulted  
 in pallets of chickens being placed in the wrong slots. Unlike an error made by a picker who  
 takes a product from a slot to fill a particular customer’s order, an error at the receiving end of  
 the process has a cascading effect, which as shown in the present case, results in multiple  
 30           mispicked orders. Thus, a picker error may result in one customer receiving the wrong product  
 whereas a receiving error is likely to result in incorrect orders being shipped to many customers.  
 Accordingly, the comparison that the General Counsel makes between Sanchez and those  
 instances where other warehouse employees made picking errors is not quite the same.

          McTigue testified that in part, he decided to discharge Sanchez, instead of imposing a  
 lesser penalty, because Sanchez was essentially non-responsive during the June 6 meeting  
 and because Sanchez had already sustained multiple prior disciplinary actions. Unfortunately  
 for Sanchez, both of these assertions were true. His own testimony indicates that when called  
 in to discuss the issue, Sanchez made no explanations, apologies or excuses. And the fact  
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<sup>11</sup> I recognize that it is not always possible for the General Counsel to find and/or obtain cooperative  
 witnesses. However, I do note that there was a settlement dated September 21, 2011 in 2-CA-39715 that  
 45           remedied certain alleged violations of Section 8(a)(1) & (3) of the Act. (From the dates in the document,  
 the events upon which the complaint was based must have occurred in 2009 and/or 2010). And although  
 that settlement contained a non-admissions clause which would preclude a finding of anti-union animus  
 based on its execution, it did permit the General Counsel to utilize any of the evidence in that case for any  
 future cases; albeit such evidence would have been even more remote in time to the events in this case.  
 I also note that the Charging Party, as the bargaining representative of the warehouse employees, it had  
 the legal right to obtain from the company a list of the names, addresses and phone numbers of the unit  
 50           employees. I therefore can only assume that the Union was in a position to canvass these employees in  
 an effort to gather evidence for this proceeding.

remains that during the preceding two years of his employment, he did sustain six warnings and suspensions.

**Conclusions**

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For the reasons stated above, it is recommended that the Complaint be dismissed.

Dated, Washington, D.C., November 26, 2013.

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Raymond P. Green  
Administrative Law Judge

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