

**Portola Packaging, Inc. and Marta Magallon Corona and Jorge Garcia and United Food and Commercial Workers Union, Local No. 99.**

**Portola Packaging, Inc. and United Food and Commercial Workers Union, Local No. 99.** Cases 28–CA–067274, 28–CA–067345, 28–CA–070621, and 28–RC–067973

December 16, 2014

DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION

BY MEMBERS MISCIMARRA, JOHNSON, AND SCHIFFER

On September 13, 2012, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Petitioner filed answering briefs. The Union filed cross-exceptions and a supporting brief, and the Respondent 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 decision and the record in light of the exceptions<sup>1</sup> and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup>

<sup>1</sup> The General Counsel does not except to the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(1) by (1) promulgating an overly broad and discriminatory rule prohibiting employees from presenting Human Resources Manager Christopher McClanahan with concerted complaints, (2) issuing employee Jorge Garcia a disciplinary warning on October 4, 2011, (3) threatening employee Evangelina Villegas, during a mid-November 2011 conversation between Villegas and Production Supervisor Fabian Franco, with unspecified reprisals because employees engaged in union and other concerted activity, and (4) maintaining a handbook rule prohibiting employees from leaving their workstations during normal working time without the Respondent's permission.

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

The judge credited the testimony of current employees of the Respondent over contrary testimony of the Respondent's supervisors and managers, properly citing well-established Board precedent holding that the testimony of current employees "in direct contradiction to certain statements of their present supervisors . . . is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken." *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979). However, the judge characterized this precedent as establishing a "rebuttable presumption" of credibility. We do not rely on that characterization. "[A] witness' status as

only to the extent consistent with this Decision, Order, and Direction of Second Election, and to adopt his recommended Order as modified and set forth in full below.<sup>4</sup>

We disagree with the judge's decision in two respects. First, we conclude that the judge erred when he found that the Respondent violated Section 8(a)(1) of the Act on October 5, 2011, when Manager Tim DeCrow told employee Jorge Garcia that with one more warning, he would no longer work for the Respondent. Second, contrary to the judge, we conclude that the Respondent did violate Section 8(a)(1) when it prohibited employee Maria Magallon from using coworker Garcia to translate for her, as a reprisal for Garcia's protected concerted activity. We examine each issue in turn.

1. Manager DeCrow's statement to employee  
Garcia

The Respondent utilizes a four-step progressive disciplinary procedure: verbal reminder, first written warning, second written warning, termination. On May 6, 2011,<sup>5</sup> the Respondent issued Garcia a verbal reminder, memorialized in writing, after he failed to properly use a

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current employee may be a significant factor, but it is one among many which a judge utilizes in resolving credibility issues." *Flexsteel Industries*, 316 NLRB 745, 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996). Our careful review of all the judge's credibility determinations persuades us that he properly considered a variety of factors bearing on witness credibility, including current-employee status, notwithstanding his inaccurate characterization of the latter.

We have affirmed the judge's findings (among others) that the Respondent violated Sec. 8(a)(1) by (i) soliciting, by its agent Armando Talancon on November 10, 2011, employee complaints and grievances and promising employees increased benefits and improved terms and conditions of employment if they rejected the Union as their collective-bargaining representative, and (ii) threatening employees with unspecified reprisals on October 5, 2011, by Production Manager Tim DeCrow, on November 10, 2011, by Talancon, and on November 16, 2011, by Production Supervisor Ray Buchanan. In light of these findings, we find it unnecessary to pass on the allegations that the Respondent, (1) by Supervisor Franco in mid-November 2011, solicited employee complaints and grievances and promised employees increased benefits and improved terms and conditions of employment if they rejected the Union as their collective-bargaining representative; (2) by DeCrow in late November 2011, and General Manager Tim Tyler in mid-November 2011, threatened employees with unspecified reprisals. We do not pass on these cumulative allegations because finding these additional violations would not affect the remedy.

The Respondent contends that some of the judge's findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that this contention is without merit.

<sup>3</sup> To conform to our findings herein, we delete the judge's Conclusions of Law 3(d) and (k).

<sup>4</sup> We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

<sup>5</sup> All dates are in 2011.

new computer system to track his hours worked and to record parts used in repairs. Garcia signed this warning, but below his signature he wrote that employees needed additional training and supervisors needed to do more to make the system work. Garcia also discussed with coworkers their shared concerns about being overworked and about Supervisor Buchanan's unresponsiveness to their concerns. Garcia brought some of these concerns to the attention of DeCrow. The General Counsel did not allege, however, that Garcia's May 6 verbal reminder was unlawful retaliation for his protected concerted activity.

On October 4, the Respondent issued Garcia a first written warning for failing to complete assessments designed to measure employees' job skills and identify areas appropriate for training. The judge found that Respondent did not violate Section 8(a)(1) by issuing this discipline. The General Counsel does not dispute this finding.

The judge also found, and we agree, that on October 5, the Respondent lawfully disciplined Garcia when it issued him a second written warning for incidents that occurred in September. We agree with the judge that, when presenting this warning to Garcia, Respondent (by Manager DeCrow) violated Section 8(a)(1) by telling Garcia that he was provoking other employees to complain, was not good to have around, and was not good for business. Regardless of any animus this statement demonstrated toward Garcia's earlier protected concerted activity, we further agree with the judge that, under *Wright Line*,<sup>6</sup> the Respondent showed that it would have disciplined Garcia on October 5 even in the absence of that protected activity. The September incidents clearly violated the Respondent's policies and procedures. Among other things, Garcia ignored a supervisor's order to start a machine and left for lunch instead, and he failed to answer his phone one night when he was "on call" for emergency repairs. There is no evidence that Garcia was treated in a disparate fashion from any of the other maintenance technicians.

Later in the day on October 5, Garcia approached DeCrow and said that some of the statements in the second written warning were untrue. DeCrow replied, "Jorge, one more warning and you're no longer going to be at Portola." The judge found that this statement constituted an unlawful threat to discharge Garcia for engaging in protected activity. We disagree. DeCrow's statement accurately reflected Garcia's status under the Re-

spondent's progressive discipline system. Garcia had received a verbal reminder, a first written warning, and a second written warning. As stated above, none of these disciplines was found unlawful. If Garcia received "one more warning," it was simply true that he would "no longer . . . be at Portola," i.e., his employment would be terminated as provided under the Respondent's progressive discipline system. Moreover, although DeCrow unlawfully referred to Garcia's protected activities when he gave Garcia the second written warning earlier in the day, neither he nor Garcia mentioned Garcia's protected activities during their separate exchange later that day. In the later exchange, Garcia questioned the factual accuracy of the warning. That questioning, which concerned Garcia alone, was not concerted. See *Meyers Industries*, 268 NLRB 493, 497 (1984) (action not concerted where "solely by and on behalf of the employee himself") (subsequent history omitted). Under these circumstances, we do not find DeCrow's factually accurate statement to be a violation of Section 8(a)(1).<sup>7</sup>

## 2. The Respondent's prohibition on employee Magallon's use of Garcia as a translator

The judge found that in late May 2011, the Respondent committed no violation when it told Magallon, a Spanish-speaking employee, that she could no longer use Garcia (a bilingual employee) to translate for her in her conversations with supervisors. The Respondent based this prohibition on an incident in which Garcia, while translating a complaint on Magallon's behalf, purportedly "disrespected" Magallon's Supervisor, Ray Buchanan. The judge's finding was based on his inferences that during that incident Garcia functioned solely as an interpreter for Magallon, not as an advocate, and that because Magallon's complaint was solely on her own behalf, the two employees did not engage in concerted activity for mutual protection. We disagree.

The record establishes that Magallon and Garcia engaged in protected concerted activity and that the Respondent's prohibition was unlawfully coercive.<sup>8</sup> Magallon asked Garcia to translate for her when she complained to Buchanan that she did not want to serve as a periodic "relief team lead," as Buchanan was requiring her to do. It is undisputed that Buchanan responded by telling her she had to do as he told her and then, when she did not acquiesce, began to yell at her. Magallon

<sup>6</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). We find it unnecessary to pass on the judge's recitation of the *Wright Line* standard.

<sup>7</sup> Because we find DeCrow's statement lawful, we do not agree with the judge that it demonstrates that the Respondent harbored animus toward its employees who engaged in protected concerted activity.

<sup>8</sup> Although the complaint alleges that the prohibition was an imposition of "more onerous working conditions," it also alleged that the prohibition was an act of coercion in violation of Sec. 8(a)(1), and this allegation was fully litigated.

testified that she then “asked Mr. Garcia to ask Buchanan why was he mad, why was he turning his back on us, if I didn’t want that responsibility.” Garcia translated this, and Buchanan answered angrily that Magallon “didn’t have a choice.” Magallon testified that Garcia then asked Buchanan, “why are you mad, why you treating her like that, why you, why you yelling at her, why are you treating her badly?”<sup>9</sup> Buchanan did not answer, but gave Garcia an “aggressive stare,” turned his back, and walked away. There is no dispute that Garcia never raised his voice or said anything improper.

Although Garcia may only have translated for Magallon through most of the conversation (and assuming this was not protected in itself),<sup>10</sup> he departed from that role and took up Magallon’s cause when he independently questioned Buchanan’s behavior. Buchanan reacted to this by staring angrily at Garcia and not at Magallon, which supports a finding that Buchanan attributed the question solely to Garcia. Similarly, when Buchanan and the Respondent’s manager, Chris McClanahan, informed Magallon the following day that she could no longer use Garcia as an interpreter because of his “disrespect,” they did not threaten or reprimand her, but attributed misconduct only to Garcia, further confirming that in this instance he had not acted merely as a translator. Because Garcia’s “disrespect” consisted solely of joining with another employee in objecting to a supervisor’s abusive behavior, the Respondent’s prohibition against using him to translate was aimed directly at this protected concerted activity and was unlawfully coercive.<sup>11</sup>

#### DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board’s Rules and Regulations. Eligible to vote are those employed during the payroll period ending imme-

diately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by United Food and Commercial Workers Union, Local No. 99.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

#### 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

<sup>9</sup> The judge found that “Garcia asked [Buchanan] why he was so angry, why he was yelling, and why he was treating Magallon badly.” Buchanan did not testify about this incident.

<sup>10</sup> No party has excepted to the judge’s stated assumption that translating for another employee who is pursuing an individual grievance does not constitute protected concerted activity.

<sup>11</sup> “The Board has consistently held that concerted employee action, when invoked peaceably, to further an employment claim . . . albeit personal in nature, remains within the protective mantle of Section 7 of the Act.” *Cub Branch Mining*, 300 NLRB 57, 58 (1990). See also *Buck Brown Construction*, 283 NLRB 488, 489 (1987) (attempt to help discharged coworker get rehired protected); *Alumina Ceramics*, 257 NLRB 784 (1981) (voicing employee’s displeasure with discharge of coworker protected), enfd. in relevant part 690 F.2d 136 (8th Cir. 1982); *Columbia University*, 236 NLRB 793, 794–795 (1978) (intervention on behalf of coworker being discharged protected); *AMP, Inc.*, 218 NLRB 33, 36 (1975) (similar).

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate an overly broad rule prohibiting you from discussing your wages with each other.

WE WILL NOT promulgate an overly broad rule prohibiting you from discussing with other employees what occurred in meetings with supervisors.

WE WILL NOT solicit grievances from you and impliedly promise to remedy them in order to discourage you from supporting the Union.

WE WILL NOT promise you increased benefits and improved terms and conditions of employment in order to discourage you from supporting the Union.

WE WILL NOT threaten you with discharge if you select the Union as your bargaining representative.

WE WILL NOT threaten you with unspecified reprisals if you select the Union as your bargaining representative.

WE WILL NOT threaten you with unspecified reprisals if you engage in protected concerted activities.

WE WILL NOT coercively interrogate you about your union and protected concerted activities.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT threaten to withhold assistance from you because you engage in union and other protected concerted activities.

WE WILL NOT threaten you with reduced wages and benefits if you select the Union as your bargaining representative.

WE WILL NOT maintain an overly broad rule in our employee handbook prohibiting you from providing any information regarding the Company to the news media.

WE WILL NOT prohibit employees from using fellow employees of their choice as translators to communicate with supervisors or managers, as a reprisal for engaging in protected concerted activity.

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

WE WILL rescind the rule in our employee handbook prohibiting you from providing any information regarding the Company to the news media.

WE WILL furnish you with an insert for the current employee handbook that (1) advises that the unlawful rule has been rescinded, or (2) provides a lawfully worded rule on adhesive backing that will cover the unlawful rule; or publish and distribute to employees revised em-

ployee handbooks that (1) do not contain the unlawful rule, or (2) provide a lawfully worded rule.

WE WILL permit employee Maria Magallon to use employee Jorge Garcia as a translator to communicate with supervisors and managers.

PORTOLA PACKAGING, INC.

The Board's decision can be found at [www.nlr.gov/case/28-CA-067274](http://www.nlr.gov/case/28-CA-067274) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



*Sandra L. Lyons, Esq.*, for the Acting General Counsel.  
*Frederick C. Miner, Esq.* and *Sara Silvester, Esq.*, of Phoenix, Arizona, for the Respondent/Employer.  
*Elizabeth Q. Hinckle, Esq.*, of San Francisco, California, for the Union/Petitioner.

DECISION  
STATEMENT OF THE CASE

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Pursuant to a representation petition filed by the Petitioner in Case 28-RC-067973 and a Stipulated Election Agreement thereafter executed by the parties and approved by the Regional Director on November 7, 2011, an election by secret ballot was conducted on December 1, 2011,<sup>2</sup> among a unit of the Employer's employees. Following the election, the Region served a Tally of Ballots upon the parties, which showed that of approximately 44 eligible voters, 41 cast ballots, of which 19 were cast for the Petitioner and 19 were cast against the Petitioner.

<sup>1</sup> All pleadings reflect the complaint and answer as those documents were finally amended at the hearing. (See Motion to Amend Complaint (GC Exh. 2) and Second Motion to Amend Complaint (GC Exh. 26)).

<sup>2</sup> All dates refer to 2011, unless otherwise indicated.

There were 3 challenged ballots, a number sufficient to affect the results of the election.

On December 8, 2011, the Petitioner filed timely objections to conduct affecting the results of the election. On January 26, 2012, the Regional Director issued an Order Directing Hearing on Challenged Ballots and Objections and Notice of Hearing. In his order, the Regional Director found that both the challenged ballots and objections raised substantial and material issues of fact and credibility, which could best be resolved at a hearing. Further, on February 15, 2012, the Regional Director issued an Order Consolidating Cases and Notice of Hearing in which he found that common issues exist in Case 28–RC–067973, and Cases 28–CA–067274, 28–CA–067345, and 28–CA–070621. He therefore ordered that all these matters be consolidated for purposes of hearing, ruling, and decision, by an administrative law judge. Accordingly, I heard the issues relating to the objections and challenged ballots at the same time as I heard the unfair labor practice allegations in this combined matter.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally, and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Respondent, and counsel for the Union, and my observation of the demeanor of the witnesses,<sup>3</sup> I now make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The complaint alleges, the answer admits, and I find that at all times material, the Respondent has been a Delaware corporation, with an office and place of business in Tolleson, Arizona (the Tolleson facility), where it has been engaged in the business of manufacturing plastic closures and containers for food and beverage products. Further, I find that during the 12-month period ending October 21, 2011, the Respondent, in conducting its business operations as just described, purchased and received at its Tolleson facility goods valued in excess of \$50,000 directly from points located outside the State of Arizona.

Accordingly, I conclude that the Respondent is now, and at all times material, has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

<sup>3</sup> The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

#### III. ALLEGED UNFAIR LABOR PRACTICES AND ALLEGED OBJECTIONABLE CONDUCT

##### A. Background Facts

The Respondent is an international company with worldwide operations. It is based in Naperville, Illinois, and has eight facilities in North America, including the Tolleson, Arizona facility, which is the only facility involved in these proceedings. At that facility the Respondent manufactures plastic closures, more commonly referred to as bottle caps, and related items for a variety of beverages and food products, such as juice and milk. The Tolleson facility has been in operation for approximately 8 years. It operates 24 hours a day, 7 days a week, with three separate work shifts. There are approximately 91 employees employed at the facility, working in approximately 27 different job classifications.

The bottle caps are manufactured using “injection-mold” technology. There are approximately 39 injection-mold machines or presses, in operation at the facility, with related support or ancillary machines, such as label printing and foam insulation, also in operation. The manufacturing process can be summarized as follows: plastic pellets, also known as resin, are melted into a fluid, liquid state, which is then injected into a cavity in a steel mold, allowed to cool, and then ejected into a finished cap. On a busy shift, as many as 20–25 presses may be operating at any one time.

The highest ranking official at the Tolleson plant is Tim Tyler, general manager. A number of managers work at the plant under the direction of Tyler, including Chris McClanahan, human resources and safety manager, Paul Rose, maintenance manager, Tim DeCrow, production manager, Ray Buchanan, production supervisor, and Fabian Franco, production supervisor. All the named individuals are supervisors as defined by the Act.

For purposes of analyzing the alleged unfair labor practices, objections, and challenged ballots, it is necessary preliminarily to understand the work performed by certain of the Employer’s job classifications and the way in which those employees interact with each other. The largest group of employees employed at the facility is the “production team,” numbering 36. While various managers testified that the Respondent does not have any group of employees referred to as “operators,” the individual production team members who testified indicated that they frequently refer to themselves as operators.

During each shift, there are a certain number of presses in operation. One production team member is assigned to monitor each press during a shift. Besides monitoring the production from the presses, production team members pack the caps into boxes as the caps come off a conveyor belt from the presses. They seal the boxes, label them, and take the boxes to a central conveyor, which transports them to a staging area. “Production team leads” work alongside the production team members, relieving the team members when they go on breaks. The team leads assist the “production supervisors” who are responsible for the output from the presses. The production team members and the team leads report directly to the production supervisors.

“Staging team members” receive boxes of caps from the production team members, and sort the boxes on individual

pallets according to the customer and product. They then move the loaded pallets from the staging area to the warehouse. Staging team members report to the production supervisors.

At the time of the election, there were three employees classified as “process technicians,” Thomas Turner, Michael Burns, and Gabriel Hernandez. These were the three employees whose ballots were challenged by the Union during the election. The process technicians are primarily responsible for programming into control panels on the presses the various computerized settings, such as temperature, pressure, and speed, which affect the production of the various machines. They also provide a daily report on the performance of the molds, specifically the percentage of individual cavities within each mold that are functioning properly. It is the steel molds on the presses that contain cavities into which the plastic is injected. The process technicians are not assigned to a specific press, but, rather, they circulate around the production floor trouble shooting the presses. Sometimes the process technicians are required to open up the presses to inspect the cavities and, if necessary, block off cavities that are not functioning properly. While various witnesses testified differently, the evidence indicates that the process technicians spend between 40 and 70 percent of their working time on the production floor, with the remainder of their time spent in various locations and offices preparing reports on laptop computers. The process technicians do not report to the production supervisors, but instead report directly to Production Manager Tim DeCrow.

“Maintenance technicians” are responsible for performing machine repair and preventive maintenance using mechanical, electrical, and pneumatic tools. They troubleshoot and repair faulty equipment and perform preventive maintenance tasks on machines, including presses, ancillary equipment, and machines supporting the plant’s infrastructure. As of the date of the election, there were seven maintenance technicians employed at the facility, one of whom was Jorge Garcia. Maintenance technicians are not directly involved in the production process and do not perform production tasks.<sup>4</sup> Some of the maintenance technicians work on “GO teams,” with the “GO” standing for “get organized.” This involves a “reliability centered maintenance” system where similar equipment is assigned to a specialized team familiar with that equipment.<sup>5</sup> While Production Manager DeCrow directly supervises all Go team members, including maintenance technicians, Maintenance Manager Rose also is responsible for the hiring, training, and discipline of the maintenance technicians on the Go teams. For those maintenance technicians not assigned to Go teams, Rose is their immediate supervisor.

<sup>4</sup> The bargaining unit as set forth in the Stipulated Election Agreement excluded, among other employees, the “maintenance mechanics.” While at the hearing, the parties did not specifically stipulate that maintenance mechanics and maintenance technicians are the same group of employees, it appears from the record that such is the case, and, in any event, no party is contending that maintenance technicians should be included in the appropriate bargaining unit.

<sup>5</sup> Some production team members and some process technicians are assigned to Go teams, while other production team members and process technicians are specifically assigned to work on a given shift, rather than on a Go team.

### B. Protected Concerted Activity

Section 7 of the Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .” Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1987); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001); *Meyers Industries*, 268 NLRB 493, 479 (1984). An employer violates Section 8(a)(1) of the Act when it discharges an employee, or takes some other adverse employment action against him, for engaging in protected concerted activity. *Rinke Pontiac Co.*, 216 NLRB 239, 241, 242 (1975). Further, the Board has found that an employer violates the Act when threats of an “unspecified reprisal” are made because employees engage in union activity. Certainly, by analogy, the same would apply to protected concerted activity. Cf. *Atlas Logistics Group Retail Services (Phoenix)*, 357 NLRB 353, 353, fn. 2 (2011); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007).

The Board, with court approval, has construed the term “concerted activities” to include “those circumstances where individual employees seek to initiate, or induce, or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers Industries, Inc.*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988); See also *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984) (affirming the Board’s power to protect certain individual activities and citing as an example “the lone employee” who “intends to induce group activity”).

In her posthearing brief, counsel for the General Counsel begins her discussion of the employees’ alleged protected concerted activity by talking about employee Jorge Garcia. As noted above, Garcia was a maintenance technician. At the time of the hearing, Garcia had been employed by the Respondent for 24 years, having moved with the Employer when it closed a plant in California and opened the Tolleson facility. Initially, Garcia was assigned to work a specific shift at the plant. However, in August 2011, he was asked to become a member of a Go team, which he agreed to do as the hours of work suited him better. At the time he testified, Garcia was assigned to the 5-gallon Go team, which was responsible for the manufacture of 5-gallon lids.

According to the testimony of Production Manager Tim DeCrow, in the spring of 2011, the maintenance technicians began training on a computer program known as the Enterprise Asset Management (EAM) System. This system is designed to keep track of all the hours worked by the maintenance technicians, showing how their time was spent, and also to keep a record of the various parts utilized by the maintenance technicians in the course of repairing machinery. The person responsible for training the maintenance technicians on the EAM System was Maintenance Manager Paul Rose. He testified that a number of training sessions were given to the maintenance

technicians, including Jorge Garcia. However, even after the training, only about one third of the maintenance technicians were reporting the 7 out of 8 hours of labor that the Respondent was demanding, and/or were failing to list the parts that they used in making repairs.

Garcia testified that because he was having difficulty learning to use the EAM System, that Rose required him to sign a document entitled "EAM Training Acknowledgement Form." The document was dated May 6, 2011. It lists certain "Specific Expectations" of the employee, those requirements being the reporting of at least 7 out of 8 hours worked and listing those parts used while repairing machinery. The document stressed the importance of these reporting requirements, and the last sentence read as follows: "Any failure to meet the specific expectations outlined above will follow PPI's employee performance disciplinary procedures up to and including termination." (GC Exh. 16.) According to Garcia, Rose never informed him that this document constituted a verbal reprimand, and the first step in the Respondent's progressive disciplinary process. Apparently, Rose required that the other maintenance technicians who were not satisfying the EAM reporting requirements also sign this form, as counsel for the General Counsel does not contend that the mere signing of this form constituted disparate treatment towards Garcia.

As he signed the form, Garcia added certain comments at the bottom. (GC Exh. 16.) Garcia's handwriting is difficult to read, but when he testified, Garcia read out loud what he had written as follows: "We need a lot more training with the system EAM. A lot of the equipment don't [sic] have the location and it is hard to find it in the system. Also, the supervisors need to make the work orders so when we can't close after work is done." Garcia testified that he and the other maintenance technicians were not proficient on the computer and needed more training in the system. According to Garcia, reporting into the EAM System was taking a lot of time, it was hard to find parts listed in the computer, and supervisors needed to input certain information into the system first, in order to save the maintenance technicians' time. However, it is important to note that while Garcia contends that his concerns were shared by other maintenance technicians, there is no evidence that Garcia spoke with fellow employees about these specific complaints.

Garcia did testify that in mid-May he discussed with coworkers other issues that they were facing at work. He mentioned talking with "operators" and maintenance technicians, and named a number of individuals. He testified that these conversations were held daily in the lunchroom during break-time. However, when pressed by counsel for the General Counsel to specify the subjects that were discussed, Garcia was only able to recall the "operators" complaining that they had too many machines for which they were responsible, and so they were being over worked, and complaints about Production Supervisor Ray Buchanan being unresponsive to their concerns.

Marta Magallon Corona (Magallon), a production team member, who indicated that her job position was that of "machine operator," testified that in May 2011, in the plant dining room and parking lot, she had conversations with fellow employees about work concerns that they were having. She then

listed a number of employees with whom she had conversations about being over worked because there were fewer employees available to operate more machines, and about mistreatment from Supervisor Ray Buchanan. It appears that these were the same complaints that Garcia testified he had discussed during the same time period with fellow employees.

Another production team member, Evangelina Villegas, who indicated that her job position was that of "operator," also testified about work-related concerns that she discussed with fellow employees in May 2011. According to Villegas, they discussed "being treated badly" by Supervisor Ray Buchanan, who would "yell" at them, and about being over worked. She mentioned talking with some of the same employees who were mentioned by Magallon and Garcia.

According to Garcia, in May 2011, he brought the complaints of the production team members to the attention of Production Manager Tim DeCrow. Garcia testified that he told DeCrow that "the operators, they were saying they have too much work and [it's] hard for them to handle." In response, DeCrow allegedly said that he was "tired of hear[ing] the operators cry, wah, wah, wah." Garcia testified that he understood DeCrow to mean that the operators were whining about being over worked.

It is important to note that Garcia testified in English. He is bilingual, with Spanish being his first and best language. Garcia testified, and it is undisputed, that because of his bilingual ability, the Employer's Spanish speaking employees, of whom there are a large number, have frequently used him as an interpreter in their conversations with the Employer's English-speaking supervisors. Marta Magallon Corona is one such employee.

Magallon testified that periodically she was asked to act as a "relief team lead," when the regular team leads were absent, especially on the weekends. She was unhappy performing these duties as she believed she had not been adequately trained for the job, it was too much responsibility, especially on the weekends when the supervisors were not scheduled to work, and because she was inadequately compensated for performing the work. In mid-May she had approached her supervisor, Ray Buchanan, about her concerns, but he had not responded positively. About 2 weeks later, Magallon asked Garcia to interpret for her as she tried again to approach Buchanan regarding her concerns.

The testimony of Garcia and Magallon is essentially the same regarding the conversation with Buchanan. As Buchanan did not testify regarding this conversation, the testimony of Garcia and Magallon is unrebutted. During the conversation, Magallon spoke in Spanish, Buchanan spoke in English, and Garcia acted as an interpreter. Magallon expressed her reasons for no longer wanting to perform the duties of relief team lead. However, Buchanan was unmoved, essentially informing her that he was the supervisor and that she must perform the work assigned to her. At some point in the conversation, Buchanan apparently became loud, and Garcia asked him why he was so angry, why he was yelling, and why he was treating Magallon badly. Buchanan did not answer orally, but turned his back on the employees after giving Garcia an aggressive stare. With that gesture, the meeting ended. In any event, it is undisputed

that Garcia kept his temper, never raised his voice, used profanity, or called Buchanan names.

The following day, Buchanan called Magallon to a meeting in the conference room. Also present were Production Manager Tim DeCrow and Human Resource Manager Chris McClanahan. Magallon spoke in Spanish and English, Buchanan and DeCrow in English, and McClanahan, who is bilingual, interpreted when necessary. McClanahan informed Magallon that they were going to talk about the previous day's incident. During the conversation that followed, Magallon and the managers discussed her objections to continuing to perform the duties of the relief team lead. DeCrow tried to persuade Magallon to retain the position, telling her that she was a smart, hard worker with a lot of potential. He reminded her that the Respondent had invested a lot of time in her training and asked her to carefully consider the decision. However, Magallon continued to insist that she did not want the additional work and responsibility. Ultimately, it was agreed that Magallon would continue to perform the job of relief team lead only until a replacement could be trained.

This aspect of the meeting is not disputed. Testimony is at variance, however, concerning two other alleged subjects of the conversation, namely employees' interpreting for each other, and employee discussions about wages and the meeting itself. According to Magallon, McClanahan told her that Buchanan had said that Garcia had "disrespected" him the previous day. She was further told that for that reason, she was not allowed to use Garcia or any other coworker as an interpreter. When she protested that employee interpreting was a regular practice at the plant, one always permitted, she was informed that from now on none of the employees could use coworkers as interpreters, and that in the future Chris McClanahan would do all the interpreting between workers and supervisors.

Further, according to Magallon, when she complained about the payment that she received for working as a relief team lead, she was told it was the same payment that other employees received when they filled in as relief team leads.<sup>6</sup> She disputed that contention, claiming that she had spoken to fellow employees who had told her otherwise. Magallon contends that at that point in the conversation McClanahan told her that she was not permitted to talk about salaries with other employees or to see the salaries of other employees. Also, McClanahan is alleged to have told her that anything discussed in the conference room meeting needed to stay there, and Magallon was not permitted to talk with anyone outside the room about the contents of the meeting.

The management witnesses denied that coworker interpreting was even a topic of discussion at the meeting, or that there had been any mention of the previous day's meeting where Garcia had acted as an interpreter. Further, the Respondent contends that there is no such prohibition, and that coworkers have continued to act as interpreters for Spanish-speaking em-

ployees when having discussions with English-speaking supervisors.

DeCrow testified that when Magallon indicated that she had spoken with coworkers about their salaries, he told her that he had been receiving complaints from other workers who had been "shaken down" by her about their wages, and they felt uncomfortable with her questions. He testified that he went on to tell Magallon that if an employee wanted to have a conversation with her about his/her wages that it was fine for her to do so, but that if an employee did not want to discuss wages with her, that she should not pursue the matter. All three managers also testified that Magallon was not told that the meeting was confidential or that she should not discuss its contents with coworkers.

#### 1. Coworkers act as interpreters

The General Counsel alleges in complaint paragraph 5(b)(1), as amended in the Second Motion to Amend Complaint (GC Exh. 26), that in mid-May 2011, Chris McClanahan, Ray Buchanan, and Tim DeCrow created more onerous working conditions for [Magallon] and other employees by refusing to allow them to have their coworkers act as interpreters during discussions with the Respondent. In addressing this issue it is necessary for me to make certain credibility determinations as there are significant variances between the testimonies of the three management officials on the one hand and Magallon on the other hand.

I simply do not believe that the managers did not bring up the events of the previous day as they involved Buchanan and Garcia. From the credible testimony of Garcia and Magallon, un rebutted by Buchanan, that supervisor had been visibly upset by the incident. It is inherently plausible and reasonable to credit Magallon who testified that at the beginning of the meeting McClanahan mentioned that Buchanan felt that Garcia had "disrespected" him the previous day. Further, it is logical to conclude that the Respondent supported its supervisor, Buchanan, by McClanahan telling Magallon that because of Garcia's disrespectful actions of the previous day, that Garcia could no longer act as an interpreter for Magallon.

However, I do not credit Magallon's further testimony that she was told that henceforth, coworkers could no longer act as interpreters for fellow employees, and that only Chris McClanahan would be able to interpret for Spanish-speaking employees in conversations with English-speaking managers. I believe that Magallon was simply mistaken, magnifying the Respondent's position prohibiting her from using Garcia as an interpreter into a general prohibition from using any coworker as an interpreter.

The Respondent takes the position that coworkers have continued to be used as interpreters, and there appears to be un rebutted evidence to support this position. Tim DeCrow testified that only 1 day before his appearance at the hearing, he held a production meeting where a bilingual maintenance technician was used to interpret what a Spanish-speaking employee was saying. Further, employee Herlinda Cervantes testified that when she speaks with Ray Buchanan or other managers that she sometimes uses fellow employee "Cecilia" to interpret for her. Accordingly, I believe that counsel for the General Counsel has

<sup>6</sup> According to the Respondent, an employee who substitutes temporarily for an absent higher-paid employee is paid at the higher rate, but only for the period of time that the substitute performs the work of the absent employee.

failed to prove that the Respondent ever established a general rule prohibiting employees from using coworkers as interpreters in conversations with English-speaking managers, or that Magallon was told any such thing.

However, as I have already stated, I do believe that Magallon was told by Chris McClanahan that she could no longer use Garcia as an interpreter because he had disrespected Buchanan the previous day when acting as an interpreter for Magallon. The question remains whether this constitutes an unfair labor practice. I do not believe that it does.

Both Garcia and Magallon testified that Garcia was acting as an interpreter for Magallon during her conversation with Buchanan. He was not acting as her advocate, witness, or even supportive coworker. Even at the end of their conversation when Buchanan got mad and turned his back on the employees and raised his voice, it was Magallon who was speaking her mind, not Garcia. She testified that she “asked Mr. Garcia to ask him [Buchanan] why was he mad, why was he turning his back on us.” Although there were further words exchanged, it is clear to me that Garcia was merely acting as an interpreter, rather than going to see Buchanan because he shared common concerns with Magallon. In fact, Magallon’s concerns had nothing to do with Garcia. She was unhappy functioning as a relief team lead. Garcia was a maintenance technician, not supervised by Buchanan, and with no work-related connection to Magallon’s complaints.

Counsel for the General Counsel has not cited any Board or court authority for the proposition that when an employee acts as a translator or interpreter for another employee in a conversation with management where only the employee who needs an interpreter has work-related complaints that those employees are engaged in protected concerted activity. I know of no such authority.<sup>7</sup> An interpreter really functions only as a recording and translating device, intended merely to record the precise words of the speakers, and then to translate those precise words into the language of the listeners. Such a person is not speaking his or her own mind, but the translated words of the speaker.

I conclude that neither Magallon nor other employees were prohibited from using coworkers as interpreters in conversations with management, but at most Garcia was prohibited from functioning in that capacity.<sup>8</sup> I see no credible probative evidence that such action was taken because of any protected activity that Garcia may have engaged in, and I do not believe that Garcia and Magallon were engaged in protected concerted activity when he interpreted for her with Buchanan. Concomitantly, the Respondent was not creating “more onerous working conditions” for employees because of their protected concerted

activity. Accordingly, I shall recommend to the Board that the allegation in paragraph 5(b)(1), as set forth in the Second Motion to Amend the Complaint (GC Exh. 26.) be dismissed.

2. Rule prohibiting employees from discussing wages; and
3. Rule prohibiting employees from discussing meetings held with management

The General Counsel alleges in complaint paragraph 5(b)(2), as set forth in the Second Motion to Amend the Complaint (GC Exh. 26), that in mid-May 2011, the Respondent through McClanahan, Buchanan, and DeCrow orally promulgated an overly-broad and discriminatory rule prohibiting employees from discussing their wages and those of other employees with each other. Further, the General Counsel alleges in paragraph 5(b)(3), as set forth in the Second Motion to Amend the Complaint, that at the same time the three managers orally promulgated an overly-broad and discriminatory rule prohibiting employees from discussing with other employees what occurred in meetings with management.

These allegations arises from the meeting between the three managers and Magallon where they discussed her desire to no longer serve as a relief team lead. As was set forth above, one of Magallon’s reasons for wanting to relinquish the position was her feeling that she was not being adequately compensated for the extra work. It is undisputed that she expressed this feeling to the managers, and also her belief that other employees who preformed such relief duties received greater compensation. However, the witnesses disagree as to what was discussed next.

According to Magallon, when she complained about the payment that she received for working as a relief team lead, she was told it was the same payment that other employees received when they filled in as relief team leads. She disputed that contention, claiming that she had spoken to fellow employees who had told her otherwise. Magallon contends that at that point McClanahan told her that she was not permitted to talk about salaries with other employees or to see the salaries of other employees. Also, McClanahan is alleged to have told her that anything discussed in the conference room meeting needed to stay there, and Magallon was not permitted to talk with anyone outside the room about the contents of the meeting.

DeCrow testified that when Magallon indicated that she had spoken with coworkers about their salaries, he told her that he had been receiving complaints from other workers who had been “shaken down” by her about their wages, and they felt uncomfortable with her questions. He testified that he went on to tell Magallon that if an employee wanted to have a conversation with her about his/her wages that it was fine for her to do so, but that if an employee did not want to discuss wages with her, that she should not pursue the matter. McClanahan’s testimony was in conformity with that of DeCrow, with the addition that McClanahan testified that Magallon had said that she understood and that she “wasn’t badgering anybody or giving anyone a hard time.” All three managers also testified that Magallon was not told that the meeting was confidential or that she should not discuss its contents with coworkers.

<sup>7</sup> I do not believe that the cases or law review article cited by counsel for the General Counsel in her posthearing brief support the General Counsel’s position that the conduct engaged in by Garcia and Magallon constituted protected concerted activity. (*Republic Aviation Corp.*, 324 U.S. 793, 804–805 (1945); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978); *Caesar’s Palace*, 336 NLRB 271, 272 fn. 6 (2001), quoting *Jeanette Corp.*, 532 F.2d 916, 918 (3d Cir. 1976); Weinstein, Lauren M., *The Role of Labor Law in Challenging English-only Policies*, 47 *Harvard Civil Rights-Civil Liberties Law Review* 219 (2012)).

<sup>8</sup> There is no contention or evidence that without Garcia there were insufficient bilingual employees to act as interpreters.

Regarding the allegations that the managers told Magallon that she must not discuss wages with other employees and that she must keep the contents of their meeting confidential, I credit Magallon. As counsel for the General Counsel pointed out in her posthearing brief, there is a long line of Board cases standing for the proposition that the testimony of a current employee, which is adverse to her employer, should be viewed favorably as opposed to the self-interest testimony of a supervisor. This, of course, is nothing more than a rebuttable presumption, which is subject to the facts in each situation. See *Samaritan Medical Center*, 319 NLRB 392, 396 fn. 12 (1995); *Hi-Tec Cable Corp.*, 318 NLRB 280, 295 (1995), enf. granted in part, denied in part 128 F.3d 271 (5th Cir. 1997); *Gold Standard Enterprises*, 234 NLRB 618 (1978); *D & H Mfg. Co.*, 239 NLRB 393, 396 (1978). However, in the case before me, I am unaware of any reason to conclude that the presumption that Magallon, a current employee of the Respondent, testified credibly has been rebutted.<sup>9</sup>

The collective testimony of the three managers regarding this matter simply does not have the ring of authenticity to it. I doubt that in the course of scolding Magallon for talking about wages with her fellow employees, DeCrow took the time to explain to her a distinction that he was allegedly drawing between discussing wages with willing employees and pressuring unwilling employees to disclose such information. Rather, this seems like something the managers concocted after the charges were filed in an effort to make their admonition to Magallon sound lawful.

Further, the Respondent furnished no specific information regarding DeCrow's claim that he had received complaints from employees who allegedly reported that Magallon was pressuring them to give her their wage rates. Had such complaints actually been made, DeCrow should have been in a position to testify as to the names of those complaining employees, and the Respondent should have offered their testimony at trial. The Respondent's total failure to offer such evidence, which one would logically assume would be done if such evidence existed, creates an adverse inference that such, in fact, does not exist.<sup>10</sup> This constitutes further evidence of the incredible nature of the managers' testimony.

While DeCrow and McClanahan testified that DeCrow was the manager making the statements in question to Magallon, it is of no particular importance which of the three managers actually spoke the words. Magallon seemed to testify that McClanahan was speaking. However, she may have been confused as to whose words these were, as McClanahan was serving as the Spanish-language interpreter and may only have been translating for DeCrow. DeCrow, as production manager, was a higher ranking supervisor than McClanahan, who was the human resources manager. But, in any event, it is immaterial

whether it was McClanahan or DeCrow speaking the words in question, as the Respondent is responsible for the unlawful statements of its supervisors.

Having concluded that either DeCrow or McClanahan told Magallon that she was prohibited from talking with other employees about their wages, I also find that they told her that the matters being discussed at the meeting were to be kept confidential and not shared with other employees. It is logical that such was the case as the supervisors' admonition that Magallon must keep these matters confidential was a natural extension of the prohibition against talking with other employees about their wages. It naturally fits in the context of their conversation. Having determined that these statements, as testified to by Magallon, were made by the supervisors, I must also determine whether they constitute unfair labor practices. I find that they do.

In determining whether the existence of specific work rules violate Section 8(a)(1) of the Act, the Board has held that, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enf. 203 F.3d 52 (D.C. Cir. 1999). Further, where the rules are likely to have a chilling effect on Section 7 rights, "the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." Id. See also *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976).

The Board has further refined the above standard in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), by creating a two-step inquiry for determining whether the maintenance of a rule violates the Act. First, if the rule expressly restricts Section 7 activity, it is clearly unlawful. If the rule does not, it will none-the-less violate the Act upon a showing that: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647; See *Northwestern Land Services, Ltd.*, 352 NLRB 744 (2009) (applying the Board's standard in *Lutheran Heritage Village-Livonia*, supra at 647).

It is basic horn book law that employees are engaged in lawful protected concerted activity when they discuss among themselves issues relating to wages, hours, and working conditions. An employer violates the Act when it attempts to prevent employees from engaging in protected concerted activities by prohibiting employees from discussing matters such as wage rates, or prohibits employees from discussing such matters as are raised at meetings with management officials.

Through the actions of its supervisors in mid-May 2011, the Respondent was orally promulgating a rule prohibiting Marta Magallon, and other employees, from discussing their wage rates with each other; and was also orally promulgating a rule that served to prohibit Magallon, and other employees, from discussing those matters that had just been raised by management with Magallon. The rules were overly-broad and discriminatory as on their face they restrict the exercise of Section 7 rights. Further, those rules would undoubtedly have a chilling effect on the willingness of employees to engage in Section 7 activity. *Lutheran Heritage Village-Livonia*, supra.

<sup>9</sup> It is axiomatic that a witness may be found credible regarding one issue, while at the same time found incredible regarding another issue.

<sup>10</sup> See *International Automated Machines*, 285 NLRB 1122, 1122-1123 (1987), enf. 861 F.2d 720 (6th Cir. 1988) ("... when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge").

Accordingly, I conclude that by the actions of its supervisors, the Respondent has violated Section 8(a)(1) of the Act by orally promulgating overly-broad and discriminatory rules prohibiting employees from discussing their wages with each other, and by prohibiting employees from discussing with each other what occurred at meetings with supervisors, all as alleged in paragraphs 5(b)(2) and (3), as set forth in the Second Motion to Amend Complaint.

#### 4. Rule prohibiting employees from meeting in groups with managers

The General Counsel alleges in complaint paragraph 5(c) that since April 21, 2011, the Respondent, through Christopher McClanahan, has orally promulgated an overly-broad and discriminatory rule prohibiting employees from presenting concerted complaints to him. McClanahan, the safety and human resource manager, holds monthly safety meetings in the plant for all employees. Each month a different safety topic is taken up during meetings conducted on each shift. Past subjects have included fall protection, hazardous, communications, and many others. McClanahan testified that at these meetings he encourages employee feedback, and often will receive and answer questions on diverse subjects concerning such matters as days off, vacations, workloads, and other work-related subjects. This testimony was not rebutted by other witnesses.

McClanahan further testified that at the end of these safety meetings he would typically add that "if there is anybody that has a question or concern that they are embarrassed to bring up in front of everyone else, feel free to come speak with me, my door is always open." While acknowledging that such a statement was made by McClanahan, employees Marta Magallon, Evangelina Villegas, and Alicia Martinez testified that McClanahan also said that while his door was always open to hear complaints, "that employees should come by themselves and not in groups." Allegedly, such statements by McClanahan, or similar statements that employees should not come to see him in groups of two or three, were made by him at safety meetings held in May and June 2011. However, employee Christina Solano attended such meetings and denied hearing any statement from McClanahan limiting the number of employees who could approach him with complaints.

I agree with counsel for the Respondent's comment in his posthearing brief that it would be "inherently illogical" for McClanahan to solicit questions from employees at group meetings regarding work-related matters that he would not also be willing to entertain in his office when approached by more than one employee. If McClanahan was willing to discuss employee concerns in a group setting, why would he be reluctant to do so in his private office? It makes no sense that he would have any such reservation.

It seems likely that employees Magallon, Villegas, and Martinez are simply mistaken or confused about what McClanahan actually said. Perhaps they misunderstood McClanahan's statement that employees who were embarrassed to bring up matters in front of other employees could come and speak with him in his office to mean that employees must come alone to see him. In any event, I credit the testimony of McClanahan and Solano because it is logical and inherently probable.

I conclude that McClanahan never said that employees could only come alone to see him with complaints, and, thus, did not promulgate an overly-broad and discriminatory rule prohibiting employees from presenting him with concerted complaints. Accordingly, I shall recommend to the Board that complaint paragraph 5(c) be dismissed.

#### 5. Threats for engaging in protected concerted activity

It is alleged in complaint paragraphs 5(d)(1) and (2) that on about October 5, 2011, the Respondent, through Tim DeCrow, threatened employees with discharge and/or with unspecified reprisals for engaging in concerted activities. It is further alleged in complaint paragraph 5(k) that on about October 4, 2011, the Respondent issued a written warning to Jorge Garcia, and in paragraph 5(l) that on about October 5, 2011, the Respondent issued Garcia another written warning. It is the General Counsel's contention that all these actions were taken against Garcia by the Respondent, through Production Manager Tim DeCrow, in the course of a 2-day period because of Garcia's protected concerted activity.

As is set forth in more detail earlier in this decision, Garcia had engaged in protected concerted activities with his coworkers. In mid-May 2011, he had spent time in the lunchroom when on break on a daily basis discussing with production team members and maintenance technicians work-related complaints. In particular, he had discussed with the "operators" their complaints about being over worked and about Supervisor Ray Buchanan being unresponsive to their needs.

Garcia brought the complaints of the production team members to the attention of Production Manager Tim DeCrow. Garcia testified that he told DeCrow that "the operators, they were saying they have too much work and [it's] hard for them to handle." In response, DeCrow allegedly said that he was "tired of hear[ing] the operators cry, wah, wah, wah." Garcia testified that he understood DeCrow to mean that the operators were whining about being over worked. As DeCrow never specifically denied having had this conversation with Garcia, I conclude that it did occur as testified to by Garcia.

Also, in this same May 2011 time period, Garcia was having trouble with the Respondent's Enterprise Asset Management [EAM] System. As set forth in detail above, the EAM System is designed to keep track of all the hours worked by the maintenance technicians, showing how their time was spent, and also to keep a record of the various parts utilized by the maintenance technicians in the course of repairing machinery. Garcia, as with some of the other maintenance technicians, was having difficulty learning how to use the system. As was discussed above, the Respondent, through its Maintenance Manager Paul Rose, made considerable efforts to train the maintenance technicians in the new EAM System. However, despite these efforts some of the technicians, including Garcia, seemed slow or reluctant to achieve the desired results.

Because of Garcia's inability to achieve the desired results using the EAM System, Rose required him to sign a document entitled "EAM Training Acknowledgement Form." The document was dated May 6, 2011. It lists certain "Specific Expectations" of the employee, those requirements being the reporting of at least 7 out of 8 hours worked and listing those parts used

while repairing machinery. The document stressed the importance of these reporting requirements, and the last sentence read as follows: "Any failure to meet the specific expectations outlined above will follow PPI's employee performance disciplinary procedures up to and including termination." (GC Exh. 16.) According to Garcia, Rose never informed him that this document constituted a verbal reprimand, and the first step in the Respondent's progressive disciplinary process. Apparently, Rose required the other maintenance technicians who were not satisfying the EAM reporting requirements to also sign this form, as counsel for the General Counsel does not contend that the mere signing of this form constituted disparate treatment towards Garcia. The requirement that Garcia sign the form is not alleged in the complaint as an unfair labor practice.

As he signed the form, Garcia added certain comments at the bottom. Those comments read as follows: "We need a lot more training with the system EAM. A lot of the equipment don't [sic] have the location and it is hard to find it in the system. Also, the supervisors need to make the work orders so when we can't close after work is done." (GC Exh. 16.) He testified that his concerns were shared by other maintenance technicians, however, there is no evidence that Garcia spoke with fellow employees about these specific complaints. Nevertheless, I believe that in writing his comments on the form, Garcia was engaged in protected concerted activity. His comments should be construed to be the efforts of an individual employee seeking "to initiate or induce or to prepare for group action," as well as that of an individual employee "bringing truly group complaints to the attention of management." *Meyer Industries, Inc.*, 281 NLRB 882 (1986), *affd.* 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing as an example "the lone employee" who "intends to induce group activity").

While it is clear that around May 2011, Garcia engaged in protected concerted activities with other employees, and alone but also on behalf of other employees, it remains to be seen whether his activities were in any way related to the subsequent actions of management. I will address each of the four allegations of unlawful conduct towards Garcia in chronological order.

Complaint paragraph 5(k) alleges that on October 4, 2011, the Respondent issued Garcia a written warning. He did in fact receive such a warning on a "Disciplinary Process Form" dated October 4 and issued by his immediate supervisor, Paul Rose. (GC Exh. 17.) The discipline form makes reference to a prior "verbal reminder" dated May 6, 2011. This prior reminder was the "EAM Training Acknowledgement Form" mentioned above. (GC Exh. 16.) While counsel for the General Counsel in her posthearing brief argues that this EAM form "does [not indicate] that it is a discipline, part of the progressive discipline plan, or a verbal reminder," that is not entirely accurate. The last sentence reads: "Any failure to meet the specific expectations outlined above will follow PPI's employee performance disciplinary procedures up to and including termination." Therefore, I agree with counsel for the Respondent that for all

practical purposes the EAM form constituted a first warning to Garcia.

A series of disciplinary warnings issued to Garcia over his failure to train on the Respondent's EAM System and to become proficient in that system. As mentioned earlier, the EAM System is a computer operated electronic system that is used to track hours worked and parts used by maintenance technicians given certain assignments to perform, in an effort to promote the Respondent's ability to manage its production operating costs. The "warning" that Garcia received in the "EAM Training Acknowledgement Form" was for failing to record at least 7 of his 8 hours of employment in the system, and also for failing to record all parts used in making repairs. (GC Exh.16.)

In December 2010, Rose provided classroom training in the EAM System to maintenance technicians, including Garcia. Followup training was given in February. Every maintenance technician was required to use the system, and all who failed to do so received the same written acknowledgement form that Garcia received. It is undisputed that Rose spoke with Garcia numerous times about his failure to properly record information into the system. However, during the hearing, Garcia testified that his failure to use the system as required was solely because he either did not receive adequate training, or was too busy with his regular maintenance duties to train on the system.

As early as August 2011, Rose assigned all the maintenance technicians in the plant the duty of completing seven skill assessments to determine their skill levels relative to several different performance areas including pneumatics, electronics, motor controls, and others. These assessments were intended to identify subjects where individual maintenance technicians would need more training. Rose scheduled each of the technicians a designated time each week to use a dedicated computer located in a plant conference room to complete the assessments during working time. Garcia acknowledged at the hearing that he was assigned to work on the assessments every Wednesday, and testified that he did not work on the assessment after the assignments were made. He testified that he told Rose that he had "too much work and had no help," so that he could not leave the production floor. However, Rose told him that the assessments must be done, and that he should perform them as scheduled unless there was a priority need to make a repair.

Rose continued to talk with Garcia about not doing the assessments. According to Rose's un rebutted testimony, as of October 1, 2011, only two technicians had failed to complete a single assessment, namely Garcia and Bonito Deiparine. Therefore, on October 4, Rose called both men into the conference room, presented them with nearly identical "Disciplinary Process Forms," and told them that they were receiving written warnings because of their failures to complete the assessments assigned in early August. He told them that their failure to complete any of the assessments was unacceptable, and that they must complete the assessments no later than November 1 or additional discipline would be imposed.

The Disciplinary Process Form that Garcia received indicated on its face that it constituted a "First Warning," that a "Verbal Reminder" had been given on May 6, 2011, that the unacceptable performance was the failure to have completed any of the seven assessments first assigned in early August, and that

the expected improvement was “7 of 7 assessment tests completed by 11/01/11.” (GC Exh. 17.) The form was signed by Christopher McClanahan, Paul Rose, and Garcia.

Counsel for the General Counsel argues in her posthearing brief that Garcia was never given a deadline in which to complete the assessments until he was given the written warning on October 4, and she is suggesting that in some way this was unfair. However, there is no probative, credible evidence that Garcia was treated in a disparate fashion from any of the other maintenance technicians. While Garcia testified that he thought that one technician may have completed fewer assessments than he had done, no evidence was offered to support this contention. Further, I credit the testimony of Rose who testified in a detailed, convincing manner, and whose testimony was supported by documentary evidence that Garcia did not complete his first assessment until October 7, 2011, 3 days after he received the written warning. (Emp. Exh.10.)

In my view, Garcia was disciplined for cause on October 4 when he received the “Disciplinary Process Form.” (GC Exh. 17.) He was given ample opportunity to receive training on the EAM System, was repeatedly spoken to by Ross about the need to complete the assessment tests in a timely fashion, was told to take the training at the times scheduled unless he had a priority repair to perform, and was not treated in a disparate fashion from the other maintenance technicians.

The remaining three allegations of unlawful mistreatment of Garcia by the Respondent (complaint pars. 5(d)(1), (2), and 5(l)) all occurred on the following day, October 5, 2011. However, it is necessary to first note that Garcia accepted an assignment to a “Go team” in August 2011. At that time, DeCrow became his supervisor. As discussed above, a Go team is made up of production employees, process technicians, and maintenance mechanics, among other classifications. The Go team members are assigned to a specialized team familiar with a particular set of machines. These employees are distinguished from their coworkers who work on a number of different types of machines during one of three designated work shifts. Garcia accepted the position on the Go team because those hours of work were better for him than the times of the tradition shift to which he had previously been assigned.

It is the Respondent’s position that after being assigned to the Go team, Garcia began to have significant performance issues. Specifically, the Respondent documented four incidents, which ultimately became the basis for a second disciplinary warning. In each of these four incidents, the General Counsel argues that Garcia’s job performance was appropriate under the circumstances. It is the receipt of this second written warning that the General Counsel contends was unlawful. (See complaint par. 5(l).) These four alleged incidents of improper performance are set forth in the “Disciplinary Process Form” received by Garcia on October 5, 2011.

The four incidents reported on the Disciplinary Process Form are: (1) an incident occurring on September 12–13 where Garcia was unable to fix a mechanical problem for 2 days, causing production delays, and requiring another maintenance technician to make the repair; (2) an incident on September 13 where Garcia installed a valve backwards, destroying it and costing the Employer \$4000; (3) an incident on September 28 when

Garcia refused to follow the direction of his supervisor causing a production delay; and (4) an incident occurring on September 30 when Garcia failed to answer his phone and report for work to repair a machine over the course of two shifts, causing another technician to be called to make the repair, resulting in a production delay. (GC Exh. 18.) DeCrow testified that after each incident he spoke with Garcia, told him what he had done wrong, and at one point told him, regarding the Go team, that “[i]f this is too much for you, let me know and we can put you back on shift duty.” When asked by counsel for the General Counsel why he gave Garcia this second written warning, rather than just making it a part of the first written warning issued a day earlier, DeCrow responded logically that the two written warnings involved totally different issues. Although Garcia testified that he had not been spoken to after these incidents occurred, I credit DeCrow. His testimony was detailed and had the ring of authenticity about it. Certainly, these incidents were of a sufficient magnitude to have warranted DeCrow’s immediate need to speak with Garcia about them.

Regarding each of the four incidents, Garcia testified that his actions were reasonable under the circumstances and that he had done nothing wrong. As a layman, unfamiliar with the technical requirements of repairing presses, I am unable to determine whether Garcia was at fault or not regarding the first two incidents where production was delayed allegedly because he was unable to repair machinery and had destroyed a valve that he was trying to replace. However, I am able to analyze the second two incidents, which I believe are illustrative of all four.

According to the Respondent, incident three, which occurred on September 28, involved Garcia’s refusal to follow direction from Supervisor Ray Buchanan. Garcia testified about the incident, and while he admitted that he failed to follow Buchanan’s order to run a machine and instead went to lunch, he contended that he did not follow Buchanan’s direction because the machine needed 2 hours to warm up in order to avoid being damaged. According to Garcia, when he went to get lunch, Buchanan started the machine himself without waiting for it to warm up, resulting in the color for the machine spilling all over the floor. In any event, it seems to me that the salient point is not whether the machine should have been started without first warming up, but, rather, that Garcia ignored Supervisor Buchanan’s order to start the machine and instead left for lunch. This was an act of insubordination.

Incident four occurred on September 30, when Garcia was at home and off from work. The Respondent requires its maintenance technicians to be on-call and available to work an emergency whenever necessary. During the night, when Garcia was at home sleeping, a machine needed to be repaired, and supervisors made a number of calls to Garcia’s personal cell phone attempting to contact him and have him report to the plant to make the necessary repairs. However, Garcia failed to answer the calls. He testified that he did not hear the calls, apparently because his phone was on vibrate. The Respondent ultimately called in another maintenance technician who repaired the machine. In any event, Garcia admits that he failed to follow the Respondent’s procedure and be available and “on-call” when needed by the Respondent to report for work.

Concerning incidents three and four, it is clear that Garcia violated the Respondent's policies and procedures as he was, respectively, insubordinate towards a supervisor, and was unavailable and not on-call when needed by the Respondent to report for work. As such, the Respondent had a legitimate basis for issuing a written warning to Garcia. Regarding incidents one and two, while I am not able to determine the technical issues involved, on the face of the Respondent's complaints, I can see no impropriety in the Respondent's conclusion that Garcia was either unable to make the repairs, or made them improperly, causing lost production and damaging equipment. In any event, it is important to stress that counsel for the General Counsel was unable to show that for any of these incidents that Garcia was treated in a disparate fashion from other maintenance technicians or that the stated reasons for the discipline was a pretext.

As noted above, Garcia received this second Disciplinary Process Form on October 5, 2011. (GC Exh. 18.) He was called to a meeting in the human resource office where DeCrow, McClanahan, and Rose were present. Garcia testified that while DeCrow was giving him the written warning, DeCrow told him that he was making too many mistakes. According to Garcia, DeCrow went on to say that he was "provoking some other people for them to complain," and that he "was the kind of person that was not good to have around." Allegedly, DeCrow added that Garcia "was not good for the business." Garcia testified that in response he told DeCrow that he was not provoking anyone, but just trying to pass information on to management that he heard from the "operators" on the plant floor. Garcia signed the written warning and then walked out of the room.

However, Garcia was not happy with the receipt of the written warning, believing that the discipline was not warranted. He returned to talk with McClanahan, telling him that he wanted a copy of the warning. At the same time, Garcia indicated he was not happy with the warning and, so, McClanahan brought him to talk again with DeCrow. Garcia testified that he told the two men that "some of these—that's on the paper, I believe is not true." According to Garcia, he could see DeCrow's "temper change," and DeCrow said, "Jorge, one more warning and you're no longer going to be at Portola." That ended the conversation and Garcia left the room.

All three management witnesses, DeCrow, McClanahan, and Rose denied that DeCrow made the statements attributed to him by Garcia. The Respondent contends that DeCrow merely told Garcia that his performance had been poor and was getting worse, with many mistakes having been made, and, therefore, he was going to receive a written warning.

In this instance, I credit Garcia over the three supervisors. Garcia's version of the conversation was highly detailed, and, as he told the story, I could see the emotional effect that testifying about the incident was having on him. On the other hand, the supervisors testified in a cold, detached way, which led me to believe that their version of these events was fabricated. Garcia's testimony had the ring of authenticity about it, was consistent, and inherently plausible. As I have already noted, Garcia engaged in protected concerted activity with other employees in May 2011, when they discussed work-related com-

plaints in the lunchroom. He ultimately brought some of those complaints to DeCrow. However, as I have already found, DeCrow was less than sympathetic about hearing that the "operators" felt they were overworked, saying that he was "tired of hear[ing] the operators cry, wah, wah, wah." Further, Garcia was engaged in protected concerted activity on behalf of himself and the other maintenance technicians when on May 6, 2011, he wrote his complaints about the EAM System at the bottom of the EAM Training Acknowledgement Form that he received. (GC Exh. 16.)

The statements attributed to DeCrow on October 5 by Garcia are consistent with DeCrow's earlier statements about the operators' crying. He obviously had no patience with complaining employees or those who were dissatisfied with their working conditions. Further, I believe the Board's policy of giving special credence to the testimony of a current employee who testifies against the financial interests of his employer should certainly apply to Garcia. See *House of Good Samaritan*, 319 NLRB 392, 396 fn. 12 (1995) (citing *Georgia Rug Mills*, 131 NLRB 1304 (1961)). While I have not uniformly found Garcia's testimony credible, I believe that in this instance it is clearly so.

Having found Garcia's testimony in this instance credible, I find that on October 5, 2011, the Respondent, through DeCrow, threatened Garcia because of his concerted activity when DeCrow told Garcia that he was causing other employees to complain, was not good to have around, and was not good for business. Accordingly, I find that the Respondent, through DeCrow, threatened Garcia with unspecified reprisals for engaging in protected activity in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(d)(2). Further, I find that on that same date, the Respondent, through DeCrow, threatened Garcia because of his concerted activity when DeCrow told Garcia that with one more warning, he would no longer be working for the Employer. Accordingly, I find that the Respondent, through DeCrow, threatened Garcia with discharge for engaging in protected activity in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(d)(1). These violations establish that the Respondent, through DeCrow, harbored animus towards its employees who engaged in protected concerted activity.

It is now necessary to determine the Respondent's motive in issuing the two written disciplinary warnings to Garcia on October 4 and 5, 2011. (GC Exhs. 17 & 18.) In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has made a prima facie showing that Garcia's protected concerted activity was a motivating factor in the Respondent's decision to issue to him two written disciplinary warnings. In *Tracker Marine, L.L.C.*, 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under the framework, the judge held that the General Counsel must establish four elements by a preponderance of evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. However, more recently the Board has stated that, "Board cases typically do not include [the fourth element] as an independent element." *Wal-Mart Stores*, 352 NLRB 815, fn.5 (2008) (citing *Gelita USA Inc.*, 352 NLRB 406, 407, fn. 2 (2008)); *SFO Good-Nite Inn, LLC*, 352 NLRB 268, 269 (2008); Also see *Praxair Distribution, Inc.*, 357 NLRB 1048 fn. 2 (2011). In any event, to rebut the presumption, the Respondent bears the burden of showing the same action would have taken place even in the absence of the protected conduct. See *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

It is axiomatic that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions. Further, the Board has consistently held that the communication between employees "for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities." *Phoenix Transit Systems*, 337 NLRB 510 (2002) (citing *Container Corp. of America*, 244 NLRB 318, 322 (1979)).

As I have already found, there is no doubt that Garcia was engaged in protected concerted activity in May 2011, when he discussed work-related concerns with fellow employees in the lunchroom at the plant, and when he brought operator complaints about being over worked to the attention of DeCrow. Further, he engaged in protected concerted activity on behalf of himself and the other maintenance technicians when on May 6 he wrote negative comments about the EAM System training on the bottom of the EAM Training Acknowledgement Form (GC Exh. 16) that he signed and gave to Paul Rose.

Obviously, the Respondent was aware of Garcia's protected concerted activity as Production Manager DeCrow was the recipient of Garcia's complaints regarding the operators being overworked, and Maintenance Manager Rose was the recipient of Garcia's complaints regarding the EAM System training for maintenance technicians.

The two "Disciplinary Process Forms" (written warnings) received by Garcia on October 4 and 5, 2011, respectively, were clearly adverse employment actions. These were serious matters under the Respondent's progressive discipline system,

as the second written warning (the one dated October 5) indicates on its face that the next action was "Termination."

Finally, counsel for the General Counsel has established a connection or nexus between the discipline and Garcia's protected activity by showing that the Respondent, through DeCrow, harbored animus towards Garcia because of those activities. As noted above, I have found that on October 5, the date of the second written warning, and only 1 day after the issuance of the first written warning, DeCrow orally threatened Garcia with discharge and with other unspecified reprisals because he had engaged in protected concerted activity. I have already found that these threats constituted violations of the Act. Certainly, the timing of the oral threats in connection with the issuance of written warnings is support for the proposition that the Respondent was at least to some extent motivated to issue the written warnings in question because Garcia had engaged in protected concerted activity.

Having found that the General Counsel has established a prima facie case that the Respondent was motivated to issue the two written warnings to Garcia, at least in part, because of his protected concerted activity, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizen Coordinating Council of Riverbay Community*, 330 NLRB 1100 (2000); *Regal Recycling, Inc.*, 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co.*, 310 NLRB 865, 871 (1993). I am of the view that the Respondent has met this burden.

Earlier in this decision, I analyzed the two written warnings received by Garcia on October 4 and 5, 2011, respectively. For the reason that I noted above at length, I concluded that the two warnings were not a pretext, did not establish disparate treatment, and appeared to constitute an effort by the Respondent to discipline Garcia for legitimate reasons. Garcia was far from a model employee. He failed to take timely assessment training on the EAM System despite repeated efforts on the part of Maintenance Manager Rose to assist him in doing so. For this he received the first written warning on October 4. Garcia committed numerous breaches of the Respondent's policies and procedures, including insubordination, failure to respond to an "on-call" contact, and questionable machine repair efforts, which on their face appear to have resulted in lost production and significant replacement costs for the Respondent. For this he received the second written warning on October 5. These were not the actions of an employee who was interested in performing his job duties to the best of his ability. Such misconduct on the part of an employee, whether Garcia or any other maintenance technician, would likely have resulted in similar disciplinary action, even where the employee had engaged in no protected conduct.

Accordingly, based on the above, I conclude that the Respondent has met its burden of proof and established by a preponderance of the evidence that Garcia was issued the two written warnings on October 4 and 5, 2011, respectively, for cause. As such, the Respondent has rebutted the General Counsel's prima facie case and shown that it would have disciplined Garcia even in the absence of his having engaged in

protected conduct. Therefore, I shall recommend to the Board that complaint paragraphs 5(k) and (l) be dismissed.

### *C. Union Activity*

It appears that the concerted activity engaged in by certain of the Respondent's employees eventually progressed into union activity. Many of the Respondent's employees remained dissatisfied with their working conditions and felt that management was unresponsive to their concerns.

On November 1, 2011, the Union filed a petition for an election with the Region. (GC Exh. 1(e).) On November 7, 2011, a Stipulated Election Agreement was executed by the parties and approved by the Regional Director. (Emp. Exh. 4.) That agreement provided for an election among the following unit of the Respondent's employees:

Included: All full time and regular part-time production workers including machine operators, sanitation, and packaging employees employed by the Employer at its facility in Tolleson, Arizona.

Excluded: All other employees including maintenance mechanics, shipping and receiving employees, quality control employees, office clericals, managers, guards, and supervisors as defined in the Act.

Following the Respondent's notice that a representation petition had been filed, it hired a union-avoidance consulting firm, LRI Consulting Services (LRI). The Respondent entered into a contract with LRI on November 8, 2011. (GC Exh. 4.) Under the terms of the contract, LRI agrees to provide "expert campaign consulting with an on-site facilitator to communicate your message directly to employees in employee meetings and one-on-one." (GC Exh. 4, p. 1 of the attached proposal.) One of the three stated objectives in the contract is for the Respondent to "win the NLRB election by as wide a margin as possible or achieve a withdrawal of the petition, without meritorious election objections or unfair labor practice charges." (GC Exh. 4.) LRI dispatched Armando Talancon to the Tolleson plant soon after the contract was signed to serve as the on-site facilitator.

Under the terms of the contract, LRI's fee is \$50,000 plus expenses for the first 15 days of work, and \$3000 for each day thereafter. However, under the contract the bulk of these sums are refundable should the Union be certified by the Board. (GC Exh. 4.)

Talancon arrived at the Tolleson facility on November 8, 2011, and remained at the plant until 2 days prior to the election, which was held on December 1. He speaks English and Spanish and was formerly employed by a different local of the United Food and Commercial Workers Union. Talancon testified that he has a contract with LRI, under which terms he is paid expenses and a \$50,000 fee for his work at the Respondent's facility. However, it is significant to note that according to Talancon, he is only paid the \$50,000 fee if the Union loses the election. If the Union wins the election, then he only gets his expenses, principally for travel, meals, and housing.<sup>11</sup>

<sup>11</sup> The \$50,000 sum is somewhat confusing as the LRI contract with the Respondent provides for the payment of a fee in that amount, and

Talancon testified at length at the hearing. Preliminarily, I would note that I did not find him to be a credible witness. He made some highly incredible statements at the hearing. Talancon testified that LRI did not tell him what they wanted him to do at the plant, and that he was not sent there to communicate the Respondent's message to their employees. He contends that he is a "consultant," sent to the facility merely to answer the questions employees ask about the election, and to explain the election process to them. He claimed that he had never seen the contract between LRI and Portola before the hearing, and despite the language of the contract promising that the "facilitator" will communicate the Employer's message to the employees, he testified that he did not communicate that message to the employees. He argued that the Employer was responsible for communicating its own message.

During examination by counsel for the General Counsel, Talancon seemed very uncomfortable, especially when testifying about his role in the election campaign. He struggled to make sense out of some really nonsensical contentions, and seemed frequently uncertain as to what answer to give to counsel's questions. His discomfort was somewhat surprising, considering his educational and professional background. He testified that he has attended law school, and has worked on labor relations issues, arbitrations, grievances, and contract negotiations at different times on both the union and the employer side. Frankly, I believe that his discomfort was the result of his being totally unable to reconcile his contention that he was merely at the plant to answer employee questions and to explain the election process, with the terms of LRI's contract with Portola, which terms provided that the facilitator would present the Employer's case to the employees, with the stated objective of defeating the Union in the election. As I have said, Talancon's testimony was simply incredible.

When he first arrived at the plant, Talancon held a meeting with management where he sought to discover "what the problems were, [and] what threw up a flag to their employees to seek to be represented by the UFCW." The Employer provided him with an office at the plant that he could use during his stay. Thereafter, Talancon spent much of his time at the facility between November 10 and 18 meeting with small groups of employees. Obviously, he was authorized by the Respondent to conduct these meetings, which were mandatory and held during worktime.

Human Resource Manager Chris McClanahan arranged a schedule for groups of three or four employees at a time to meet with Talancon in the plant conference room. McClanahan and/or Plant General Manager Tim Tyler came to the meetings to introduce Talancon. Typically, they would introduce Talancon as someone who had previously worked as a union organizer, and who had more knowledge than they did regarding the Union and the election process. The employees were told that the Employer had brought Talancon in to the facility to speak to them, and that he was there to inform the employees about the

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Talancon testified that his fee with LRI is for the same amount. Nevertheless, it is clear that the Respondent is only required to pay a fee to LRI if the Union loses the election, and, similarly, LRI is only required to pay a fee to Talancon if the Union is defeated.

Union and to answer any of their questions. At least one employee, Evangelina Villegas, testified that she was told that Talancon was there to speak for Portola. Following their introductions, Tyler and McClanahan would leave the meeting.

Talancon testified that following meetings with groups of employees, that he meet with management officials and advised them of the issues that employees were raising, principally that there was a lack of respect for employees, that the Employer seemed uninterested in their complaints, and that Supervisor Ray Buchanan was particularly unresponsive to their needs. During his testimony, Talancon admitted that he told employees that he “would let management know” of their complaints, so that “[management] could try to fix things if they could. . . .”

In its answer to the complaint, the Respondent denied that Talancon was an agent of the Respondent within the meaning of Section 2(13) of the Act. I find this denial frivolous. It is well established that the Board applies the common-law principles of agency when determining whether an individual is an agent of the employer. Additionally, as stated in the Act, when making a determination of agency, “the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”

Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp., Ltd.*, 315 NLRB 725 (1994); See generally *Great American Products*, 312 NLRB 962, 963 (1993); *Dentach Corp.*, 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988). The test is whether, under all the circumstances, the employees “would reasonably believe that the employee in question (the alleged agent) was reflecting company policy and speaking and acting for management.” *Waterbed World*, 286 NLRB 425, 426–427 (1987). This test is satisfied when the employee is held out as a conduit for transmitting information from management to other employees. *Cooper Industries*, 328 NLRB 145, 145 (1999). Obviously, the “agent” can also be an individual, other than an employee.

Typically, labor relations consultants or “facilitators” hired by an employer to convey its message to employees are considered to be agents of the employer, and, thus, statements made by them can be attributed to the employer. See *DHL Express, Inc.*, 355 NLRB 680, 698 (2010).

In the matter at hand, under the terms of the contract between the Employer and LRI, the facilitator, who is obviously Talancon, is expected to communicate the Employer’s message directly to employees in employee meetings and one-on-one. (GC Exh. 4.) Thus, he becomes an actual agent of the Respondent, appointed for the purpose of communicating on behalf of the Employer with its employees. Further, Talancon was invested with apparent authority as the Respondent, through Supervisors Tyler and McClanahan, brought him into meetings with small groups of employees, who were told that he had been brought to the plant by Portola so that he might answer their questions and explain the election process to them. The only logical conclusion that those employees could reach was that Talancon was representing the Employer and the interests of management. The Employer did nothing to refute that

impression. Therefore, the Employer was responsible for the actions and statements of its agent, Talancon. *Uniontown Hospital Assn.*, 277 NLRB 1298, 1299 (1985).

#### 1. The actions and statements of Armando Talancon

It is alleged in complaint paragraph 5(e)(1) that on about November 10, 2011, Talancon unlawfully solicited employee complaints and grievances, and promised the Respondent’s employees increased benefits and improved terms and conditions of employment if they rejected the Union as their collective-bargaining representative. Further, it is alleged in complaint paragraph 5(e)(2) that during the same period of time, Talancon threatened employees with discharge if they chose the Union as their collective-bargaining representative. Also, it is alleged in complaint paragraph 5(e)(3) that in that same period, Talancon threatened employees with unspecified reprisals if they selected the Union as their collective-bargaining representative. These threats and statements are alleged to have occurred during the numerous small group meetings that the Respondent arraigned for Talancon to have with employees between November 10 and 18, 2011.

Talancon spoke to these groups of employees in both English and Spanish, going back and forth between the two languages. Some of the employees to whom he spoke were proficient in only one language, with others being proficient in both. Five employees, Marta Magallon, Herlinda Cervantes, Evangelina Villegas, Paul Gaudet, and Maria Solano, testified at some length about their meetings with Talancon.<sup>12</sup> However, they did not all attend the same meetings.

As I previously stated, I found Talancon to be an incredible witness. His professed lack of knowledge about his role as a “facilitator” as set forth in the contract between LRI and the Respondent, and his contention that his role was that of educator, rather than a partisan attempting to secure the Union’s defeat in the election, defies credulity. Further, the contingent character of his fee, and that of LRI, being totally dependent upon the Union’s defeat in the election, makes Talancon potentially a highly biased witness. Obviously, he has a considerable monetary interest in the outcome of this hearing favoring the Respondent. That is to be contrasted with the employee witnesses who testified against the pecuniary interest of their Employer, and who placed their future with Portola at risk in doing so. The Board has frequently held that the testimony of such witnesses may be given special credence. For these reasons, as well as those expressed earlier in this decision, I will credit the testimony of employee witnesses over that of Talancon, whenever they are at variance.

Marta Magallon attended the same meeting as Paul Gaudet. Magallon speaks Spanish, Gaudet speaks English, and his job classification was not included in the unit sought to be represented by the Union. Magallon, somewhat inarticulately, recalls Talancon saying that “we could lose the benefits we have with Portola, that if Portola didn’t want to, they didn’t, they wouldn’t give us any benefits.” She also remembered Talancon

<sup>12</sup> Employee Alicia Martinez also spoke about her meeting with Talancon, but with very little detail. She testified that she could not remember much of what was said because of Talancon’s poor Spanish.

saying that management would “go and talk to us.” Magallon claims that Talancon mentioned the “attendance policy,” and she seems to be saying that Talancon was suggesting that the policy was something that the employees might be able to get management to “change.”

In his testimony, Gaudet remembered the meeting differently. He recalled the gist of the meeting as an explanation of the election process, and the use of secret ballots. Gaudet specifically denied that Talancon issued any threats, promises, or commands to vote a certain way. However, I did not find Gaudet to be a compelling witness. He seemed to have his testimony rehearsed and testified as if by rote.

I credit Magallon, whose testimony seemed genuine, and conclude that Talancon was telling the employees that they would lose benefits if the Union were successful in the election. Further, I conclude that Talancon was suggesting to the employees that in the case of the attendance policy, the Employer might be willing to make improvements. As I discredit Talancon, I do not believe that he was simply explaining the election process and collective-bargaining process to the employees. I find his self-serving statements very disingenuous.

Herlinda Cervantes attended a meeting with Talancon at which none of the other five testifying employees were present. She testified in a rather disjointed, broken manner, perhaps because of the use of a Spanish-language interpreter. At one point she appeared to be testifying as to what Talancon had said that the Respondent would do, if the Union won the election. She testified that he said that while “he didn’t know how the company [would] react, and that the company could treat us badly, for, do, to treat the employees badly that were in favor of the union because, and that we could be fired.” However, during cross-examination by counsel for the Respondent, Cervantes responded to a question as to whether Talancon had said anything about what could happen if the Union won the election, with an emphatic, “That we could be fired.”

I credit Cervantes, whose testimony is never directly challenged, except by Talancon’s discredited general denials. Therefore, I conclude that Talancon threatened employees with discharge if the Union were successful in the election.

Evangelina Villegas testified about a meeting she attended with Talancon, along with Maria Solano. According to Villegas, during the meeting, Talancon said that he had received many “complaints” from employees, and that “he was going to hand over all those notes to the managers,” so they would be aware of them. Further, he indicated that he had been taking such notes when employees voiced complaints. Villegas testified that during the meeting, Solano complained about not being respected by the supervisors, having too much work to perform, and of seeing employees cry because they were overworked. According to Villegas, Talancon replied that he would “tell that to all the bosses, to the managers, and he would see if they change things.”

Solano testified in a general way that Talancon “explained to us about the work, about the Union, and about Portola.” He talked about the election, and said that it was “no problem” however an employee decided to vote. Solano denied that Talancon made threats, or promises, or said that the Respondent would otherwise take any action on the basis of how employees

voted. However, she never addressed the specific claim of Villegas that Talancon said that he would take his notes of employee complaints to management, and see whether they were addressed. In this respect, Solano’s testimony does not rebut or dispute the testimony of Villegas. As noted, I do not accord Talancon’s discredited denials any weight. Accordingly, I credit Villegas’ testimony that Talancon said that he would take employee complaints to management for them to address.

Regarding the allegation in complaint paragraph 5(e)(1), I believe that the testimony of Marta Magallon and Evangelina Villegas establishes that the Respondent solicited employee complaints and grievances, and promised its employees increased benefits and improved terms and conditions of employment if they rejected the Union in the election. I found that Magallon credibly testified that at an employee meeting, Talancon told the assembled workers that management would talk with the employees and that something might be done to get an attendance policy they did not like changed. Further, I found that Villegas credibly testified that at a similar meeting, Talancon told the employees present that he had been taking notes of employee complaints, and that he was going to hand those notes over to Portola’s managers so that they would be aware of the complaints.

The Board has repeatedly held that, in the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizational campaign violates the Act when the employer promises to remedy those grievances. See, e.g., *Center Construction Co.*, 345 NLRB 729, 729–731 (2005), *enfd.* in part, *denied* in part 482 F.3d 425 (6th Cir. 2007); *Uarco, Inc.*, 216 NLRB 1, 2 (1974). The promise to remedy need not be specific or even explicit. *Grouse Mountain Associates II*, 333 NLRB 1322, 1324 (2001). Where an organizational campaign is ongoing, the solicitation of grievances creates a rebuttable presumption that the employer is going to remedy them. *Aladdin Gaming, LLC*, 345 NLRB 585, 607 (2005), citing *Maple Grove Health Center*, 330 NLRB 775, 775 (2000); *Center Construction Co.*, *supra*. This is especially true when an employer that has not previously had a practice of soliciting employee grievances suddenly initiates such a practice during an organizational campaign. *Amptech, Inc.*, 432 NLRB 1131, 1136–1138 (2004).

In the matter before me, there is no probative evidence that the Employer ever had a practice of soliciting employee complaints. To the contrary, the Employer has the reputation among its employees of being insensitive to employee complaints. Talancon’s statements during preelection meetings with employees were designed to cause employees to state their complaints or grievances, followed by a subtle notice that those complaints would be transmitted to management, with the implied suggestion or promise that those complaints would then be favorably adjusted by the Employer. The Respondent has offered no credible evidence to rebut this presumption.

Accordingly, I conclude that counsel for the General Counsel has met her burden and established that the Respondent interfered with, restrained, or coerced employees in the exercise of their rights guaranteed by Section 7 of the Act, through the conduct of Talancon as alleged in complaint paragraph 5(e)(1).

Such conduct constitutes a violation of Section 8(a)(1) of the Act.

Regarding the allegation in complaint paragraph 5(e)(2), I believe that the testimony of Herlinda Cervantes establishes that Talancon threatened employees with discharge for supporting the Union. I have found that Cervantes credibly testified that at a preelection meeting for employees, Talancon informed the assemble employees that if the Union won the election, the Employer might treat them badly, even firing them.

Of course, it is axiomatic that an employer violates Section 8(a)(1) of the Act when it threatens to discharge or take other adverse employment action against employees for supporting a union. Such conduct clearly serves to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Accordingly, counsel for the General Counsel has established that the Respondent, through Talancon, has violated the Act, as alleged in complaint paragraph 5(e)(2).

Regarding the allegation in complaint paragraph 5(e)(3), I believe that the testimony of Marta Magallon establishes that Talancon threatened employees with unspecified reprisals if they chose the Union as their collective-bargaining representative. I have found that Magallon credibly testified that at a preelection meeting for employees, Talancon informed assembled employees that if the Union won the election, the employees might lose benefits. While not specifying what benefits he was talking about, and without making his statement contingent on the vagaries of collective-bargaining, Talancon was simply threatening employees that a union victory might result in a loss of benefits.

Once again, it is axiomatic that an employer violates Section 8(a)(1) of the Act when it threatens to withhold benefits from employees for supporting a union. Such conduct clearly serves to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Accordingly, counsel for the General Counsel has established that the Respondent, through Talancon, has violated the Act, as alleged in complaint paragraph 5(e)(3).

## 2. The actions and statements of Ray Buchanan

The General Counsel alleges in complaint paragraph 5(f)(1) that on about November 16, 2011, Supervisor Ray Buchanan interrogated employees about their union and concerted activities. Further, it is alleged in complaint paragraph 5(f)(2) that during the same period of time, Buchanan created an impression among the employees that their union and other concerted activities were under surveillance by the Respondent. Also, it is alleged in complaint paragraph 5(f)(3) that during that same period, Buchanan threatened employees with unspecified reprisals by not assisting them because they engaged in union and other concerted activity.<sup>13</sup> These three allegations arise out of a single conversation between Herlinda Cervantes and her supervisor, Ray Buchanan, in the lunchroom of the plant on November 16, 2011.

According to the testimony of Cervantes, she was present in the lunchroom with Buchanan and another employee, Daisy, whose last name she cannot recall. Daisy is a production team

member, as is Cervantes. Cervantes testified that she approached Buchanan and told him that he should help an employee by the name of Jorge Mendez, who she said had too much work to perform. Further, she testified that Buchanan replied that he would not help Mendez because “he knows that [Mendez] was in the Union.” Allegedly, Buchanan then asked Cervantes if she knew that Mendez was in the Union, to which she replied that she did not know. Cervantes testified that Buchanan next asked her whether she had “signed a card for the Union.” She told him that she had not, to which he asked her if she was sure. This time she did not answer his question.

Cervantes testified that next she asked Buchanan a question, namely whether he had been in a union before. He replied that he had been in a union in the past, but “it was no good.” Buchanan followed up with a question to Cervantes, asking her whether she had been in a union before. Cervantes replied that she had previously been in a union, 15–18 years in the past. She added that currently she was still receiving money from that union. According to Cervantes, Buchanan said that he could not believe that.

Cervantes testified that Buchanan then asked Daisy “what she thought about unions,” to which Daisy said that she did not know. Cervantes next told Buchanan that she needed to go back to work, as her time was up. She left the room, which ended the conversation.

As one would expect, Buchanan’s version of this conversation was somewhat different. He recalled the conversation in the lunch room, and also remembered the other employee present was Daisy Malabo, another production team member. Buchanan testified that Cervantes started the conversation, asking him for his “opinion, about the Union coming into the Portola plant.” He responded that in his opinion, “[T]he Union coming into the Portola plant is a very big mistake.” She asked him why, to which he replied that based on his past experiences, if the Union came into the plant, the supervisors would no longer be able to help the production team members on the plant floor, as they did currently. After prompting by counsel for the Respondent, Buchanan testified that he told Cervantes that his past experience consisted of working at Ford Motor Company where the UAW represented the employees, and where supervisors were not allowed to assist the production employees on the plant floor. He claims that he told Cervantes that his “fear” was not being allowed to assist the production team members as he currently did. Cervantes replied that she did not believe that to be true, and that was the end of the conversation.

Buchanan testified that he did not speak with Daisy during this conversation, and Daisy said nothing, simply sitting and eating her lunch. Unfortunately, Daisy was not called as a witness by any party to this proceeding.

Obviously, Buchanan and Cervantes differ significantly regarding the substance of this conversation. This is not an easy matter to resolve, as both witnesses testified in a direct and forceful way. However, on the whole, I was more impressed with Cervantes. Her testimony was reassuringly detailed. Overall it also seemed more logical and likely than that told by Buchanan. His contention that he told Cervantes about having previously worked for Ford Motor Company sounded a bit

<sup>13</sup> This unfair labor practice allegation is also the subject of the Union’s Objection 3 to conduct affecting the results of the election.

contrived and self-serving. Further, as I have mentioned several times in this decision, the Board tends to give added weight to the testimony of current employees of a respondent, such as Cervantes, who are testifying against their employer's interests, to the potential detriment of themselves. It is appropriate to assume that such employees wish to keep their jobs, and, therefore, only testify against the interests of their employer because telling the truth requires them to do so. See *Samaritan Medical Center*, supra; *Hi-Tech Cable Corp.*, supra; *Georgia Rug Mills*, supra; *Gold Standard Enterprises*, supra; *D & H Mfg. Co.*, supra. It was certainly easier for Buchanan to testify in favor of the Respondent than it was for Cervantes to testify against her employer's interests. Therefore, I credit Cervantes' version of her conversation with Buchanan.

Buchanan was engaged in an illegal interrogation, creating an impression of surveillance, as well as a threat to not assist employees due to their union activity. The conversation began with Cervantes making a legitimate work-related remark to Buchanan, namely that he should help employee Jorge Mendez, as Mendez had too much work to do. Buchanan replied by saying that he would not help Mendez because Mendez was in the Union. This statement constitutes an unlawful implied threat to discriminate against Mendez by refusing to help him due to his union activity. See *Evergreen America Corp.*, 348 NLRB 178, 202–203 (2006) (telling known union proponent, “Why did you lead this campaign? Now I can’t help you anymore” was implied threat of reprisal). Buchanan’s threat constituted a violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(f)(3).<sup>14</sup>

Further, when Buchanan asked Cervantes if she knew whether Mendez was in the Union and asked her whether she had signed a union authorization card, he was engaged in unlawful interrogation. The Board looks to the “totality of the circumstances” in determining whether a supervisor’s questions to an employee about suspected protected activity were coercive under the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Westwood Health Care Center*, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as “*Bourne factors*,” so named because they were first set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). These factors include the background of the parties’ relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply.

In the matter at hand, Buchanan was Cervantes’ immediate supervisor, and he questioned her in the lunchroom in the presence of one other employee, also a subordinate of Buchanan. The information sought was highly confidential and privileged, namely whether Mendez was “in the Union,” and whether Cer-

vantes had “signed a union authorization card.” Cervantes was clearly surprised and frightened by the question, telling Buchanan that she did not know whether Mendez was in the Union or not, and denying that she had signed a union card. She was obviously unwilling to tell him that she was a union supporter, even after he asked her a second time. Under the *Bourne factors*, Buchanan’s interrogation of Cervantes was clearly coercive.

Based on the above, I conclude that Buchanan unlawfully interrogated Cervantes. His questions served to interfere with, restrain, or coerce Cervantes in the exercise of her Section 7 activity. Accordingly, I find that the Respondent, through Buchanan, violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(f)(1).

Buchanan also created an impression among employees that their union and other concerted activities were under surveillance by the Respondent. In his conversation with Cervantes, Buchanan made the statement that Mendez was in the Union, as if that was a fact that he knew. Also, when Cervantes denied that she had signed a union card, Buchanan asked her if she was “sure,” as if he had some knowledge of what she had done. These statements by Buchanan could reasonably have left Cervantes, and Daisy who was also present, with the impression that the Respondent was somehow aware of the union activity engaged in by its employees.

It is well established that where employees are conducting their activities openly on or near company premises, the open observation of such activities by an employer is not unlawful. *Roadway Package System*, 302 NLRB 961 (1991). On the other hand, the Board has consistently held that “[e]mployees should not have to fear that ‘members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.’” *Conley Trucking*, 349 NLRB 308, 314 (2007), quoting *Fred’k Wallace & Son, Inc.*, 331 NLRB 914 (2000).

There is no indication that Mendez and Cervantes were engaged in union activity in an open manner, or, for that matter, in any way. Nevertheless, Buchanan’s statements would reasonably leave employees with the impression that the Respondent, through Buchanan, was somehow aware of what they were doing. This would logically cause employees to suspect that the Respondent was watching their movements and actions, even when those activities were conducted in private.

Buchanan’s statements would tend to interfere with, restrain, or coerce employees who wished to exercise their Section 7 rights. Accordingly, I conclude that the Respondent, through Buchanan, has violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(f)(2).

### 3. The vote “no” letter

Complaint paragraph 5(g) alleges that in mid-November 2011, Tim Tyler, by letter, threatened employees with unspecified reprisals by demanding that they vote “no” in the upcoming representation election. As was noted above, an election was scheduled for December 1, 2011, in Case 28–RC–067973, for a unit of the Respondent’s employees. The Respondent had been engaged in a vigorous campaign to defeat the Union almost since the petition was filed on November 1. As was dis-

<sup>14</sup> Whether Buchanan’s implied threat is construed as a threat of an unspecified reprisal, as set forth in the complaint, or an implied threat specifically to withhold assistance to employees, the result is the same. In either case, the Respondent, through Buchanan, has violated the Act by threatening to discriminate against employees because of their union activity.

cussed earlier, the Respondent contracting with LRI to conduct much of that campaign, pursuant to which Armando Talancon held meetings with small groups of employees. Additionally, numerous flyers and letters were produced by the Employer and distributed to employees, some were posted at the plant, others were handed to employees, and still others were mailed to employees' homes. These flyers and letters were clearly intended to cause the employees to vote in the election against union representation. Many of the flyers and letters were signed by the plant general manager, Tim Tyler.

While there is some dispute about this issue, I have concluded, as testified to by the Respondent's witnesses, that each flyer or letter was two sided, with the text written in the English language on one side, and the Spanish-language text on the other side. The English-language text was translated into Spanish by Chris McClanahan, who is fluent in Spanish, and/or by Armando Talancon, who is conversant in Spanish, but not fluent. I have concluded that those Spanish-speaking employee witnesses called by the General Counsel, who testified that they received election related documents from the Employer, were mistaken when they testified that some of those documents only contained a Spanish-language text. I am of the view that as they were only fluent in Spanish, they paid no attention to the English-language text, and, therefore, have simply forgotten that the documents contained two languages.

The document at issue herein was undated, but the testimony of various witnesses establish that it was issued about 2 weeks prior to the election. This document is a letter signed by Tim Tyler, addressed individually to each specific employee in the proposed bargaining unit, and mailed, respectively, to each employee's home address. There were two versions of the letter entered into evidence, the Spanish-language version (GG Exh. 5) and the English-language version (Emp. Exh. 5). Tyler testified that he wrote the letter in English, and Armando Talancon testified that he translated the letter into Spanish. Talancon testified that his Spanish is "not that great."

As I have indicated above, I conclude that his letter, as with all preelection documents produced by the Respondent, was two sided, with English on one side and Spanish on the other. The Spanish-language version of the letter is the subject of this unfair labor practice allegation.<sup>15</sup>

For the most part, the letter consists of standard campaign talking points for an employer, such as an admonition to beware of union promises, and with a discussion of the uncertainties of the collective-bargaining process. However, it is the last sentence in the Spanish-language text that is the subject of this allegation. The same sentence in the English-language text, which reads as follows, is not in dispute: "I urge you to vote NO on December 1."

The Spanish-language text of the last sentence of the letter is: "Te *exijo* que votas NO en Diciembre 1, 2011." The General Counsel and the Union contend that the Spanish sentence should be translated as, "I demand that you vote NO on December 1, 2011." The key phrase is "*te exige*." However, according to the Employer, the Spanish verb "*exigir*" should be

translated as "urge" or "exhort," rather than "demand," making the sentence in dispute read: "I urge that you vote NO on December 1, 2011."

At the hearing, much testimony and evidence was taken regarding the meaning of the Spanish verb "*exigir*." I asked the Spanish-language interpreter during the hearing to translate the sentence in question using "common, everyday Spanish as used by Spanish speakers in the State of Arizona." The interpreter translated the sentence as follows: "I *demand* that you vote no on December 1, 2011." However, when interpreting the testimony of both Marta Magallon and Evangelina Villegas, two Spanish-speaking employees, as to their understanding of the sentence, the same interpreter used the word to "*exhort*," rather than to "demand." When the interpreter was asked as to why the discrepancy, she responded as follows: "I believe when translating or interpreting the spoken word, sometimes the speaker's inflection may alter the slight nuance of the word, which is why I chose exhort. In the written word, I have just what it says, but in the spoken word there is always that nuance that can be picked up and that's why I chose, which essentially the words mean the same things, one's a little degree more assertive than the other and I picked that up from the speaker's inflection." She went on to say, "Actually here, which is the word to demand, could be anything from demand, to ask, to exhort, to require, so there is many different meanings."

Both Magallon and Villegas testified that they were frightened after receiving the letter from Tyler, believing that they could be fired if they voted for the Union. They said that they felt they were being told to vote against the Union, and they shared their fear with other employees.

Finally, a number of pages from Spanish/English dictionaries were admitted into evidence. The *McGraw-Hill Spanish and English Legal Dictionary* gives the definition of "*exigir*" as, "To demand, command, order, require." (GC Exh. 8.) *Webster's New World Concise Spanish Dictionary* gives the definition of "*exigir*" as, "to demand" or "to call for, to require." (GC Exh. 9.)

Talancon admitted that his Spanish was weak. Regarding this particular translation, which he drafted, he testified, "It was kind of simple. It is elementary translation. It is not that great." Nevertheless, he said that he believed that "*exigir*" meant urge or exhort.

Based on the evidence presented, I am convinced that the word "*exigir*," as used in the Spanish-language letter expressed a command and that "demand" is a better translation than "urge" or "exhort." While I recognize that the word "*exigir*" may have shades of meaning in Spanish corresponding to the range identified by the interpreter, I believe that the use of the word in the letter fell within the forceful, commanding end of that spectrum. The pages from the two Spanish/English dictionaries admitted into evidence translate the word as "demand" and do not even mention the more gentle senses described by the interpreter. This indicates to me that the imperative sense is predominant. Further, the interpreter gave the common, regional translation as "demand." Aside from being good evidence of what the word means to the Tolleson plant employees, there is no disparity between the dictionary definition and local usage. Finally, the commanding sense is consistent with the

<sup>15</sup> This dispute is also the subject of the Union's Objection 1 to conduct affecting the results of the election.

reaction of the employees reported by Magallon and Villegas. The words “I demand” used by a boss inspire fear in a way that the words “I urge” or “I exhort” do not.

I am of the view that the Spanish-language letter sent to Spanish-speaking employees, of which there were approximately 30, in mid-November 2011, threatened those employees with unspecified reprisals by “demanding” that they vote “no” in the election. This demand, made in the name of the general manager of the facility, reasonably had a tendency to coerce employees into voting against the Union based on their fear of the consequences of defying Tyler’s demand. In the context of the workplace, employees naturally take any demand made by a manager or supervisor very seriously. Here, that is evidenced by the fear and concern that Tyler’s demand instilled in Magallon, Villegas, and other employees they spoke with about the letter.

A threat need not be explicit to violate the Act. In *Martech MDI*, 331 NLRB 487, 500 (2000), the employer’s order to “knock it off” regarding union sympathies was found to contain an implied threat in violation of Section 8(a)(1) of the Act. Further, the threat need not specify the reprisal that will be taken against the employees. In *Valleydale Packers, Inc.*, 238 NLRB 1340, 1343 (1978), the Board held that the employer’s warning that an employee “had better leave it [the Union] alone,” constituted an implicit threat to the employee, although the exact reprisal against the employee that was implied in the threat was not spelled out.

It is immaterial what Tyler’s intent was, or what the English-language version of the letter said. What matters is whether Talancon’s Spanish translation of the letter had a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. I believe that it did. Accordingly, I conclude that Tyler’s letter mailed to employees in mid-November 2011, violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(g).

#### 4. The actions and statements of Fabian Franco

Complaint paragraphs 5(h)(1), (2), and (3) allege that in about mid-November 2011, the Respondent, through Production Supervisor Fabian Franco, interrogated employees about their union and other concerted activities; threatened employees with reduced benefits if the Union was selected as the employees’ collective-bargaining representative; and threatened its employees with unspecified reprisals because they engaged in union and other concerted activities. In support of these allegations, counsel for the General Counsel offered the testimony of employee Evangelina Villegas.

According to the testimony of Villegas, approximately 3 weeks before the election, she was in the production room with her shift supervisor, Franco. The two were alone and she was working when Franco asked her, “What do you think about the Union?” Villegas testified that she responded that she had never previously worked with a union. She contends that Franco answered, “The Union wasn’t good because it would take away benefits, we’d get paid less, and would take away our vacations.” After hearing that, Villegas asked Franco, “If the Union’s not good and they’re gonna take away our benefits, and they are going to pay us less, wouldn’t that benefit the compa-

ny?” Allegedly, Franco responded that, “Portola had the money, not the Union.” According to Villegas, the conversation ended with Franco saying that if she had any other questions about the Union, she should seek him out and ask. On cross-examination, Villegas denied that Franco’s statements were made in the context of explanations of the bargaining process, or Franco’s personal experience as a union member or supervisor in an organized facility.

While some of her testimony was a little obtuse, I think it is obvious that what Villegas was contending that Franco said was that if the Union won the election, the Respondent would respond and retaliate by reducing wages and benefits. Nothing else could have been reasonably intended when Franco added that the Employer had the money, not the Union. In this context, “money” meant “power.”

Franco testified that in the month preceding the election, he had only one conversation with Villegas about the Union or the election. This conversation occurred a few days before the election and was very brief. According to Franco, he simply reminded Villegas to vote in the election, and said to her that it was none of his business how she voted. He categorically denied making threats or promises to employees or asking employees about their thoughts and feelings regarding the Union.

It is not possible to reconcile the two versions of the conversation told by Villegas and Franco. One of them is not telling the truth. Counsel for the Respondent argues that Franco should be credited as he is no longer employed by Portola, having voluntarily resigned to relocate to a cooler climate, and, therefore, as a disinterested witness, had no reason to fabricate. See, e.g., *Vegas Village Shopping Corp.*, 229 NLRB 279, 282–283 (1977); *Yaohan of California*, 280 NLRB 268, 278 (1986); *W. R. Grace Co.*, 240 NLRB 813, 820 (1979). On the other hand, the General Counsel contends that Villegas should be credited as she is a current employee who is willing to testify against her employer’s interests, potentially jeopardizing her job, which allegedly demonstrates her willingness to tell the truth. Both arguments are logical and have some merit.

However, I credit the testimony of Villegas. I view her story as too detailed and specific to be purely a product of her own imagination. Further, for the most part, she held to her account on cross-examination. Franco does not acknowledge that the main substance of the conversation even took place. In my view, this is more improbable than Villegas’ testimony about the content of the conversation. The context in which Villegas contends the conversation occurred seems logical and has the ring of authenticity to it. Accordingly, I will credit Villegas’ version of the conversation.

In asking Villegas what she thought of the Union, Franco was engaged in unlawful interrogation. Looking at the “totality of the circumstances” as set forth in *Rossmore House*, supra, and the *Bourne factors*, as found in *Bourne v. NLRB*, supra, I find that Franco’s question was coercive. Franco and Villegas were alone on the production floor, Franco was Villegas’ immediate supervisor, the question of what she thought about the Union was highly intrusive, and Villegas, who was a union supporter, was clearly afraid to be honest with Franco and tell him the truth. Under these circumstances, Franco’s question would reasonably have had the affect of chilling Villegas’ in-

terest in engaging in union activity. As such, it constituted a violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(h)(1).

Further, Franco continued to violate the Act during the conversation when he stated that the Union was no good and, implying that if the Union won the election, employees would lose benefits, that employees would be paid less, and that they would lose their vacations. This was coupled with Franco's statement that it was the Employer who had the money, not the Union. There was nothing said about the vagaries of collective bargaining or about the bargaining process in general, merely the implication that if the Union won the election, some bad things would happen, and that the Employer held the economic power. What this reasonably said to Villegas was that if the Union won the election, the Employer would retaliate by reducing wages and benefits. As such, it constituted a not very subtle threat by the Respondent, through Franco, to reduce benefits and wages if the Union was selected as the collective-bargaining representative. Certainly such a threat would tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. This constitutes a violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(h)(2).

The General Counsel alleges in complaint paragraph 5(h)(3) that during this same conversation between Villegas and Franco, that Franco threatened her with unspecified reprisals because the employees engaged in union and other concerted activity. However, I have no idea what facts allegedly support the General Counsel's contention. To the extent that Franco made threats to Villages, it was to reduce wages and benefits, which I have just discussed. This was a specific threat of a reprisal, not an unspecified threat. If anything, this allegation is simply a repetition of the earlier allegation. As such, it is duplicative. Therefore, I shall recommend to the Board that complaint paragraph 5(h)(3) be dismissed.

The General Counsel alleges in complaint paragraph 5(i) that in about mid-November 2011, the Respondent, by Franco, solicited employee complaints and grievances, and promised its employees increased benefits and improved terms and conditions of employment if they rejected the Union as their collective-bargaining representative. In support of this allegation, counsel for the General Counsel offers the testimony of Evangelina Villegas, who testified that in the month of November, the employees on her shift started having to attend meetings with Supervisor Franco towards the end of each shift. According to Villegas, Franco said that the reason for these meetings was to "talk about the problems with the machines," and also so that "we would get more attention from our employers."

Tim DeCrow testified about "production meetings" with employees that started in October 2011. However, on cross-examination by counsel for the General Counsel, he admitted that these meetings actually started in November 2011, as was reflected in an affidavit that he had previously given to the Region. Under cross-examination, DeCrow admitted that these meetings were also used for training, to discuss safety issues, and to talk about the upcoming union election. Beginning in November, these meetings were held on every shift, which amounted to three meetings with employees every day.

In any event, in my view, counsel for the General Counsel has failed to offer sufficient evidence to support a violation of the Act regarding the allegation that starting in November the Respondent solicited employee complaints and grievances, and promised its employees increased benefits and improved terms and conditions of employment if they rejected the Union. In her posthearing brief, counsel stated that "witness after witness, including DeCrow and Franco, testified that the meetings began in November." But, the only employee witness whose testimony is referenced by counsel is Villegas. Further, nothing in the testimony of Villegas, DeCrow, or Franco indicates that grievances or complaints were solicited at these meetings and that promises were made to remedy complaints. Villegas' testimony regarding these meetings was confusing, somewhat incomprehensible, vague, and without substance. Her statement that Franco said, "[W]e would get more attention from our employers," makes no sense to me. I have no idea what Villegas was trying to say, and counsel failed to clarify it with further questioning.

Accordingly, as the General Counsel has failed to meet her burden of proof and support this allegation by a preponderance of the evidence, or by any other standard of proof, I shall recommend to the Board that complaint paragraph 5(i) be dismissed.

#### 5. Tim DeCrow's preelection statements

Complaint paragraph 5(j) alleges that in late November 2011, the Respondent, by Tim DeCrow, threatened employees with unspecified reprisals, if they selected the Union as their collective-bargaining representative. According to the testimony of employee Marta Magallon, at the end of a shift meeting, with Supervisor Fabian Franco present, Production Manager DeCrow addressed the employees on her shift. Allegedly, referring to the soon to be held election, DeCrow said that "he couldn't tell us whether to vote yes or no, but to vote, keeping in mind the wellbeing of our families." DeCrow spoke in English, with Franco translating his words into Spanish. Magallon testified that as they left the plant, employees talked about DeCrow's words, and that they were scared about losing their jobs, and wondered how they would feed their families. This was the only evidence offered by counsel for the General Counsel in support of this allegation.

Two other employees testified about the end of the shift meeting where DeCrow spoke. According to Herlinda Cervantes, in referring to the election, DeCrow told the assembled employees that "we were all big and [that] was a decision we were going to have to make." By the word decision, Cervantes indicated that she understood it meant to vote "yes or no." Evangelina Villegas testified that she attended the meeting where DeCrow spoke. According to Villegas, DeCrow said that "he could not tell us who to vote for, but just to keep in mind that we should vote for the [party] who could help us the most and who would help our families."

The day before the 24-hour period preceding the election, DeCrow attended an end of shift meeting. According to his testimony, regarding the election, he told the employees that they had all "been friends for a long time, . . . [and they should] remember their relationships with each other." Further, he told

them that they “would have [their] own situations, [their] own decisions to make, and each one of us has to make our vote based on what is best for us, and what is best for our families.”

In fact, there is really not much of a difference between what Magallon, Cervantes, Villegas, or DeCrow claim was said by DeCrow at the meeting in question. Even accepting Magallon’s testimony as accurate, all she claims that DeCrow said was that in voting, “to keep in mind the wellbeing of [their] families.” I see nothing improper in that statement. It is not a threat of any reprisal, unspecified or otherwise. A representation election was a big event at the plant. Collective bargaining would, of course, potentially affect the wages, hours, and working conditions of the employees, and collaterally of their families. I fail to see how reminding the employees of the importance of the election to themselves and their families could constitute a threat of reprisal. For Magallon or other employees to have reached the conclusion that DeCrow’s statement was a threat of reprisal against them if they voted in favor of the Union or if the Union won the election was, in my view, unreasonable.

Further, there is ample Board case authority for the proposition that DeCrow’s statement that employees should vote in their own best interests, or those of their families, does not constitute a violation of the Act. See, e.g., *Goldtex, Inc.*, 309 NLRB 158, 163 (1991) (statement to employee “that it would be in his best interest to vote no, that the Union could not do anything but charge dues,” was not coercive.), enfd. mem. 16 F.3d 409 (4th Cir. 1994); *Liberty Mutual Insurance Co.*, 194 NLRB 1043, 1044–1046 (1972) (memo to employees stating that selecting a union “would not be to your best interest and, in fact, could deter and hamper your personal relation with your Company” is at most an argument containing no threat or warning).

In *Werthan Packaging, Inc.*, 345 NLRB 343, 344 (2005), the Board ruled that the employer’s statement that it was in employees’ and their families’ best interest to vote “no” was not threatening. “An employer’s telling an employee that it would be in that person’s or family’s ‘best interest’ to vote against the union, unaccompanied by threats, is too vague to warrant a finding that the employer was threatening the employee.” Id. “At most, [the employer] was expressing her opinion that [the employee and his] family did not need the Union.” Id. The employer “was free to express the view that unionization would not be in the best interests of the employees and their families.” Id.

The *Werthan* case is directly on point. DeCrow’s statements at the shift meeting did not interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Those statements did not constitute a threat of reprisal for voting in favor of the Union or for engaging in other union activity. He merely advised employees that their vote was theirs to make, and he lawfully stressed the importance of their vote by urging them to consider their own best interests and those of their families. DeCrow’s statements were permissible under Section 8(c) of the Act. Accordingly, I shall recommend to the Board that complaint paragraph 5(j) be dismissed.

## 6. Employee handbook

The General Counsel alleges in paragraph 5(m)(1) of the complaint, as set forth in the Motion to Amend the Complaint (GC Exh. 2), that since about April 21, 2011, the Respondent has maintained the following overly-broad and discriminatory rule in its employee handbook, dated January 1, 2011: “Section 1008; Corrective Actions: The following behaviors are also prohibited: Violations may result in corrective action up to and including immediate termination: 20. Failure to obtain permission to leave work, or your workstation, for any reason during normal working time.” (GC Exh. 3.) The Respondent denies that this provision is in any way unlawful.

In determining whether the existence of specific work rules violate Section 8(a)(1) of the Act, the Board has held that “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Further, where the rules are likely to have a chilling effect on Section 7 rights, “the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.” Id. See also *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976).

The Board has further refined the above standard in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), by creating a two-step inquiry for determining whether the maintenance of a rule violates the Act. First, if the rule expressly restricts Section 7 activity, it is clearly unlawful. If the rule does not, it will nonetheless violate the Act upon a showing that: “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” Id. at 647; See *Northwestern Land Services, Ltd.*, 352 NLRB 744 (2009) (applying the Board’s standard in *Lutheran Heritage Village-Livonia*, supra at 647).

On the issue before me, counsel for the Respondent has correctly recited the current state of the law in his posthearing brief, and has convincingly established that the provision in question is not unlawful. As counsel points out, the provision prohibits the “failure to obtain permission to leave work, or your workstation, for any reason during normal *working time*.” (Emphasis added by me.) The term “working time” is critical to this analysis. In the Respondent’s handbook, the term “working time” is specifically defined as “the period of time scheduled for the performance of job duties, not including meal times, break times or other periods when employees are properly not engaged in performing their work duties.” (GC Exh. 3, p. 51, sec. 1104.)

As counsel points out, in an industrial environment, such as Portola, where equipment is continuously running and production requires constant attention, promoting employees’ presence at their workstations during working time is critically important. Again, the prohibition only involves leaving the workstation without permission during normal “working time.” It is a well worn and established maxim that “work time is for work.” *Ling Products Co.*, 212 NLRB 152, 156 (1974). It is highly unlikely that employees will misconstrue the term “working time” to include lunch and breaktimes, which times

are typically encompassed and differentiated by the term “working hours.”

Further, there is no reasonable basis for inferring a restriction on Section 7 activity as a result of the rule. As the rule in question does not refer to Section 7 activity, the Board will not normally conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. *Lutheran Heritage Village*, 343 NLRB at 646. See *Palms Hotel & Casino*, 344 NLRB 1363, 1367 (2005) (“in determining whether a challenged rule is unlawful, the rule must be given a reasonable reading, phrases should not be read in isolation, and improper interference with employees’ right is not to be presumed.”).

A very similar rule as that before me was approved by the Board recently in *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1818 (2011). In that case, the ALJ found a rule over-broad that prohibited “[l]eaving a department or the plant during a working shift without a supervisor’s permission,” and “[s]topping work before the shift ends or taking unauthorized breaks.” The Board disagreed and reversed, applying the standard used in *Lutheran Heritage Village*. In its analysis, the Board first found that the rule did not explicitly restrict Section 7 activities, as it “only prevent[ed] an employee from taking unauthorized leaves or breaks and does not expressly restrict concerted action by employee.” Further, the Board concluded that an employee reading the rule would not reasonably construe it to prohibit conduct protected by Section 7.

In analyzing the rule in the *2 Sisters* case, the Board distinguished *Labor Ready, Inc.*, 331 NLRB 1656, 1656 fn. 2 (2000), in which it held that a rule prohibiting “walk[ing] off” the job was unlawfully overbroad because employees reasonably would understand such a rule to prohibit the restriction on “walking off” as synonymous with striking. The rule involved in *2 Sisters*, as with the similar rule at issue before me, prohibited only leaving a department or the employer’s plant without permission, stopping work before a shift ends, or talking unauthorized breaks. As such, it should not confuse employees or reasonably lead them to believe that their right to engage in Section 7 activity is being limited in any way.

I believe that *2 Sisters* is controlling on this issue and represents the current state of Board law. Therefore, I find nothing unlawful, overly-broad, or discriminatory regarding the rule in question. Accordingly, I shall recommend to the Board that paragraph 5(m)(1), as set forth in the Motion to Amend Complaint (GC Exh. 2) be dismissed.

Paragraph 5(m)(2) of the complaint, as set forth in the Motion to Amend Complaint (GC Exh. 2), alleges that since about April 21, 2011, the Respondent has maintained an overly-broad and discriminatory rule in its employee handbook, dated January 1, 2011, which reads as follows: “(2) Section 1404: Media Relations: Policy Statement—Employees should not provide any information regarding the Company to the media (e.g. television, radio and newspaper). All requests for information from the media regarding any aspect of Portola must be referred to the Chief Financial Officer or President. All press releases, publications, articles and any other documents for release to the media must be approved in advance by the Chief

Financial Officer.” The Respondent denies that this provision is in any way unlawful.

I am of the view that the rule in question is on its face overly-broad and, thus, unlawful. A rule that limits the ability of employees to discuss work-related issues with the media constitutes an unlawful restriction on employees who wish to engage in concerted activity with others, in this case through the media. See, e.g., *Crown Plaza Hotel*, 352 NLRB 382, 386 (2008) (media policy prohibiting employees from commenting on “any incident” unlawful where not restricted to when media seeks the employer’s “official comments”); *Leather Center, Inc.*, 312 NLRB 521, 525, 528 (1993) (Board adopts ALJ finding that a handbook provision allowing only a company officer to comment to the media, and requiring all media contacts be referred to a company official a violation).

Certainly one can imagine a situation where employees who are unhappy with their wages, hours, or terms and conditions of employment maybe interested in bringing their complaints to the attention of the local press, with the hope that adverse publicity, as reported in the press, may serve to embarrass the employer, and, thus, exert enough pressure to motivate the employer to improve working conditions. This is the essence of concerted activity, and, as protected conduct, cannot be abridged.

Counsel for the Respondent’s statement in his posthearing brief that “nowhere” does the policy purport to restrict employees from communicating to the media about matters of concern to them, and does not restrict the expression of views about employment conditions,” ignores a reasonable reading of that policy. The Board has held that “[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.” *Double D Construction Group, Inc.*, 339 NLRB 303, 304 (2003). In any event, even if the rule is ambiguous, any ambiguity in a work rule that may restrict protected concerted conduct “must be construed against the [employer] as the promulgator of the rule.” *Ark Las Vegas Restaurant Corp.*, 343 NLRB 1281, 1282 (2004) (an ambiguity in a “no-loitering” rule construed against the employer). See also *Norris/O’Bannon*, 307 NLRB 1236, 1245 (1992).

I conclude that a plain and reasonable reading of the rule in question would serve to chill employees’ interest in engaging in lawful concerted activity by alerting the press to work related concerns regarding wages, hours, and terms and conditions of employment. As such, the very maintenance of the rule, without any actual enforcement, interferes with, restrains, and coerces employees in the exercise of their Section 7 rights. Accordingly, the maintenance of the rule in question constitutes a violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(m)(2), as referenced in the Motion to Amend Complaint. (GC Exh. 2.)

#### 7. The flyer

In complaint paragraphs 5(n)(1), (2), and (3), as is reflected in the Motion to Amend Complaint (GC Exh. 2), the General Counsel alleges that in about mid-November 2011, the Respondent, by Fabian Franco and Tim DeCrow, in a flyer: (1) unlawfully disparaged the Union and those that supported the

Union by telling employees “don’t be a loser!”; (2) threatened employees with loss of benefits if they supported the Union; and (3) informed its employees that it would be futile for them to select the Union as their bargaining representative. The Respondent denies that its campaign flyers contained any statements that would constitute unfair labor practices.

Counsel for the General Counsel indicates in her posthearing brief that the flyer in question, which was written in both English and Spanish, was posted at the Respondent’s facility, and also handed out by Franco during his “after-shift” meetings. Counsel states that the alleged offending flyer is in evidence as General Counsel’s Exhibit 11, which is a two-page document, one page in English and one in Spanish. However, in counsel for the Respondent’s posthearing brief, when he addresses this issue, he refers to a Spanish-language flyer that is in evidence as General Counsel’s Exhibit 19. The text of this one-page Spanish-language flyer was translated on the record into English by the Spanish-language interpreter during the hearing. So, in addressing these allegations, the General Counsel and the Respondent are referring to different flyers. Despite this discrepancy, the legal issues in question are addressed by both parties, although the content of the flyers is different.

I will direct my attention to the flyer in evidence as General Counsel’s Exhibit 11, as this is, according to counsel for the General Counsel, the alleged offending flyer, and the General Counsel has the burden of proof. The flyer is headed with the statement, “Don’t be a loser! Say No to the Union.” It is followed by numerous statistics regarding such matters as: percentage of organized workers in the work force, numbers of union certification elections held, number of union election victories; number of union election petitions withdrawn; and the number of union decertification elections held and the results. The one-page flyer has a concluding paragraph, which asks the question, why if unions are successful are the numbers of union members declining? The final sentence reads: “Actions speak for themselves: union representation is a game in which you will always **LOSE. Vote NO X**” (emphasis as in original). On the Spanish-language version only, there are black and white drawings of a soccer player kicking a ball, a soccer ball going into a goal, a baseball player hitting an enlarged baseball, and a basketball hoop. (GC Exh. 11.)

Counsel for the General Counsel contends that the flyer disparages the Union and those that support it by suggesting that they are “losers,” by suggesting the futility of representation, and by implicitly saying that benefits will be lost if the Union wins the election. That is all nonsense. The flyer says nothing of the sort. The language of the flyer does not have the implicit meanings that the General Counsel attributes to it.

This flyer constitutes election campaign propaganda. It is totally permissible under Section 8(c) of the Act. It is the Employer’s expression of views, disseminated in writing, which do not contain a threat of reprisal, or force, or promise of benefit. It does not constitute an unfair labor practice.

The Respondent’s employees are adults, and certainly they understand that campaign propaganda constitutes the view point of a particular party to an election, and need not, and should not be accepted at face value as accurate. It is axiomatic that the Board does not police the correctness and accuracy of

every statement made by an employer during an election campaign, so long as those statements do not contain a threat of reprisal, or force, or promise of benefit. See *Sears, Roebuck & Co.*, 305 NLRB 193 (1991) (“Words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1).”). The communication in the flyer under review is of the type routinely used in election campaigns, where the Board leaves it up to employees to shift through the parties’ propaganda, reach their own conclusions about the relative merits, and make an informed choice. See *Shopping Kart Food Market*, 228 NLRB 1311, 1313 (1977) (“We believe that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.”).

It is not unlawful, disparaging, or denigrating to the Union or its supporters to point out the risks of union representation and collective bargaining and to urge that those risks be avoided. See, e.g., *Poly-America, Inc.*, 328 NLRB 667, 669 (1999), *affd.* in part and *revd.* in part 260 F.3d 465 (5th Cir. 2001) (“It is well settled that Section 8(c) . . . gives employers the right to express their views about unionization or a particular union as long as those communications do not threaten reprisals or promise benefits”); *Children’s Center for Behavioral Development*, 347 NLRB 35 (2006) (“an employer may criticize, disparage or denigrate a union without running afoul of Section 8(c)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees”); *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004) (argument involving disparaging remarks is left routinely to the good sense of employees).

The flyer in question does not threaten reprisals or promise benefits, nor does it imply that union representation or collective bargaining is futile. It does not interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. It is not the responsibility of the Board to hold the hands of the potential voters and police the accuracy of the Employer’s election propaganda. The voters are responsible adults who should be able to distinguish truth from fiction and likely understand that not everything written or said during an election campaign is accurate. As long as the Employer is not threatening reprisals or promising benefits, the Board will not interject itself into the campaign. As mentioned above, the Board has traditionally ruled that election campaigns are best evaluated by the voters themselves. See, e.g., *Shopping Kart Food Market*, *supra*; *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982). Accordingly, I shall recommend to the Board that complaint paragraphs 5(n)(1), (2), and (3), as reflected in the Motion to Amend Complaint (GC Exh. 2) be dismissed.

#### 8. The video

It is alleged in complaint paragraphs 5(o)(1), (2), and (3), as referenced in the Second Motion to Amend Complaint (GC Exh. 26), that in late November 2011, the Respondent, by playing a video at the Respondent’s facility during working hours, which was viewed by employees: (1) threatened employees by implying that the Union was behind the vandalism and violence depicted on the video; (2) disparaged the Union by implying

that the Union was behind the vandalism and violence depicted on the video; and (3) threatened employees with termination by telling employees that the Union could request their termination in “right to work” States. The Respondent denies that this video indicated or implied anything orally or visually that could reasonably constitute either an unfair labor practice or objectionable conduct.

LRI provided the Respondent with antiunion videos. There were eight videos in total, four in English and four Spanish counterparts. The Spanish and English “pared” versions covered roughly the same material, although the individual “employees” giving interviews or testimonials were different. The Spanish videos played in the lunchroom and the English ones ran on a monitor in a hallway. Each video was played continuously for 24 hours, and then substituted for a different one the next day. The videos played at a very high volume, uncomfortably high such that Evangeline Villegas mentioned the noise three times in her testimony, and indicated that she sometimes left the lunchroom to avoid it. Villegas also testified that the video disheartened her and her coworkers and made them afraid. The video played at the hearing was approximately 20 minutes long, which would mean it would have been repeated 22 times in a 24-hour period.

Two of these videos are the basis of these unfair labor practice allegations and objections to the election. Both videos were screened at the hearing, with the Spanish-language video being translated by the interpreter into the record, and the English-language video directly recorded into the record. A transcript of the English video was also admitted into evidence. (U. Exh. 8.) The English video is entitled, “Your Job on the Line” and the Spanish video is entitled, “Job Security and Strikes.”

The videos are presented in a newscast style, and alternate between two “anchors” speaking and with interviews of “employees” in the field. The videos discuss the alleged hardships of employees involved in strikes and the alleged problems for employees created by labor organizing and collective bargaining. There is talk on the video of permanent replacements, boycotts, and plant shutdowns. Some of the subjects broached are in legal form. For example, the discussion of permanent replacements quotes from a Board decision. Other parts of the video consist of discussions of actual organizing campaigns and of unionized facilities. These include interviews with persons, purported to be actual union organizers and represented employees, who “volunteered” to share their experiences for the camera. Clearly, the intent of the video is to place unions, union representation, and collective bargaining in a very negative light. The aim of the video is obviously to convince the viewer not to support a union organizing campaign, in this instance the soon to be conducted election at Portola.

While the two videos are very similar, they are not identical. Counsel for the General Counsel makes it clear in her posthearing brief that it is the Spanish-language video that allegedly violates the Act. She contends that the video depicts acts of vandalism with the distinct impression being left with the viewer that the Union was responsible for this violence. Further, she contends that the video implies that unions have the ability, unrestricted, to ask an employer to fire an employee who does not pay union dues. Allegedly, the video misstates the law, as

it does not distinguish between a “right to work” State such as Arizona and a nonright to work State.

However, in both the posthearing briefs from counsel for the Union and counsel for the Respondent, it appears that they are addressing issues in the English-language video. My review of the evidence strongly suggests that counsel for the General Counsel has simply made an inadvertent error in referring to the Spanish-language video, and it is actually the English-language video, “Your Job on the Line,” which alleged contains the offending scenes and language. Therefore, I will address my comments and analysis to that video.

At one point in the video, there is discussion regarding a strike that occurred at a unionized employer, Basic Vegetables in King City, California. It recounts a break down in collective bargaining, resulting in a strike. Employee interviewees describe how the strike lasted much longer than expected and created tension in the community, especially between strikers and those employees who crossed the picket line. Those who crossed the picket line describe harassment, insults, threats, and broken windows. One of the purported news anchors then states: “Now months into the strike, daily reports of violence and vandalism have become common throughout the town. King City was a community being torn apart by a union strike. Local union leaders continued to claim the company was losing money and would soon give in to their demands.” While he is talking, the video on screen depicts a car being vandalized.

There is a date and time stamp on the screen that reads, October 15th 1999, and shows 1:13 am. The parties stipulated on the record as to specifically what the screen depicted, but basically it shows a vehicle being vandalized by two individuals. They appear to be breaking the vehicle’s windows, and perhaps damaging the tires. The scene is somewhat “grainy,” and appears to be filmed through a window. After viewing this scene, I was unable to determine whether it was an actual depiction of a car being vandalized in real time, or a dramatization of an event filmed for demonstrative purposes. In any event, I do not believe it matters for purposes of resolving the alleged unfair labor practices.

The General Counsel alleges that the scene in question implies that the union was behind the vandalism, and, thus, was threatening to the employees at Portola and disparaging of the Union. However, in my view, that contention is highly inaccurate. Both from the narrative and visual scene on the video, it would appear to any reasonable person that the vandalism being shown and reported related solely to the strike at Basic Vegetables in King City, California. The “anchor man” is reporting on that strike and has clearly identified it as the one involving Basic Vegetables. The date and time stamp that appears on the screen as the vandalism is being depicted shows a date some 12 years earlier. Further, there is absolutely nothing on the video as would connect the union organizing the workers at Portola in Tolleson, Arizona, with a strike at a different business, located in King City, California, some 12 years earlier.

I simply fail to see any connection between the events depicted on the video screen and the Union’s organizing campaign at Portola. I do not believe that any reasonable employee who viewed the video at Portola prior to the election would find any nexus between the Union and the vandalism depicted on

the video. I do not believe that by showing the video, the Respondent was implying that the Union was behind the vandalism depicted on the screen, and, concomitantly, no reason for employees to feel threatened, or any reason for anyone to conclude that the scene disparaged the Union. Further, there is no reasonable basis for employees to conclude that simply because there was allegedly violence associated with a strike in California some 12 years earlier, that they should fear violence in connection with the organizing campaign at Portola. Such alleged implications are unreasonable, and “a bridge too far.” Accordingly, I shall recommend to the Board that complaint paragraphs 5(n)(1) and (2), as reflected in the Second Motion to Amend Complaint, be dismissed.

Regarding the General Counsel’s allegation that the video “threatened employees with termination by telling employees that the Union could request their termination in ‘right to work’ states” (complaint par. 5(n)(3), as reflected in the Second Motion to Amend Complaint, GC Exh. 26), counsel for the General Counsel is rather cryptic in offering evidence in support of this contention. In her posthearing brief, counsel for the General Counsel devotes only a very short paragraph in support of this complaint allegation. She says, “[T]he video implies that unions have the ability, unrestricted, to ask an employer to fire an employee who does not pay his or her dues. This video makes no distinction between a ‘right to work’ state such as Arizona or a non-right to work state where a union may or may not have that ability.” Unfortunately, counsel does not indicate where in the video this alleged offending language appears.

However, my review of the English-language video transcript (U. Exh. 8) discovered the following narrative. In the video the female anchor explains: “Some actions taken by unions directly threaten the job security of members. Here’s a letter from a union to an employer. The first paragraph states that an employee has failed to become a member of the union and pay dues. The second paragraph says, ‘We therefore request that in accordance with the union contract, this employee be discharged.’” The anchor then continues, “A request like this is not unusual. People accused of violating certain provisions of the union’s constitution, local bylaws, or collective bargaining contract can be let go by their employer at the union’s request. During contract negotiations, unions bargain hard for this kind of power.”

Counsel for the General Counsel offered no case law or argument in support of this allegation. However, counsel for the Respondent did. The Respondent argues that at most what exists here is a failure to explain the right to work provision in Arizona. The case law cited by counsel, *Shopping Kart Food Market*, supra at 1313; *Midland National Life Insurance Co.*, supra at 133, stands for the proposition that the Board does not generally probe into the truth or falsity of the parties’ campaign statements. Further, the “mere fact that a party makes an untrue statement, whether of law or fact, is not grounds for setting aside the election.” *John W. Galbreath & Co.*, 288 NLRB 876, 877 (1988). See *Furr’s, Inc.*, 265 NLRB 1300, 1300 fn. 10 (1982) (there is “no basis for treating misrepresentations of law differently from other misrepresentations”). Nor presumably would it constitute an unfair labor practice.

I am of the view that the video’s failure to provide a more comprehensive discussion and treatment of Arizona’s right to work law does not make the video unlawful when presented in Arizona.<sup>16</sup> It does not impliedly threaten that any employee of the Tolleson facility will be terminated because of a request from the Union. It remains the responsibility of the potential employee voters to educate themselves as to the truth or falsity of campaign propaganda, whether from the Employer or the Union. Accordingly, I find no violation of the Act, and shall recommend to the Board that complaint paragraph 5(n)(3), as referenced in the Second Amendment to Complaint (GC Exh. 26.) be dismissed.

#### D. Summary of Conclusions

In summary, I have found that the Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraphs: 5(b)(2), (3), (d)(1), (2), (e)(1), (2), (3), (f)(1), (2), (3), (g), (h)(1), (2), and (m)(2). Further, I have recommended that the following complaint paragraphs be dismissed: 5(b)(1), (c), (h)(3), (i), (j), (k), (l), (m)(1), (n)(1), (2), (3), (o)(1), (2), and (3).

### IV. THE REPRESENTATION CASE

#### A. The Challenged Ballots

As noted earlier in this decision, the tally of ballots from the election held on December 1, 2011, showed that there were 3 challenged ballots, a number sufficient to affect the results of the election. The Union had challenged the ballots of the three “process technicians,” Thomas Turner, Michael Burns, and Gabriel Hernandez, contending that they were not properly included in the stipulated unit. To the contrary, the Employer contends that the process technicians are actually “production workers,” and specifically included in the stipulated unit. It is axiomatic that the Union, as the party challenging the votes of the process technicians, has the burden of proof and must establish the ineligibility of the challenged voters. I believe that the Union has met this burden.

The Stipulated Election Agreement entered into by the parties and approved by the Regional Director on November 7, 2011, provides for a unit of “All full-time and regular part-time production workers including machine operators, sanitation, and packaging employees . . .” excluding all other employees, including certain named classifications. However, the term “process technicians” is not listed in either the inclusions or exclusions. Nevertheless, it is clear that what the Union was seeking in its petition for an election and what the parties agreed to in the stipulated unit was a group of production workers. Unfortunately, the Employer does not actually have a classification of employees designated as “production workers.” The Union contends that the term “production workers” refers to the employees classified as “production team members,” who are also allegedly known as “operators,” while the Employer contends that the term “production workers” or “opera-

<sup>16</sup> Apparently this same video is used by LRI and sent to its clients in various States of the United States, both right to work and nonright to work States.

tors” refers to the process technicians, whose status in the unit is disputed by the Union.

The Board uses a three-step analysis when resolving determinative challenge ballots in cases involving stipulated bargaining units. First, the Board determines whether the stipulation is ambiguous. Where the objective intent of the parties to the stipulation is clearly and unambiguously expressed in the stipulation, the Board merely enforces the agreement. However, if the stipulation is ambiguous, the Board will seek to determine the parties’ intent through the normal methods of contract interpretation, including by the examination of extrinsic evidence. Finally, if the parties’ intent still cannot be discerned, then the Board determines the bargaining unit by employing the normal “community of interest” test. *Caesars Tahoe*, 337 NLRB 1096 (2002).

Unfortunately, it appears that the stipulated unit is ambiguous. There is no mention in the stipulated unit of “process technicians,” either in the classifications included or excluded. Further, while the term “machine operators” is included in the unit, the Employer does not actually have such a classification of employees. Therefore, the Board cannot simply enforce the terms of the stipulation.

Seeking to determine the parties’ intent through the normal methods of contract interpretation is also problematic. As mentioned, it is obvious from the way the stipulated unit is described that the Union is basically seeking to represent a group of production workers. But there is no such classification. The parties agree that the largest group of employees included in the unit is classified as “production team members.” Out of a total of 44 employees included on the *Excelsior* list, 33 were production team members.<sup>17</sup> Of the production team members who testified at the hearing, most of them indicated that they refer to themselves as “operators.” However, a number of the Employer’s supervisors who testified indicated that they were unaware that the production team members referred to themselves as “operators,” and that, in fact, the group that most nearly performed the duties of “operators,” were the process technicians.

I find this position taken by some of the Employer’s supervisors to be totally disingenuous. It is inconceivable that with the production team members regularly referring to themselves as “operators,” the supervisors could be unaware of such. Further, as will be apparent following a description of the respective work performed by the production team members and the process technicians, the term “operator” much more closely describes the work performed by the production team members than it does that work performed by the process technicians. In my opinion, the effort on the part of the Employer to try and portray the process technicians as “operators” is merely part of the campaign to have them included in the stipulated unit so that they might vote in the election.

In any event, because the use of the various terms in question, “production team member, process technician, and operator,” are somewhat confusing, because the testimony of the witnesses is somewhat contradictory, and because the parties

hold contrary views, I will not attempt to decide the issue of the parties’ intent through normal methods of contract interpretation. Rather, I will resolve the question of the determinative challenge ballots through the Board’s normal community-of-interest test.

In determining whether employees share a “community of interest,” the Board considers the following factors: “[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.” *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

Earlier in this decision, I discussed at length the work performed by certain of the Employer’s job classifications and the way in which those employees interact with each other. However, for the purpose of establishing the community of interest of the employees comprising the stipulated unit, it is necessary to restate some of that information.

The largest group of employees employed at the facility is the “production team members,” who at the time of the hearing numbered 36. As discussed, those employees refer to themselves as “operators.” During each shift there are a number of presses in operation. One production team member is assigned to monitor each press during a shift. Besides monitoring the production from the presses, production team members pack the caps into boxes as the caps come off a conveyor belt from the presses. They seal the boxes, label them, and take the boxes to a central conveyor, which transports them to a staging area.

“Production team leads” work alongside the production team members, relieving the team members when they go on breaks. The team leads assist the “production supervisors” who are responsible for the output from the presses. The production team members and the team leads report directly to the production supervisors.

“Staging team members” receive boxes of caps from the production team members, and sort the boxes on individual pallets according to the customer and product. They then move the loaded pallets from the staging area to the warehouse. Staging team members report to the production supervisors.

The production team members, production team leads, and staging team members all share a significant community of interest. However, in my view, the process technicians do not share this community of interest.

The process technicians are primarily responsible for programming into control panels on the presses the various computerized settings, such as temperature, pressure, and speed, which affect the production of the various machines. They also provide a daily report on the performance of the molds, specifically the percentage of individual cavities within each mold that are functioning properly. It is the steel molds on the presses that contain cavities into which the plastic is injected. The process technicians are not assigned to a specific press, but, rather, they circulate around the production floor troubleshooting the presses. Sometimes the process technicians are required

<sup>17</sup> Of the other employees included on the *Excelsior* list, four were team member leads, three were staging team members, three were process technicians, and one was a sanitation employee.

to open up the presses to inspect the cavities and, if necessary, block off cavities that are not functioning properly. While various witnesses testified differently, the evidence indicates that the process technicians spend between 40 and 70 percent of their working time on the production floor, with the remainder of their time spent in various locations and offices preparing reports on laptop computers. The process technicians do not report to the production supervisor, but instead report directly to Production Manager Tim DeCrow.

Once the process technicians program information into the control panels on the presses, they have no direct responsibility for the production of the presses. That duty falls to the production team members, one assigned to each press, who watch that press to ensure it is functioning properly. If a press is not functioning properly, the production team member normally does not try and repair it, but will alert the appropriate employee, such as a “maintenance technician” (mechanic) or process technician. The process technicians have access to simple hand tools, which they use to inspect the cavities in the molds. The production team members consider themselves “operators” because they are assigned to specific machines, watching them produce the product, with the first responsibility to spot a malfunction. Serious equipment failures are usually repaired by the maintenance technicians, who are excluded from the unit.

While the process technicians spend approximately half their time on the production floor, the remainder of their time is spent preparing reports on their laptop computers, usually in offices that are not individually assigned to them. They will occasionally serve as a replacement for a production team member who is on break, but normally that duty is performed by the production team member leads. Production team members, all of whom spend their full working time on the production floor, must get permission before taking a break, as others must be allowed to watch their machines while they are gone. The process technicians do not have to ask permission before leaving the production floor, and they apparently move freely between the production floor and office space.

Production team members are generally one of the lowest paid classifications at the facility. Process technicians are a higher paid classification, and, depending on the specific individual worker, may be paid as much as twice the rate of the production team member. Even higher paid classifications are the process specialist and process engineer, both of which have a higher education and level of training. According to Production Manager DeCrow, the process technician, process specialist, and process engineer all focus on the performance of the molds, and the process-related variables that influence that performance. While there is some limited overlap in the work performed by the process technicians and the production team members, it seems apparent that the process technicians have considerably more work overlap with the process specialists and process engineers, who work directly with the molds.

In determining with which employees the process technicians share a community of interest, it is instructive to review the Employer’s job description for the position of “Process Technician I.” (Un Exh. 2.) Some of those duties include: “Working with Process Engineers and Corporate Engineering to bring new products to our customers in a timely manner;

Working with Process Engineer and Mold Maintenance to effectively refurbish and maintain molds; Helping out in the day-to-day activities in the mold shop when necessary; Filling in as a supervisor or mold technician when the need arises; Working independently to improve cycle time and cavitation on a daily basis; and Giving feedback to mold technicians and supervisors as necessary.” These duties obviously show a significant overlap with those specialized duties performed by the process specialist and process engineer. Further, it is clear from that job description, which requires a “[m]inimum two year technical degree or 3 years of experience with multi-cavity high speed injection molding” that the position of process technician is much closer in necessary expertise with that of the process specialist and process engineer than with that of the production team member, which requires no specialized experience or education.

As noted earlier, the production team members, team leads, staging team members, and sanitation employee, all of whom it is uncontested are included in the stipulated unit, are supervised by the production supervisors. On the other hand, the process technicians are supervised by Production Manager DeCrow, who also supervises those process specialists and process engineers who are on GO-teams.

Based on all the above-referenced factors, I conclude that the process technicians do not share a significant community of interest with the classifications in the stipulated unit. On the other hand, the process technicians share a greater community of interest with the process specialists and process engineers. The process technicians are ineligible to vote as not properly included in the stipulated unit. Therefore, I conclude that the challenges to the ballots of Thomas Turner, Michael Burns, and Gabriel Hernandez are sustained, and their ballots shall remain unopened and uncounted.

#### *B. The Objections*

As reflected in the Regional Director’s Order Directing Hearing on Challenged Ballots and Objections and Notice of Hearing (GC Exh. 1(o)), there are a number of objections to the election referred to me for resolution, some of which are identical to the unfair labor practices alleged in the complaint. Where the objections are identical to the unfair labor practices, the issues will not be restated, but only the conclusions previously reached.

#### *Objection 1*

Objection 1 involves the letter from Plant General Manager Tim Tyler sent to the homes of the Employer’s employees around November 22, 2011, specifically the Spanish-language version of the letter. The objection reads as follows: “On or around November 22, 2011, the Employer stated, in a letter to employees, ‘Te exijo que votes NO en Diciembre 1, 2011.’ The primary definition of the verb ‘exigir’ in the 2009 Oxford Concise Spanish Dictionary is ‘to demand.’”

This objection was the subject of the unfair labor practice allegation found in paragraph 5(g) of the complaint. It was extensively discussed earlier in this decision. As discussed above, I found that the Spanish-language letter, likely read by the approximately 30 Spanish-speaking employees, threatened those employees with unspecified reprisals by “demanding” that they

vote no in the election. This demand, made in the name of the general manager of the facility, reasonably had a tendency to coerce employees into voting against the Union based on their fear of the consequences of defying Tyler's demand. Accordingly, I concluded that the letter violated Section 8(a)(1) of the Act. As I have found merit to this unfair labor practice allegation, concomitantly, I also find merit to Objection 1.

#### Objection 2

Objection 2 involves the same letter from Tim Tyler referenced above. Again, it is the Spanish-language version of the letter that is alleged to be objectionable. As noted earlier, each letter was addressed to the individual employee recipient, so that the employee's first name was in the salutation. Tim Tyler, the author of the English-language version of the letter, signed the document, which was translated into Spanish by Armando Talancon, the labor relations consultant.<sup>18</sup> This objection relates to the first sentence in the final bullet point in the Spanish version. (GC Exhs. 5 & 6.)

At the hearing, the Spanish-language interpreter was asked by counsel for the Union to translate this bullet point, which is actually two sentences long. After a first attempt at the translation, the interpreter asked to write out her interpretation, and then to make another attempt at the oral translation. This second translation is the final effort by the interpreter, and clearly the language with which she was satisfied. This second translation of the two sentences in the bullet point is as follows: "Do not think that the salaries and benefits remain the same or improve [sic],<sup>19</sup> as a result of the negotiation. The law specifically allows the Company to maintain its last offer to the Union if the Union and the Company cannot come to an agreement."

Counsel for the Union argues in her brief that the first sentence of the bullet point is a "threat to decrease salaries and benefits," if the Union is selected as the employees' collective-bargaining representative. However, this contention ignores the second sentence of the bullet point, which makes it clear that wages and benefits are a product of the bargaining process, and that the Employer can maintain its last offer when the parties are unable to come to an agreement. In fact, in the context of the full bullet point, this would seem to be a legitimate statement of the law, although certainly simplified to its bare essentials.

As I have discussed at length earlier in this decision, under Section 8(c) of the Act, the Employer has the right to express negative views about the collective-bargaining process, as long as there is no threat of reprisal or force or promise of benefit. Clearly, references to the risks and uncertainty of collective bargaining, including the very real possibility that some wages and benefits may be reduced, are protected by Section 8(c), and do not constitute unlawful threats. See *Wild Oats Markets, Inc.*, 344 NLRB 717, 717-718 (2005) (flyer stating that "[i]n collective bargaining you could lose what you have now" is protected by Section 8(c), and not unlawful). This is the very sort of campaign propaganda, which the Board has consistently

held that employees are astute enough to be able to judge the truth of for themselves. Accordingly, I shall recommend that Objection 2 be overruled.

#### Objection 3

Objection 3 alleges that around November 17, 2011, "an agent of the Employer told an employee that he would not help the employee with her excess workload because the employee was a union supporter." This objection was the subject of the unfair labor practice allegation found in paragraph 5(f)(3) of the complaint. It was extensively discussed earlier in this decision.

As was discussed in detail above, I found that Supervisor Ray Buchanan, during a conversation with employee Herlinda Cervantes, informed Cervantes that he would not help employee Jorge Mendez with his workload because Mendez "was in the Union." Further, I concluded that this statement constituted an unlawful implied threat to discriminate against Mendez by refusing to help him due to his union activity, in violation of Section 8(a)(1) of the Act. I should note that during this same conversation, Buchanan made other statements to Cervantes, which also constituted unlawful interrogation and creating the impression of surveillance, independent violations of the Act. As I have found merit to this unfair labor practice allegation, concomitantly, I also find merit to Objection 3.

#### Objection 4

Objection 4 reads as follows: "During the critical period, the Employer repeatedly played videos in the employee break room that gave the impression of the inevitability of a strike or strikes should the Union be voted in." Counsel for the Union, in her posthearing brief, expands on this objection, contending that the video in question "implied the inevitability of strikes," and "implied a threat of strike violence," both allegedly unsupported by objective facts.

Earlier in this decision, I discussed the video in question at great length. That discussion was in connection with complaint paragraphs 5(b)(1), (2), and (3), as reflected in the Second Motion to Amend the Complaint. (GC Exh. 26.) In those paragraphs the General Counsel alleged that the video violated the Act by "threatening employees by implying that the union was behind the vandalism and violence depicted on the video; disparag[ing] the Union by implying that the Union was behind vandalism and violence depicted on the video; [and] threatening employees with termination by telling employees that the Union could request their termination in 'right to work' states." However, I found the video did not violate the Act, as alleged in the complaint, and I recommended dismissal of these allegations.

The video in question was played to employees in both English and Spanish under the titles, "Your Job on the Line," the English version, and "Job Security and Strikes," the Spanish version. Both videos were screened at the hearing, with the Spanish-language video being translated by the interpreter into the record, and the English-language video directly recorded into the record. A transcript of the English video was also admitted into evidence. (U. Exh. 8.)

I discussed the strike violence depicted on the video at great length earlier in this decision, and that discussion is directly relevant to this objection. I will not repeat that discussion here,

<sup>18</sup> Tyler signed both the English and Spanish versions of the letter.

<sup>19</sup> The interpreter spoke the word "sic" to indicate that the Spanish-language version of the sentence, as written, was grammatically incorrect.

except to reiterated that I fail to see any connection between the events depicted on the video screen and the Union's organizing campaign at Portola. I do not believe that any reasonable employee who viewed the video at Portola prior to the election would find any nexus between the Union and the vandalism depicted on the video. Further, I do not believe that by showing the video, the Employer was implying that the Union was behind the vandalism depicted on the screen, or that it constituted a prediction of the inevitable negative consequences of unionization.

While the film depicts strikes as one possible consequence of the failure of the collective-bargaining process, it does not indicate that this is the inevitable outcome of union representation. Further, although there is strike vandalism depicted in the video, it is directly tied to a specific strike in California,<sup>20</sup> and nothing is said to suggest that such vandalism is typical or inevitable during strikes. The video, when viewed as a whole, and where the strike is not isolated out of context, is a propaganda film, not particularly unusual in an election campaign. Typically, the Board leaves it up to employees to sift through both parties' propaganda, reach their own conclusions about the relative merits, and make an informed choice. *Shopping Kart Food Market*, 228 NLRB 1311, 1313 (1976) (“[W]e believe that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it”).

In my opinion, the video in question constitutes a legitimate expression of the Employer's view of the merits of union representation under Section 8(c) of the Act. The Employer has a right to express its opinion in what is clearly a propaganda film. It does not depict strikes and violence as the inevitable consequence of union representation, although they are certainly depicted as a possible outcome. Employees exposed to campaign propaganda from both sides should be left to decide the truth for themselves, as long as no threats of reprisal or force or promise of benefit are made. Accordingly, I find Objection 4 to be without merit, and I recommend that it be overruled.

### C. Recommendation on Election

In summary, I have found merit in Objection 1, wherein the Employer “demanded” that employees vote against the Union, and in Objection 3, wherein the Employer threatened not to assist an employee who was a union supporter. I have also found merit to the following complaint allegations, wherein conduct occurred during the “critical period” between the filing of the representation petition and the election, in violation of Section 8(a)(1) of the Act: 5(e)(1), (2), (3), (f)(1), (2), (3), (g), (h)(1), (2), and (m)(2). These violations of the Act included the following unlawful actions: threats of discharge, threats of reduced wages and benefits, threats of unspecified reprisals; conduct constituting interrogation, creating the impression of surveillance, the solicitation of complaints and grievances and the promise of increased benefits and improved conditions of employment; and an overly-broad and discriminatory policy on contact with the media.

It is well settled that conduct during the critical period that creates an atmosphere rendering improbable a free choice warrants invalidating an election. See *General Shoe Corp.*, 77 NLRB 124 (1948). Such conduct is sufficient if it creates an atmosphere calculated to prevent a free and untrammelled choice by the employees. As the Board stated, “In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.” *General Shoe Corp.*, supra at 127.

I have found that the Respondent has committed numerous and significant unfair labor practices during the critical period, which unfair labor practices also constitute objectionable conduct. The Board has traditionally held that conduct violative of Section 8(a)(1) of the Act is also conduct which interferes with the exercise of a free and untrammelled choice in an election. As such, it serves as a basis for invalidating an election. According to the Board, conduct which is violative of Section 8(a)(1) of the Act is “a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in an election.” *Playskool Mfg. Co.*, 140 NLRB 1417 (1963); see also *IRIS U.S.A., Inc.* 336 NLRB 1013 (2001); *Diamond Walnut Growers, Inc.*, 326 NLRB 28 (1988). Further, the Board has held that this is also “because the test of conduct which may interfere with the ‘laboratory conditions’ for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1).” *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). See also *Overnite Transportation Co.*, 158 NLRB 879 (1966); *Excelsior Underwear*, 156 NLRB 1236 (1966).

However, not all unfair labor practice conduct will warrant setting aside an election. In *Caron International, Inc.*, 246 NLRB 1120 (1979), the Board rejected a per se approach to the fortiori language of *Playskool*. Instead, the Board said the test was an objective one, that being whether the conduct has a tendency to interfere with employees' free choice. *Hopkins Nursing Care Center*, 309 NLRB 958 (1992). See also *Recycle America*, 310 NLRB 629 (1993) (where the Board found that the unfair labor practices were not sufficient to set aside the election).

The Board weighs a number of factors in determining whether 8(a)(1) violations of the Act, and presumably separate objectionable conduct as well, are sufficient to warrant setting aside an election. In the face of unfair labor practices and meritorious objections, the Board may still decline to overturn the results of an election where it concludes that the violations and/or conduct are de minimis. *Bon Appetit Management Co.*, 334 NLRB 1042 (2001); *Caron International, Inc.*, 246 NLRB 1120 (1979). Still, 8(a)(1) violations fall within the de minimis exception only when these violations “are such that it is virtually impossible to conclude that they could have affected the results of the election.” *Super Thrift Markets*, 233 NLRB 409, 409 (1977), cited in *Sea Breeze Health Care Center*, 331 NLRB 1131 (2000).

In determining whether the misconduct could have affected the results of the election, the Board considers “the number of violations, their severity, the extent of dissemination, the size of the unit and other relevant factors.” *Clark Equipment Co.*, 278

<sup>20</sup> Basic Vegetable Products in King City, California.

NLRB 498, 505 (1986); *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986); *Chicago Metallic Corp.*, 273 NLRB 1677, 1704 (1985). Regarding those factors, several are of particular importance in considering those objections and unfair labor practices before me that I have determined have merit. This was an extremely close election, with a tie vote between those cast for the Petitioner and those cast against.<sup>21</sup> Obviously, the election results could not have been any closer. The Board has held that in a close election the objectionable and/or unlawful conduct need not be as severe or have affected as many employees in order to warrant setting aside the election. The narrowness of the vote in an election is a relevant consideration. *Robert Orr-Sysco Food Services*, 338 NLRB 614 (2002); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); also see *Avis Rent-a-Car*, supra.

Further, the meritorious objections and unfair labor practices committed by the Employer in this case were pervasive. I have found improper conduct committed during the critical period by literally every company official supervising the employees in the voting unit, including Plant General Manager Tyler, Human Resources Manager McClanahan, Production Manager DeCrow, and Supervisors Franco and Buchanan. The labor relations consultant hired to conduct the Employer's election campaign, Armando Talancon, was also found to have committed unfair labor practices. This improper and/or unlawful conduct was severe, including threats to discharge, threats to reduce wages and benefits, and threats of other unspecified reprisals, interrogation, creating the impression of surveillance, and solicitation of complaints and promises of benefits, all in an effort to defeat the Union in the election. Additionally, the Employer's conduct was widely disseminated and permeated the voting unit. Especially egregious and received by each member of the voting unit was the letter from Plant General Manager Tyler wherein he stated on the Spanish-language version of the letter that he "demanded" that the employees vote "no" in the election.

These were significant unfair labor practices and objections, which would clearly have had a tendency to seriously inhibit the employees' willingness to engage in union activity, and would likely have created an atmosphere un conducive to a free and untrammelled choice by the employees. The Employer's conduct destroyed the laboratory conditions required by the Board.

Based on the above, I conclude that the objectionable conduct and unfair labor practices engaged in by the Employer have tended to interfere with the free and fair choice of a determinative number of voting unit employees. Accordingly, as the election results do not reflect the employees' free and fair choice, I recommend that the election be set aside and that this proceeding be remanded to the Regional Director for Region 28 for the purpose of conducting a second election.

#### CONCLUSIONS OF LAW

1. The Respondent, Portola Packaging, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>21</sup> This assumes that, as I have found, the three challenged voters were not eligible to vote, and their ballots will not be counted.

2. The Union, United Food and Commercial Workers Union, Local No. 99, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Orally promulgating an overly-broad and discriminatory rule prohibiting employees from discussing their wages and those of other employees with each other.

(b) Orally promulgating an overly-broad and discriminatory rule prohibiting employees from discussing what occurred in meetings with the Respondent's supervisors with other employees.

(c) Threatening its employees with discharge for engaging in concerted activities.

(d) Threatening its employees with unspecified reprisals for engaging in concerted activities.

(e) Soliciting employee complaints and grievances, and promising its employees increased benefits and improved terms and conditions of employment if they rejected the Union as their collective-bargaining representative.

(f) Threatening its employees with discharge if they chose the Union as their collective-bargaining representative.

(g) Threatening its employees with unspecified reprisals if they chose the Union as their collective-bargaining representative.

(h) Interrogating its employees about their union and concerted activities.

(i) Creating an impression among its employees that their union and other concerted activities were under surveillance by the Respondent.

(j) Threatening its employees with withholding assistance to them because they engaged in union and other concerted activities.

(k) Threatening its employees with unspecified reprisals by demanding employees vote "no" in the upcoming representation election.

(l) Threatening its employees with reduced wages and benefits if the Union was selected as the employees' collective-bargaining representative.

(m) Maintaining an overly-broad and discriminatory rule in its employee handbook prohibiting and restricting its employees' contact with the news media.

#### 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 designated to effectuate the policies of the Act.

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physically posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

Also, having found that a provision in the Respondent's employee handbook, as referenced above, is overly-broad and discriminatory, the recommended order requires that the Re-

spondent revise or rescind the unlawful language, and advise its employees in writing that said provision has been revised or rescinded.

Further, as indicated above, I have found that the Respondent engaged in both objectionable conduct and unfair labor practices affecting the results of the election in Case 28-RC-067973. I recommend, therefore, that the election in this case held on December 1, 2011, be set aside, that a new election be held at a date and time to be determined in the discretion of the Regional Director for Region 28, and that the Regional Director include in the Notice of Election the following language:

**NOTICE TO ALL VOTERS**

The election held on December 1, 2011, was set aside because the National Labor Relations Board found that certain conduct

of the Employer interfered with the employees' free exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Election. All eligible voters should understand that the National Labor Relations Act gives them the right to cast ballots as they see fit and protects them in the exercise of this right free from interference by any of the parties.<sup>22</sup>

[Recommended Order omitted from publication.]

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<sup>22</sup> *Lufkin Rule Co.*, 147 NLRB 341 (1964).