

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

LIFEWAY FOODS, INC.

and

Cases 13-CA-146689  
13-CA-140500  
13-CA-151341

BAKERY, CONFECTIONERY, TOBACCO  
WORKERS AND GRAIN MILLERS  
INTERNATIONAL UNION, AFL-CIO-CLC,  
LOCAL UNION NO. 1<sup>1</sup>

*Melinda Hensel, Esq.,*

for the General Counsel.

*Douglas Haas and Amy Moor Gaylord, Esqs.,*

for the Respondent.

*Gail Mrozowski, Esq.,*

for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Chicago, Illinois, on August 12-13, 2015. The Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO-CLC, Local Union No. 1 (the Charging Party) filed the charge in Case 13-CA-140500 on November 6, 2014; the charge in Case 13-CA-146689 on February 19, 2015, and an amended charge on April 30, 2015; and the charge in Case 13-CA-151341 on May 1, 2015. The General Counsel issued an order consolidating cases, consolidated complaint, and notice of hearing (the complaint) on July 9, 2015.

The complaint alleges in paragraph V that the Respondent violated Section 8(a)(1) of the Act in the following respects: about November 2014, Supervisor Meliton Ramos De La Rosa (De La Rosa) threatened that the Respondent would cease the practice of allowing employees to leave early for child care because employees had reported him for sexual harassment; about December 6, 2014, Human Resources Director George De La Fuente, announced that, starting

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<sup>1</sup> The case caption has been changed to reflect the correct name of the Charging Party.

January 5, 2015, employees would no longer be allowed to leave early unless they had a medical excuse because employees had reported De La Rosa for sexual harassment; and about January 6, 2015, De La Fuente threatened employees with discipline and discharge if they continued to leave early for child care reasons in retaliation for the protected concerted complaints of employees regarding De La Rosa. The complaint further alleges that the Respondent violated Section 8(a)(1) of the Act, about February 5, 2015, by disciplining and discharging Maria Angamarca and Josefina Espinoza because they had engaged in protected concerted activities by reporting De La Rosa for sexual harassment.

Paragraph VII of the complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to its scheduling policy by announcing that, starting January 5, 2015, employees would no longer be allowed to leave early unless they had a medical excuse and, as a result of the unilateral change in scheduling policy, issued written warnings to and discharged Angamarca and Espinoza.

As amended at the hearing, paragraph VIII of the complaint alleges that since about February 16, 2015, the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain over the changes made to the Respondent's scheduling policy; the discipline and discharge of Angamarca and Espinoza; and its reimbursement to employees of biweekly uniform rental charges and the calculation of those charges.

Paragraph IX of the complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by exercising its discretion and unilaterally discharging employees Isaias Alarcon, Angamarca, and Espinoza.

As amended at the hearing, paragraph X of the complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act since about February 16, 2015, by refusing to provide and/or delaying to provide to the Union the following information: a list of employees who received uniform reimbursement and the calculation of the same for each employee; documents regarding the discharge of Espinoza and Angamarca; and documents regarding the change in the hours of work for certain warehouse employees from 4 p.m. to a later time.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses,<sup>3</sup> and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

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<sup>2</sup> At the hearing, Jt. Exhs. 1 through 4 were proffered without objection but I inadvertently failed to specifically indicate they were admitted. Those exhibits are formally admitted into the record.

<sup>3</sup> In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007). In addition, I have carefully considered all the testimony in contradiction to my factual findings and have discredited such testimony.



Since that time the Respondent has refused to bargain with the Union, contending that the Union was improperly certified. In its brief, the Respondent admits that it is testing the validity of the certification in an unfair labor practice charge filed by the Union in Case 13-CA-156570 alleging that the Respondent's overall refusal to bargain violates Section 8(a)(5) and (1). The Board has not yet issued a decision in that case.

At the Respondent's Niles facility, the front entrance enters into an office area. In the office area are several cubicles used by marketing employees and warehouse manager Reznik's office. Office employees enter the facility through the front entrance to the facility. The warehouse employees use another entrance to the facility that is located in the shipping and receiving dock area. The employee time clock is located at that entrance. Reznik's office is several hundred feet away the shipping and receiving dock; there is a production area and a door located between his office and the shipping and receiving area.

The packing area is located in the production area near the shipping and receiving dock. In this area there are four packing tables located inside a cooler and one table is located outside of the cooler area. There are four employees who work at each table and, at each table, two employees are male and two employees are female.

#### The 8(a)(5) and (1) Allegations Regarding the Discipline and Discharge of Angamarca and Espinoza

##### Facts

##### Packing Department Employees Leaving at 4 p.m.

Maria Angamarca testified with the aid of a Spanish interpreter. Angamarca worked at the Respondent's Niles facility as a packing employee from February 2, 2008, until she was discharged on February 15, 2014. According to Angamarca, the schedule in the packing department was from 7 a.m. until 4:30 p.m. when she first started but, at some point that is undetermined in the record, the schedule was changed to 5 a.m. to 6 p.m.

Angamarca's uncontradicted testimony establishes that in December 2013 or January 2014, she spoke to De La Fuente when he was at the Niles facility during the union campaign and told him that she wanted to leave work at 4 p.m. in order to pick up her son. De La Fuente told Angamarca that he could not speak to her about it at that time but he would get back to her. Approximately 2 days later, De La Fuente was again present at the Niles facility, when employees in the packing department were shown a video regarding the Union. In the presence of the packing department employees, Angamarca again spoke to De La Fuente and requested to be able to leave at 4 p.m. because she had to pick up her son at 4:30 p.m. De la Fuente responded that he was going to see about that and that he was going to help, but said nothing further.

Angamarca testified that in February 2014 she met with "Mischa" in his office which is located at the entrance to the facility where the offices are located. Angamarca did not know "Mischa's" last name but described him as tall and skinny with blond hair. According to Angamarca, when she met with "Mischa," he told her that she could not work after 4 p.m. because she had to pick up her son and had no one else to pick him up. "Mischa" told

Angamarca that it was not a problem and that she could leave at 4 p.m., as he had the authority to deal with time issues.<sup>5</sup>

5 Beginning in February 2014, Angamarca's time records reflect that she left work at 4 p.m. approximately 2 days a week during the months of February and March. (R. Exh. 8.) Angamarca testified that in approximately April 2014 she began to clock out and leave work at 4 p.m. on a regular basis. Angamarca's time records confirm her testimony on this point. Angamarca's supervisor, De La Rosa, observed her leaving at 4 p.m. and did not tell her that she could not leave at that time. According to Angamarca, after she began to leave at 4 p.m. on a regular basis, employees Josefina Espinoza, Ana Yupa, Christina Flores, and Veronica Suarez, also began to clock out and leave work at 4 p.m. on certain days.

15 Josefina Espinoza testified with the aid of a Spanish interpreter. Espinoza worked at the Respondent's Niles facility as a packer from October 10, 2013, until she was discharged on February 5, 2015. According to Espinoza's uncontradicted testimony, in June 2014, she spoke to her supervisor, De La Rosa, and told him that she wanted to leave at 4 p.m. because of child care needs on Monday, Tuesday, and Wednesday and that he gave her permission to do so.<sup>6</sup> According to Espinoza, Angamarca, Suarez, and Yupa also left work early on certain days.

20 Ana Yupa also testified with the aid of a Spanish interpreter. Yupa testified that in July 2014 she asked de la Rosa if she could leave work at 4 p.m. on some days because of child care issues and that he gave her permission to do so.

25 Israel Arteta testified on behalf of the Respondent. Arteta testified, in part, with the aid of a Spanish interpreter, while the remainder of his testimony was in English. At the time of hearing, Arteta was a supervisor in the shipping and receiving department and reported to

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<sup>5</sup> Michael Reznik testified that he is also known by the name "Mischa." Reznik denied that he ever gave Angamarca permission to leave early on a regular basis for child care reasons. I credit Angamarca's testimony over that of Reznik. While Angamarca did not know Reznik's last name, she explained in detail that his office was located in the office area located by the main entrance to the facility. While Reznik has brown hair rather than blond hair, I do not find this aspect of Angamarca's testimony sufficient for me to discredit it. I find that it is inherently plausible that, since Angamarca did not receive a clear indication from De La Fuente that she could leave at 4 p.m., she went to Reznik, the warehouse manager, in order to receive such permission. Angamarca's demeanor while testifying on this point reflected certainty and was more impressive than Reznik's demeanor while testifying.

In further considering Angamarca's credibility on this issue, on cross-examination, Angamarca admitted that, in the affidavit that she had given to the NLRB during the investigation of the case, she indicated that De La Fuente had given her permission to leave early. Angamarca testified on cross-examination that she did speak to De La Fuente and he told her that her leaving early was not going to be a problem and then she spoke to Reznik about it. I do not credit this portion of Angamarca's testimony. Rather, I find that, consistent with Angamarca's testimony on direct examination, when she asked De La Fuente for permission to leave at 4 p.m., he told her that he would see about that and would help, but did not give her express permission to leave at 4 p.m.

<sup>6</sup> De La Rosa did not testify at the hearing. The record establishes that he resigned his employment with the Respondent on January 23, 2015.

Reznik.<sup>7</sup> Since De La Rosa's resignation on January 23, 2015, Arteta has also supervised the packing and assembly department, together with another supervisor, Juan Carlos Duran. Arteta testified that in 2014 he observed Angamarca, Espinoza, and Yupa leaving work at 4 p.m. for approximately 6 months before he spoke to De La Rosa about it in late November 2014. (Tr. 324-325) When Arteta spoke to De La Rosa about certain employees leaving early, De La Rosa told Arteta that he knew of it. Arteta did not report his observations of certain packing department employees leaving early to anyone else.

Reznik testified that he has established the weekly schedule for employees at the Niles facility on a weekly basis for approximately 2 years. His practice has been that on Friday the schedule is set for the following week. Prior to his resignation, De La Rosa assisted Reznik in scheduling employees and Arteta has assisted him in this regard since De La Rosa's resignation.

#### Employees Complain About De La Rosa

Yupa testified that on Halloween, October 31, 2014, she asked De La Rosa if she could leave early in order to pick up her son and he told her that she could. De La Rosa told her that he was going to allow her to leave, but asked her to send him a "sexy picture" of herself. De La Rosa added that if Yupa did not, she was going to only have 8 hours of work the following Monday. According to Yupa, De La Rosa also invited female employees out to eat with him. Shortly after the incident with De La Rosa on Halloween 2014, Yupa spoke to other female employees about De La Rosa's advances and was told "he was like that." Espinoza testified that in November 2014, De La Rosa asked her to go out with him. Espinoza told De La Rosa that she was married and had children. De La Rosa told Espinoza that nobody would know that they were going out. Espinoza told him no. De La Rosa then told Espinoza that she was going to have to work in the cooler and that he was not going to give her any more days off and that they were not going to talk to each other. De La Rosa also told her that she could not leave early anymore and that she was going to have to work until 6 p.m. Angamarca testified only that sometime in 2013 De La Rosa had invited her to go out for a ride.

According to Arteta's uncontradicted testimony, in late November 2014, employee Jasmine Bahena told him that employee Maura De Jesus wanted to speak with him. When Arteta spoke to De Jesus she informed him that De La Rosa was verbally sexually harassing her and said that he was also doing the same to Espinoza and Yupa. Arteta spoke to Espinoza near the end of the same day and she confirmed what De Jesus had reported to him. The next day, Arteta called De La Fuente and informed him that there were some employees in the packing department who wanted to speak to him about a serious matter.<sup>8</sup> De La Fuente and his assistant,

<sup>7</sup> I find, based on the record evidence, that Arteta is a supervisor within the meaning of Section 2(11) of the Act.

<sup>8</sup> I find, based on the record as a whole, that De La Fuente and Soto arrived at the Niles facility and interviewed employees regarding the conduct of De La Rosa on an undetermined date in late November, 2014. In this connection, Yupa and Espinoza testified that their meetings with De La Fuente regarding De La Rosa occurred in late November 2014. Angamarca testified that she met with Soto in late November. Arteta testified that the complaints of sexual harassment were brought to his attention in late November or early December. I do not credit De La Fuente's testimony that his interviews with employees regarding De La Rosa occurred on December 2, 2014. De La Fuente's testimony regarding the date is based, in part, on notes that were contained in the personnel files of Angamarca (R. Exh. 6) and Espinoza (R. Exh. 7)

Luis Soto, then went to the Niles facility. De La Fuente and Soto first met with De Jesus who informed them that on a number of occasions De La Rosa had asked her to go out on a date and made her feel uncomfortable.

5 De La Fuente and Soto then interviewed Espinoza. Based on Espinoza's credited  
 testimony, in late November 2014, De La Fuente and Soto met her in the dining room and asked  
 her to come to the office to speak with him. De La Fuente asked her what was going on and told  
 her that he was there to resolve the problem. Espinoza told De La Fuente that De La Rosa  
 10 wanted her to go out with him. Espinoza also informed De La Fuente that De La Rosa told her  
 that if she did not, she would have to work in the cooler and he was not going to let her leave  
 early. According to Espinoza, at this meeting De La Fuente did not say anything at this meeting  
 about not being allowed to leave early.

15 Yupa testified that De La Fuente asked her to meet with him in November 2014. Yupa  
 testified she met with De La Fuente alone and told him about De La Rosa's advances toward  
 her.<sup>9</sup>

According to Angamarca's uncontradicted testimony, in November 2014 she was called  
 to the office by Soto. Soto asked her if she wanted to talk to him and she responded "no." Soto

reflecting the meetings were held on that date regarding the schedule of those employees. There is no  
 mention in those notes of De La Fuente interviewing the employees regarding the alleged sexual  
 harassment of De La Rosa. I find it odd that there would be no mention in the notes of the alleged sexual  
 harassment of De La Rosa, since the reason that De La Fuente traveled to the facility was to speak to  
 employees about De La Rosa. On the basis of the record as a whole, I find that the notes dated December  
 2 refer to later meetings held by De La Fuente where the schedules of Angamarca and Espinoza were  
 discussed.

<sup>9</sup> I do not credit Yupa's testimony that she had another meeting with De La Fuente regarding this  
 matter approximately 3 weeks later, at which Espinoza was present. I believe that Yupa was confusing her  
 meeting with De La Fuente regarding the subject of De La Rosa's advances toward her with some of the  
 meetings that were held later regarding scheduling. I also do not credit Espinoza's testimony that Yupa  
 was present when De La Fuente interviewed her. Espinoza's testimony on this point was brief and  
 attenuated. I do credit Espinoza and Yupa regarding the substance of what was discussed during the  
 interview with De La Fuente. Their testimony has sufficient detail regarding the substance of their  
 individual meetings to establish that it is reliable. In addition, their demeanor while testifying about the  
 meeting itself reflected certainty. While I credit De La Fuente's testimony to the extent that he testified  
 that he interviewed Espinoza and Yupa separately regarding the alleged sexual harassment, I do not credit  
 his testimony with regard to the substance of the meetings to the extent that it conflicts with that of Yupa  
 and Espinoza. De la Fuente testified that he met with De Jesus, Espinoza, Yupa, and Angamarca  
 separately about the allegations regarding De La Rosa and during these interviews found out that some  
 packing department employees were leaving early. The meetings with employees began in the late  
 morning approximately 11 a.m. According to De La Fuente, after learning that some employees were  
 leaving early from work, he reviewed time clock records for those employees the same day. He then  
 confronted De La Rosa and inquired of him what was going on. De La Fuente then testified that he had  
 another meeting with Espinoza about leaving early that same day. I find De La Fuente's testimony that  
 all of this occurred in one day is implausible and I do not credit his testimony that he had a second  
 meeting that day with Espinoza.

stated that Yupa, De Jesus, and Espinoza told him that she wanted to talk to him. Angamarca replied that she did not know what the other women had talked to him about. Angamarca did tell Soto that there was inequality in De La Rosa's assignments, since some of the female employees were allowed to work in the warm area, outside of the cooler, while others, including herself,  
 5 worked in the cooler area. Soto told her that he would speak to De La Fuente about it. During this meeting, Angamarca did not relay any complaints regarding De La Rosa sexually harassing her.

10 Espinoza testified that the day following her meeting with De La Fuente about De La Rosa, De La Rosa spoke to all of the employees in the packing area and said that the women who went to complain at the office were going to be "the losers" because he already had 18 years of working there. De La Rosa also that he would not allow the employees who were leaving at 4 p.m. to leave early. Espinoza responded by telling De La Rosa that she had, in fact, gone to the office and that he was the one who invited her to go out and she told him that she did not want  
 15 to. Angamarca and Yupa also testified regarding this meeting and their testimony corroborates that of Espinoza in all material respects.

20 Yupa testified that a couple of days after she met with De La Fuente, De La Rosa spoke to her privately and told her that he knew that the women had complained about him and that changes were going to occur and that they were his decisions. De La Rosa added that nobody was going to tell him what to do because he had worked there for 20 years. De la Rosa told her that because she was pregnant, she could continue to leave when she wished, but if she was not pregnant she would be under the same "punishment" as the other women. (Tr. 183-184)<sup>10</sup>

25 Based on the credited testimony of Angamarca, Espinoza, and Yupa, I find that De La Rosa threatened employees that they would not be allowed to leave work at 4 p.m. because they had gone to the office and complained about him. By threatening to retaliate against employees who had raised protected concerted complaints about him, De La Rosa's statements violated  
 30 Section 8(a)(1) of the Act.

#### The Implementation of the 2015 Work Schedule

35 According to the uncontradicted testimony of Angamarca, Espinoza, and Yupa, in early December 2014, approximately a week after they met with De La Fuente regarding De La Rosa, De La Fuente had a meeting with all 20 employees in the packing department. De La Rosa and Soto were also present. At this meeting, De La Fuente informed the employees that they had to work from 5 a.m. to 6 p.m., beginning on January 1, 2015. De La Fuente told the employees that if they did not comply with this rule, they would be given three warnings and then they would be discharged. Angamarca said that she could not work this new schedule because she was already  
 40 working 11 hours, from 5 a.m. to 4 p.m. De la Fuente responded that all of employees had to work under that schedule. Angamarca indicated that she could not work late and told De La

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<sup>10</sup> While Yupa's testimony is somewhat confusing regarding specifically when this conversation occurred, in context, it is clear that it occurred after De La Rosa spoke to all of the packing employees the day after the female employees had complained to De La Fuente about him. With respect to the substance of the conversation, however, I find that Yupa's testimony has sufficient detail to render it credible. In addition, I found her demeanor while testifying respect to the substance of this meeting to be convincing.

Fuente that she needed to speak to the owner. De La Fuente responded that she could not speak to the owner, "because that is why he is there." When Angamarca asked him for permission to leave at 4 p.m., De La Fuente responded that he could not do anything and that it was going to be compulsory to work that schedule.

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After the meeting held with the entire packing department, on December 2, 2014, De La Fuente, Soto, and De La Rosa met separately with Angamarca and Espinoza. De La Fuente reiterated that the 2015 work schedule would have to be followed and there were no exceptions for leaving early without a legitimate medical reason. Both employees were given until January 2, 2015, to coordinate their child care. (R. Exhs.6 and 7.) After the announcement of the 2015 work schedule, Angamarca continued to leave work at 4 p.m. on a daily basis (R. Exh. 8); Espinoza continued to leave work at 4 p.m. 3 days a week (R. Exh. 14); and Yupa continued to leave work at 4 p.m. up to 3 days per week (R. Exh. 33).

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On January 6, 2015, De La Fuente, Soto, and Reznik met with Angamarca and Espinoza separately and De La Fuente reiterated that the 2015 work schedule would have to be followed and that there were no exceptions for leaving early without a medical reason. Angamarca was given until February 2, 2015, to coordinate child care. (Tr. 77-79, R. Exh. 6) At the meeting with Espinoza, two other employees Brian Alvarado and Steve Alvarado, were present and De La Fuente also indicated that the proper call off procedure needed to be followed in case of being tardy or absent. ( R Exh. 6) At these meetings, Angamarca and Espinoza both told De La Fuente that they had to leave at 4 p.m. to pick up their children.

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On January 23, 2015, De La Fuente, Soto, and Reznik, again met with both Angamarca and Espinoza separately and De La Fuente again reiterated that the 2015 work schedule was to be followed and that no exceptions were permitted for leaving early without a legitimate medical reason. Espinoza was given until February 2, 2015 to coordinate child care. (R. Exh. 7.) On February 5, 2015, De La Fuente again met with Angamarca and Espinoza and presented each of them written warnings for leaving at 4 p.m. on February 3 and 4, 2015. (GC Exh. 7; R Exhs. 6 and 7). When Espinoza and Angamarca refused to sign the warnings they were discharged.

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In February 2015, Yupa, who was pregnant at the time, presented a note from her doctor indicating that she could not stand on her feet for long periods. (Tr. 190-191.) After Yupa presented evidence of a medical reason for leaving early, she was permitted to leave work early until she went on maternity leave in April 2015.

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It is undisputed that the Union did not receive prior notice of the implementation of the 2015 work schedule or the discharges of Angamarca and Espinoza and the written warnings issued to them. After Angamarca and Espinoza were terminated, they notified Beth Zavala, the Union's recording secretary, of the circumstances under which they were discharged. On February 6, 2015, Zavala sent a letter to De La Fuente (GC Exh. 4) stating, in part, that the Union had not been provided any notice and an opportunity to bargain regarding the change in work hours that had resulted in the discipline and termination of Espinoza and Angamarca. In the letter, the Union specifically demanded to bargain regarding the change in work hours and the discipline and termination of the employees related to that change. The Union's letter also requested that the Respondent forward any documents regarding the termination of Espinoza and Angamarca and the change in the hours of work for certain warehouse employees from 4 p.m. to

a later time. On February 16, 2015, the Respondent's attorney responded to the Union's February 6 letter by email. The email indicates that the Respondent had no obligation to bargain with the Union over the policy of leaving work before the end of shifts and the terminations of the two employees, because the Union had not been certified. (GC Exh. 5.) However, on July 6, 2015,  
 5 the Respondent did provide to the Union the documents related to the discipline and termination of Espinoza (GC Exhs. 12 and 18).

#### Contentions of the Parties

10 The General Counsel and the Charging Party contend that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the schedules of employees in the packing department at the Niles facility by eliminating the practice by which employees could leave at 4 p.m. with the permission of their supervisor.

15 In asserting that its conduct did not violate Section 8(a)(5) and (1), the Respondent first contends that it has no bargaining obligation because the Union was not properly certified. The Respondent next contends that in December 2014, it merely reiterated its policy that employees in the packing department had to work from 5 a.m. to 6 p.m. and therefore there was no  
 20 substantial and material change that would require bargaining. In this connection, the Respondent contends that the evidence does not establish that there was a binding past practice with respect to allowing employees to leave early from the packing department sufficient to establish a bargaining obligation.

#### Analysis

25 With respect to the Respondent's argument that the Union was not properly certified, on June 10, 2015, the Board issued a decision certifying the union as the bargaining representative for the employees in the unit. I am, of course, obligated to follow Board law in deciding the allegations of the complaint. *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Accordingly, I find no merit to the Respondent's  
 30 contention that the Union was not properly certified.

35 The fact that the Respondent announced in December 2014, that all employees in the packing department would have to work until 6 p.m., prior to the Union's certification in July 2015, does not serve as a defense in the instant case. An employer acts at its peril in making changes to the terms and conditions of employment during the period when its objections to an election are pending and a certification has not yet issued to a union. Where a final determination on the objections results in the certification of a union, the Board has long held that an employer violates Section 8(a)(5) and (1) when it has made such unilateral changes. *Mike O'Connor Chevrolet*, 209 NLRB 701, 703-704 (1974), enf. denied on other grounds, 512 F.2d 684 (8th Cir. 1975); *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542, 561 (2004).

45 It is well established that when an employer unilaterally changes the terms and conditions of employment of its employees unilaterally, without giving notice and an opportunity to bargain to a union representing the employees, it violates Section 8(a)(5) and (1). *NLRB v. Katz*, 369 U.S. 736 (1962). It is beyond dispute that the number of hours worked by employees is a mandatory subject of bargaining. In *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965),

the Supreme Court held: “[T]he particular hours of the day and the particular days of the week during which employees may be required to work are subjects within the realm of wages, hours and other terms and conditions of employment about which employers and unions must bargain.” The Board has consistently found, with court approval, that the number of hours employees are required to work is a mandatory subject of bargaining. *Tuskegee Transportation System*, 308 NLRB 251, 251-252 (1992), *enfd.* 5 F.3d 1499 (11th Cir. 1993); *Atlas Microfilming*, 267 NLRB 682, 695-696 (1983), *enfd.* F.2d 313 (3d Cir. 1985); *Fall River Savings Bank*, 260 NLRB 911 (1982).

The Board also requires that a change in working conditions must be “material, substantial and significant” in order for a bargaining obligation to be present. *Bohemian Club*, 351 NLRB 1065, 1066 (2007); *Mitchellace, Inc.*, 321 NLRB 191, 193 (1996). When the General Counsel alleges that an employer has unilaterally changed, in a material, substantial and significant way, terms and conditions of employment that constitute a past practice, the General Counsel must establish the existence of an established practice. *National Steel & Shipbuilding Co.*, 348 NLRB 320, 323 (2006); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988).

In the instant case, I find that the evidence establishes that three employees in the packing department at the Niles facility had a regular and established practice for approximately 6 months of leaving work at 4 p.m. with the permission of their supervisors. In February 2014, Angamarca began leaving at 4 p.m. approximately 2 to 3 days a week and in April 2014, began to leave work at 4 p.m. on a daily basis, because of child care needs, after receiving permission to do so from Reznik, the manager of the Niles facility. Angamarca’s immediate supervisor, De la Rosa, observed her leaving at 4 p.m. and never questioned her about it. Shortly thereafter, Espinoza and Yupa received permission from their immediate supervisor, De La Rosa, to leave work at 4 p.m. up to 3 days a week in order to pick up their children. In addition, another supervisor, Arteta, observed the three employees leaving early on a regular basis for approximately 6 months before de la Fuente announced in early December 2014 that in 2015 all employees would have to work until 6 p.m. unless they had a medical excuse. Reznik was responsible for establishing the schedule employees at the Niles facility on a weekly basis.

Prior to his resignation in January 2015, De La Rosa assisted Reznik in making out the schedule. Since then Arteta has assisted Reznick in that regard. Thus, it is clear that three supervisors of the Niles facility, including the warehouse manager, knew that three employees regularly left at 4 p.m. because of child care needs. In addition, each employee’s departure at 4 p.m. was recorded on their time sheets.

I find that the evidence establishes that there was a sufficient established practice of allowing employees to leave at 4 p.m. for child care reasons, with supervisory approval, to require bargaining before the Respondent could change that practice. Thus, De la Fuente’s announcement in late November 2014 that it was compulsory for all employees in the packing department to work until 6 p.m. and his statements in early December 2014, that the only exception to this policy would be for medical reasons, constituted an unlawful unilateral change.

I find that by such conduct the Respondent violated Section 8(a)(5) and (1) of the Act. In so finding, I do not agree with the Respondent’s contention that De La Fuente was merely reiterating the Respondent’s existing policy. Rather, an established practice had been conducted

for approximately 6 months in which De La Rosa and Reznik had exercised their discretion in allowing employees to leave at 4 p.m. in order to accommodate child care needs.

5 The Board's decision in *Wayne County Neighborhood Legal Services*, 249 NLRB 1260 (1980), supports my conclusion that the Respondent's conduct constitutes a unilateral change violative of Section 8(a)(5) and (1). In *Wayne County* the respondent's attorney employees had an obligation to work a 40 hour workweek and to record their time accurately. The evidence established, however, that attorneys were permitted, on a regular and recurring basis, to observe a work day which varied from the regular 9 to 5 hours during which the respondent's offices were open to the general public. Under these circumstances, the Board found that the respondent's action in issuing a memo stating that attorneys were expected to work 40 hours per week, 9 to 5, Monday through Friday, constituted a unilateral change in violation of Section 8(a)(5) and (1) of the Act. The Board noted that the memo requiring employees to adhere to a 9 to 5 schedule changed the established practice of allowing employees to make individual adjustments with their supervisors regarding their work schedules. The Board rejected the respondent's contention that the memo merely reiterated rules which had already been in existence.

20 The Respondent, in support of its position that it did not have an obligation to bargain over implementing a rule requiring employees in the packing department to work until 6 p.m. unless they had a medical excuse, relies principally on *National Association of Government Employees, Local R14-77 and US Department of Veterans Affairs Medical Center*, 40 FLRA 342 (1991). In the first instance, as noted above, I am obligated to follow Board precedent, unless and until it is reversed by the Supreme Court, in deciding the allegations of the complaint. *Pathmark Stores, Inc.; Waco Inc.*, supra. Moreover, I find *National Association of Government Employees*, to be distinguishable. In that case one department supervisor allowed some employees to cleanup and change out of their uniforms at the end of their shift while they were on working time. When higher level management learned of this practice, it was stopped. The union filed a grievance and an arbitrator concluded, inter alia, that there was insufficient evidence to establish a binding past practice. The FLRA denied the union's exceptions to the arbitrator's decision. As noted above, in the instant case, both the employees' immediate supervisor and the facility manager were aware of and condoned the practice of allowing employees to leave at 4 p.m. for child care reasons, with supervisory approval.

35 As noted above, the complaint also alleges that, as a result of the Respondent's unilateral change in scheduling in the packing department, the discipline and discharge of Angamarca and Espinoza also violates Section 8(a)(5) and (1) of the Act. The evidence establishes that Angamarca and Espinoza were discharged for violating the unilaterally imposed rule that required all employees in the packing department to work until 6 p.m., unless they had a medical reason. Under clearly established Board law, if an employer's unilaterally imposed rules were a factor in the discipline or discharge of employee, the discipline and discharge violates Section 8 (a)(5) and (1) of the Act. *Consec Security*, 328 NLRB 1201 (1999); *Behnke, Inc.*, 313 NLRB 1132, 1139 (1994); *Equitable Gas Co.*, 303 NLRB 925, 931 fn. 29 (1991). Since the Respondent's unilaterally implemented rule that all employees in the packing department had to work until 6 p.m., unless they had a medical reason for leaving early, was the basis for the discipline and discharge of Angamarca and Espinoza, their discipline and discharge violates Section 8(a)(5) and (1) of the Act.

### The Information Requests Regarding Angamarca and Espinoza

As noted above, after learning of the implementation of the new policy regarding work hours in the packing department that resulted in the discharges of Espinoza and Angamarca, on February 6, 2015, the Union sent a letter to the Respondent requesting information regarding the change in hours for certain warehouse employees from 4 p.m. to a later time and the terminations of Espinoza and Angamarca. On February 16, 2015, the Respondent replied to the Union and indicated it had no obligation to bargain with the Union. However, on July 6, 2015, the Respondent did provide to the Union the documents related to the discipline and discharge of Espinoza and the change in work hours as it applied to her.

It is clearly established that an employer is obligated to provide the collective-bargaining representative of its employees, on request, with information that is necessary and relevant to the union's function as the collective-bargaining representative. Relevance is determined by a broad discovery type standard and it is only necessary to establish the probability that the information sought would be useful to the union in carrying out its statutory duties. *NLRB v. Acme Industrial Co.*, 35 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). As I have noted above, the Respondent instituted a unilateral change regarding the ability of employees in the packing department to leave at 4 p.m. with permission of their supervisor and made it compulsory that employees had to work until 6 p.m., unless they had a medical reason for leaving early. This change in the number of hours these employees were required to work involves a mandatory subject of bargaining. Accordingly, the Respondent was obligated to provide the requested information on that basis.

In addition, the Board has long held that information concerning unit employees' terms and conditions of employment is deemed to be presumptively relevant to the union's duty to represent the employees. *Pavilion and Forestal Nursing & Rehabilitation*, 346 NLRB 458, 463 (2006); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984); *Cowles Communication, Inc.* 172 NLRB 1909 (1968). Accordingly, the Respondent was obligated to furnish the Union information regarding the change in hours for certain employees in the packing department and the information regarding the discipline and discharges of Angamarca and Espinoza. The Respondent's failure to furnish, at all, the requested information regarding the change in hours and the discipline and discharge of Angamarca, constitutes a violation of Section 8(a)(5) and (1) of the Act.

In July 2015, the Respondent furnished the information to the Union regarding the discipline and discharge of Espinoza and the change in work hours as it applied to her. The Respondent offered no explanation regarding its reason for the delay. The Board has consistently found that such delays in providing the requested information, without a legitimate explanation, to be violative of Section 8(a)(5) and (1) of the Act. *Pan American Grain*, 343 NLRB 318 (2004), *enfd.* in relevant part, 432 F.3d 69 (1st Cir. 2005) (3-month delay); *Bundy Corp.*, 292 NLRB 671 (1989) (2.5 month delay); *Woodland Clinic*, 331 NLRB 735, 736-737 (7-week delay). Accordingly, I find that the Respondent's delay in furnishing the requested information to the Union regarding the discipline and discharge of Espinoza and the change in work hours as it applied to her violates Section 8(a)(5) and (1) of the Act.

The Complaint Allegations that the Discipline and Discharge of Angamarca and Espinoza Violated Section 8(a) (1) of the Act.

Contentions of the Parties

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The General Counsel and the Charging Party contend that the discipline and discharge of Angamarca and Espinoza independently violated Section 8(a)(1) of the Act because the Respondent took such action in response to their concerted complaints regarding the sexual harassment of De La Rosa.

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The Respondent contends that neither Angamarca nor Espinoza engaged in protected concerted activity. The Respondent further contends that if I should find that they engaged in protected concerted activity there is insufficient evidence to establish that such conduct motivated the Respondent to terminate them in retaliation for such conduct in violation of Section 8(a)(1) of the Act.

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Analysis

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In support of their position that the discipline and discharge of Angamarca and Espinoza was motivated by protected concerted complaints that they made, the General Counsel and the Charging Party rely on the Board's decision in *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014). In that case, the Board clarified its position regarding what constitutes protected concerted activity. In doing so, the Board reiterated the principle that concerted activity includes situations "where individual employees seek to initiate or to induce or prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." (Citation omitted). *Id.* slip op. at 3. The Board also noted that "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Id.* slip op. at 3.

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In the instant case, it is clear that De La Rosa asked female packing department employees to go out with him and made sexually harassing statements to some of the female employees. As noted above, Yupa specifically testified that she spoke to other employees about De La Rosa's conduct in this regard. In late November 2014, De Jesus reported to Arteta that Delarosa was verbally sexually harassing her and also reported that he was doing the same to Espinoza and Yupa. Arteta spoke to Espinoza the same day and she confirmed what De Jesus had reported to him. The next day Arteta contacted De La Fuente and informed him that there were some employees in the packing department who wanted speak to him about a serious matter. De La Fuente and then met with De Jesus who reported that a number of occasions Delarosa had asked her on a date. De la Fuente then interviewed Espinoza and she told him that De La Rosa wanted her to go out with him and also reported that he threatened her that if she did not she would have to work in the cooler and he was not going to let her leave early. De la Fuente then interviewed Yupa who also testified that Delarosa had made advances toward her. Angamarca testified that she only reported to Soto that there was inequality in some of De La Rosa's assignments, since some of the female employees worked in the warm area and others, including herself, worked in the cooler. Angamarca did not relay any complaints regarding De La Rosa sexually harassing her.

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It is clear that female packing department employees discussed among themselves De La Rosa's sexually harassing conduct and then De Jesus reported that conduct to Arteta. After confirming that De La Rosa had engaged in such conduct toward other female employees, Arteta relayed the concerns to De La Fuente. De la Fuente spoke with De Jesus, Espinoza and Yupa, who all confirmed De La Rosa's improper advances toward them. Angamarca did not relay any inappropriate advances that De La Rosa may have made to her when she was an interview by Soto, but she did complain about de la Rosa's "inequality" in making assignments regarding the female employees.

I find that, under the principles expressed in *Fresh & Easy Neighborhood Market*, the evidence establishes that De Jesus, Espinoza, and Yupa were engaged in protected concerted activity as they brought to management complaints regarding De La Rosa's inappropriate sexual advances. Angamarca did not specifically relay any complaints about sexual harassment by De La Rosa, but she did report to management her complaint regarding his inequality in assignments among the female employees. As *Fresh & Easy Neighborhood Market* makes clear, the concept of mutual aid or protection focuses on the goal of concerted activity in seeking to improve terms and conditions of employment, and there is no requirement that an employee's activity in attempting to improve working conditions with fellow employees "combine with each other in any particular way." *Id.* slip op. at 3. (Citation omitted.) Accordingly, I find that Angamarca was also engaged in protected concerted activity when she complained to Soto regarding De La Rosa's assignments regarding the female employees.

In *Ferguson Enterprises, Inc.*, 355 NLRB No. 189 fn. 3 (2010), the Board approved the use of a *Wright Line* analysis in determining 8(a)(1) allegations that turn on motive. In *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981) cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity and antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, at 1089. Accord: *Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 2 (2011).

In the instant case, I find that Espinoza was involved in protected concerted activity when she reported De La Rosa's advances toward her to De La Fuente. I also find that Angamarca was involved in protected concerted activity when she complained about De La Rosa's assignments regarding the female employees to Soto. Under these circumstances, there is no question that the Respondent was aware of the protected concerted complaints made by Espinoza and Angamarca. As noted above, De La Rosa threatened employees with retaliation because he knew that employees had gone to the office and complained about him. Such a statement by an acknowledged supervisor demonstrates animus toward the exercise of concerted activity that is protected under the Act. Accordingly, I find the evidence sufficient to conclude that the General Counsel established a prima facie case under *Wright Line*.

Turning to the Respondent's defense, I find that the Respondent has met its burden of persuasion to establish that the protected concerted activity of Angamarca and Espinoza was not the motivating factor behind its decision to discipline and discharge them. In this regard, I note that De Jesus and Yupa had also lodged protected concerted complaints regarding the verbal sexual harassment of De La Rosa, yet no action was taken against them. Considering the record as a whole, I find that the discipline and discharge of Angamarca and Espinoza was motivated by their failure to comply with the Respondent's unilaterally implemented rule requiring all employees in the packing department to work until 6 p.m., unless they had a medical excuse.

The evidence establishes that, in the context of investigating the complaints regarding the conduct of De La Rosa, De La Fuente learned that certain employees in the packing department were leaving at 4 p.m. After learning of this, De La Fuente decided to eliminate this practice and met with employees in the packing department in early December and informed them that it was compulsory for all employees to work until 6 p.m. In meetings with Angamarca and Espinoza held shortly thereafter on December 2, De La Fuente indicated that the only exception for leaving early were medical reasons. (R. Exhs. 6 and 7.) While De La Rosa was present when these announcements were made, there is no evidence to establish that he played any role in this decision. While De La Rosa threatened employees that because female employees had complained about him to higher management, he was no longer going to allow them to leave early, I find that this was merely a threat by a supervisor who was angered by the complaints made about his sexually harassing conduct. The record as a whole convinces me that De La Fuente alone made the decision to eliminate the discretion previously exercised by De La Rosa and Reznik to allow employees to leave early and institute a policy in the packing department requiring all employees to work until 6 p.m. unless they had medical reason to leave earlier.

I also find that the timing of the discipline and discharge of Angamarca and Espinoza does not support the contention that these actions were discriminatorily motivated. In this regard, on December 2, 2014, the Respondent gave Angamarca and Espinoza until January 2, 2015, to coordinate child care in order to comply with the new schedule. On January 6, 2015, Angamarca was given an extension until February 2, 2015, to coordinate child care and on January 23, Espinoza was given such an extension. Finally, on January 23, 2015, Angamarca and Espinoza were again informed that the 2015 work schedule needed to be followed and there were no exceptions for leaving early without a legitimate medical reason. (R. Exhs. 6 and 7.) Thus, rather than precipitously discharging Angamarca and Espinoza shortly after they had engaged in protected concerted activity in complaining about De La Rosa, the Respondent gave them several opportunities to comply with the new rule requiring them to work until 6 p.m. before disciplining and discharging them for failing to comply with it. Under these circumstances, I find that the Respondent disciplined and discharged Angamarca and Espinoza because they did not comply with the Respondent's unlawful unilaterally implemented rule eliminating the discretion of supervisors to allow employees to leave work at 4 p.m., and requiring all employees to work until 6 p.m. absent a medical reason to leave earlier. I do not find that the discipline and discharge of Angamarca and Espinoza was motivated by a desire to retaliate against them for raising protected concerted complaints regarding De La Rosa. Therefore, I shall dismiss the complaint allegation that the Respondent independently violated Section 8(a)(1) by disciplining and discharging Angamarca and Espinoza. I shall also dismiss the allegations in paragraph V of the complaint that De La Fuente independently violated Section 8(a)(1) by announcing that

employees would no longer be allowed to leave early unless they had a medical excuse and threatening employees with discharge and discipline if they failed to adhere to that rule. De La Fuente's statements were not motivated by a desire to retaliate against employees for engaging in protected concerted activity but rather constituted the unlawful imposition of a unilateral rule and the concomitant threat to discipline employees for violating that rule.

#### The Respondent's Payments to Employees for Reimbursement of Uniform Expense Deductions

As amended at hearing, paragraph VIII (a) the complaint alleges, in relevant part, that the Respondent refused to bargain regarding the reimbursement to employees of biweekly uniform rental charges and the calculation of those charges in violation of Section 8(a)(5) and (1) of the Act.

#### Facts

The Respondent provides uniform rental services for its production and warehouse employees through a third-party, Aramark. Prior to October 2013, the Respondent maintained a practice of deducting the cost of uniform rental and cleaning services from the paychecks of employees. For some employees, this resulted in their being paid less than the minimum wage established by the Illinois Minimum Wage Law. On October 24, 2014, Isaias Alarcon, a former employee of the Respondent, filed a lawsuit "on behalf of himself and other similarly situated past and present employees" in the in the U.S. District Court for the Northern District of Illinois, No. 14 cv 8386, alleging, in relevant part, that the deductions for uniform rental and cleaning services violated the Illinois Minimum Wage Law and the Illinois Wage Payment and Collection Act because, for some employees, the deductions caused their hourly wages to be below the State minimum wage. After the lawsuit was filed, the Respondent, without admitting liability, agreed to settle the case by providing a full remedy to Alarcon and other similarly situated employees and former employees. The settlement provided for all back wages as provided by the Illinois Minimum Wage law; prejudgment interest on the back wages in accordance with the statutory formula; damages pursuant to the statutory formula; and repayment of all unauthorized deductions for statutory damages as set forth in the relevant statute. Respondent then performed the calculations pursuant to the above noted formula for Alarcon and all of its similarly situated employees and former employees who had the cost of uniform rental and cleaning services deducted from their paychecks between January 1, 2011, and October 31, 2013. On or about January 10, 2015, the Respondent paid the calculated amount in lump-sum checks to all such employees and former employees to the extent that they could be located. (Jt. Exh. 4.) Thereafter, on the basis of the settlement described above, on April 8, 2015, Alarcon submitted a motion to withdraw the complaint in his lawsuit ( Jt. Exh. 3). The Respondent paid out approximately \$90,000 to its current and former employees who were eligible, pursuant to the formula set forth above.

Is undisputed that the Union was not given notice of the Respondent's payment of the backpay and interest to employees who were made whole by virtue of the settlement of the lawsuit referred to above. In the Union's February 6, 2015 letter to the Respondent, the Union indicated that it had been advised that the Respondent " has reimbursed employees for uniforms however the reimbursement was not uniform and was made without explanation regarding the

calculation.” (GC Exh. 4.) The Union requested bargaining regarding the reimbursement to employees of uniform payments and further requested that the Respondent “provide a list of employees who received uniform reimbursements and the calculation of the same for each employee.” The February 16 email sent by the Respondent’s attorney in response indicated that the Respondent had no obligation to bargain with the Union regarding this matter because the Union had not yet been certified.

#### Contentions of the Parties

The General Counsel and the Charging Party contend that the backpay payments made by the Respondent to employees for unauthorized uniform deductions deducted from wages, and the statutory interest associated with those payments constitutes wages within the meaning of Section 8(d) of the Act. The General Counsel and the Charging Party further contend that the Respondent was obligated to give notice and an opportunity to bargain to the Union prior to making these payments, and that its failure to do so constitutes a unilateral change in violation of Section 8(a)(5) and (1). The only authority relied on by the General Counsel in support of his position is *Mike O’Connor Chevrolet*, supra.

The Respondent contends that it had no obligation to bargain over the backpay and interest paid to employees pursuant to the settlement of the lawsuit because these payments were mandated by law and thus it had no discretion in the matter. The Respondent contends that the duty to bargain attaches only when an employer has discretion regarding how to implement certain changes in employee wages or benefits that are imposed by statute or regulation.

#### Analysis

In *Long Island Day Care Services*, 303 NLRB 112 (1991), the respondent received a grant from the Federal Government for a 4.75 percent cost of living increase requiring that at least 65 percent of the grant had to be spent on salary and/or fringe benefits. The employer unilaterally allocated 100 percent of the 4.75 percent cost-of-living increase to salaries. The Board found that because the employer had discretion in the manner in which it could allocate this cost-of-living increase, it had an obligation to bargain regarding this cost-of-living increase. The Board found that the Respondent’s unilateral action in granting the entire 4.75 percent cost-of-living increase to wages violated Section 8(a)(5) and (1) of the Act. However, the Board reached a different conclusion regarding a 2 percent cost-of-living adjustment that was funded by the Federal Government. The 2 percent cost-of-living increase was mandated by the Federal Government to be paid as a 2 percent permanent addition to the salaries of all employees. The respondent had no discretion with respect to how the 2 percent would be allocated. The respondent notified employees that they would be receiving a 2 percent permanent salary increase without giving notice and an opportunity to bargain to the union. The Board found that the employer had a total lack of discretion over implementation of the 2 percent cost-of-living increase and this established that there was “nothing of substance to bargain about concerning it.” *Id.* at 117. Accordingly the Board found that the employer did not violate Section 8(a) and (5) and (1) of the Act by unilaterally applying the 2 percent cost-of-living increase to wages and dismissed that allegation in the complaint.

In the instant case, I find that the payment of back pay and interest to the employees in order to remedy the alleged violation of the Illinois Minimum Wage Act presents a situation where there is no obligation to bargain. As part of the settlement the Respondent effectuated a complete remedy to all of the eligible employees. The amount of money paid to employees in backpay and interest was paid pursuant to the statutory formula under the Illinois Minimum Wage Act. The Respondent utilized no discretion with regard to the employees who received payments or the amount of such payments. I find that the Board's analysis of the 2 percent cost-of-living increase in *Long Island Day Care Services*, supra, is applicable to the instant case. Accordingly, I find that the Respondent's unilateral action in making payments to employees of the amounts necessary to make them whole pursuant to the provisions of the Illinois Minimum Wage Act did not violate Section 8(a)(5) and (1) of the Act. Accordingly, I shall dismiss this allegation of the complaint.

As noted above, on February 6, 2015, the Union requested bargaining regarding the reimbursement to employees for uniform payments and also requested that the Respondent "provide a list of employees who received uniform reimbursements and the calculation of the same for each employee." While I have found that the Respondent had no obligation to give notice and an opportunity to bargain to the Union regarding payments it made to employees for reimbursement for the deductions made for uniforms, I do find that it had the obligation to provide the requested information on this matter. The Respondent's obligation does not arise from the Union's necessity to have this information in order to intelligently bargain over this issue, but rather stems from the fundamental right of the Union to obtain information concerning unit employees' terms and conditions of employment. The payments made to employees for reimbursement of the amounts unlawfully deducted from employees' paychecks pursuant to Illinois State Law obviously constitutes wages within the meaning of Section 8(d) of the Act.

I find that the Union's request for this information is presumptively relevant to the union's duty to represent employees. *Pavilion and Forestal Nursing & Rehabilitation; Atlanta Hilton & Tower; Cowles Communication, Inc.* supra. At minimum, this information would enable the Union to understand the basis for the payments made to employees by the Respondent and allow it to determine whether all eligible employees had received the appropriate amounts. Accordingly, I find that the Respondent's refusal to provide this information to the Union constitutes a violation of Section 8(a)(5) and (1) of the Act.

### The Refusal to Bargain over the Discharges of Employees

Paragraph IX of the complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discharging employees Isais Alarcon on October 14, 2014, and Angamarca and Espinoza on February 5, 2015, and that it exercised discretion in doing so. The Respondent's answer admits that it unilaterally discharged the three employees and that it exercised discretion in imposing the discipline. It is undisputed that the Respondent did not give the Union notice and an opportunity to bargain prior to exercising its discretion in discharging the three above-named employees.

As noted above on February 6, 2015, the Union requested bargaining regarding the discharges of Angamarca and Espinoza and on February 16, 2015, the Respondent denied the request to bargain.

## Contentions of the Parties

5 The General Counsel and the Charging Party contend that I should apply the principles expressed by the Board in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), and, on the basis of those principles, find that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing to give notice and an opportunity to bargain to the Union before discharging the three employees. While recognizing that the Board's decision in *Alan Ritchey, Inc.*, supra, was invalidated by virtue of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2014 (2014),<sup>11</sup> the General Counsel and the Charging Party contend that the principles expressed in that decision are sound and should be applied to the instant case. The General Counsel further notes that several administrative law judges have issued decisions finding it was appropriate to apply the reasoning of *Alan Ritchey, Inc.*, and that, in one such decision, *Kitsap Tenant Support Services, Inc.*, (JD(SF)-29-15) the Board, in an unpublished order dated September 8, 2015, adopted the administrative law judge's decision in the absence of exceptions. The General Counsel further acknowledges, however, that other administrative law judges have declined to apply the principles expressed in *Alan Ritchey, Inc.*, because it has been invalidated pursuant to *Noel Canning*, supra, and thus applied the Board's prior decision regarding this issue in *Fresno Bee*, 337 NLRB 1161 (2002), and have dismissed complaint allegations presenting the same issue raised in the instant case.

20 The Respondent contends primarily that, given the Supreme Court's invalidation of *Alan Ritchey, Inc.* supra, in *NLRB v. Noel Canning*, supra, I am obligated to apply the principles expressed in *Fresno Bee*, supra, and dismiss this complaint allegation on that basis.

## Analysis

25 In *Alan Ritchey, Inc.*, supra, the Board held that an employer must provide a bargaining representative notice and an opportunity to bargain with it before exercising its discretion to impose serious discipline such as suspension, demotion, and discharge on individual employees, absent a binding process such as a grievance-arbitration system to resolve such disputes. The Board further indicated in *Alan Ritchey, Inc.*, supra, at that it would apply the decision prospectively only as it was a significant change in the law in this area. *Id.* slip op. at 11. As noted above, however, the Board's decision in *Alan Ritchey, Inc.*, has been invalidated by the Supreme Court in *NLRB v. Noel Canning*, and therefore is not binding precedent. Given the invalidation of the Board's decision in *Alan Ritchey, Inc.*, its decision in *Fresno Bee*, is the governing precedent regarding this issue. As noted earlier, I am obligated to apply established Board precedent, unless it is reversed by the Supreme Court, in deciding the allegations of the complaint. *Pathmark Stores, Inc.; Waco, Inc.* It is, of course, also the case that the Board's adoption of administrative law judge's decision to which no exceptions have been filed is not binding precedent in other cases. *Carpenters Local 370 (Eastern Contractors Association)*, 332 NLRB 174, 175 fn. 2 (2000).

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<sup>11</sup> In *NLRB v Noel Canning*, the Court concluded that the Board which issued *Alan Ritchey, Inc.*, and many other decisions, lacked a lawful quorum because the President's recess appointments for three seats on the Board were invalid.

Since the Board's decision in *Alan Ritchey, Inc.*, supra, has been invalidated by *NLRB v. Noel Canning, Fresno Bee*, supra, is the existing Board precedent in this area of the law. In *Fresno Bee* the Board held that the respondent did not violate Section 8(a)(5) and (1) of the Act by issuing discretionary discipline to individual employees. Id. at 1186-1188. Accordingly, based on the Board's decision in *Fresno Bee*, I shall dismiss this allegation in the complaint.<sup>12</sup>

#### CONCLUSIONS OF LAW

1. The Union is, and at all material times, was the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production/maintenance, production, maintenance, and shipping/receiving employees employed by the Employer at its facilities currently located at 7645 North Austin Avenue, Skokie, Illinois and 6431 West Oakton, Morton Grove, Illinois, and 6101 West Grosse Point Road, Niles, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

2. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by:

(a) unilaterally implementing a rule at its Niles, Illinois facility ceasing its practice of allowing employees to leave work early for child care purposes with supervisory approval and requiring employees to provide a medical excuse if they need to leave work early.

(b) enforcing its unilaterally imposed rule at its Niles, Illinois facility regarding the cessation of its practice of allowing employees to leave work early for child care purposes with supervisory approval and requiring employees to provide a medical excuse if they need to leave work early, by disciplining and discharging Maria Angamarca and Josefina Espinoza.

(c) refusing to provide relevant and necessary information to the Union regarding its unilaterally implemented rule regarding the cessation of its practice of allowing employees to leave work early for child care purposes with supervisory approval at its Niles, Illinois facility, and the discipline and discharge of Maria Angamarca pursuant to that rule.

(d) delaying the provision of relevant and necessary information to the Union regarding its unilaterally implemented rule regarding the cessation of its practice of allowing employees to leave work early for child care purposes with supervisory approval its Niles, Illinois facility, and the discipline and discharge of Josefina Espinoza pursuant to that rule.

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<sup>12</sup> I note that, in view of my finding that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing the new rule regarding hours of work in the packing department at the Niles facility, and disciplining and discharging Angamarca and Espinoza pursuant to that rule, I will provide a complete remedy to them for violations of that type.



present in this case. *Pathmark Stores, Inc.*, supra. Accordingly, I shall deny the General Counsel's request for this additional remedy.

5 The record establishes that a substantial portion of the bargaining unit is predominantly Spanish-speaking. In such circumstances, the Board's policy is to post the notice in multiple languages in order to fully communicate to employees their rights under the Act. *Alstyle Apparel*, 351 NLRB 1287 (2007). Accordingly, I shall order the notice to be posted in both English and Spanish.

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

#### ORDER

15 The Respondent, Lifeway Foods, Inc., Morton Grove, Illinois, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

20 (a) Unilaterally implementing a rule at its Niles, Illinois facility ceasing its practice of allowing employees to leave work early for child care purposes with supervisory approval and requiring employees to provide a medical excuse if they need to leave work early.

25 (b) Enforcing its unilaterally imposed rule at its Niles, Illinois facility regarding the cessation of its practice of allowing employees to leave work early for child care purposes with supervisory approval and requiring employees to provide medical excuse if they need to leave work early by disciplining and discharging employees.

30 (c) Refusing to provide relevant and necessary information to the Union regarding its unilaterally implemented rule regarding the cessation of its practice of allowing employees to leave work early for child care purposes with supervisory approval at its Niles, Illinois facility, and the discipline and discharge of Maria Angamarca pursuant to that rule.

35 (d) Delaying the provision of relevant and necessary information to the Union regarding its unilaterally implemented rule regarding the cessation of its practice of allowing employees to leave work early for child care purposes with supervisory approval at its Niles, Illinois facility and the discipline and discharge of Josefina Espinoza pursuant to that rule.

40 (e) Refusing to provide relevant and necessary information to the Union regarding a list of the employees who received reimbursement for amounts deducted from their paycheck for uniform rental and cleaning and the calculations of those amounts for each employee.

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<sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f). Threatening to retaliate against employees because they made protected concerted complaints about the conduct of a supervisor.

5 (g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

10 (a) Give notice and an opportunity to bargain to the Union regarding ceasing its practice at its Niles, Illinois facility of allowing employees to leave work early for child care purposes with supervisory approval and requiring employees to provide a medical excuse if they need to leave work early. The appropriate unit is:

15 All full-time and regular part-time time production/maintenance, production, maintenance, and shipping/receiving employees employed by the Employer at its facilities currently located at 7645 North Austin Avenue, Skokie, Illinois and 6431 West Oakton, Morton Grove, Illinois, and 6101 West Grosse Point Road, Niles, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

20 (b) Within 14 days from the date of the Board's Order, offer to Maria Angamarca and Josefina Espinoza full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

25 (c) Make Maria Angamarca and Josefina Espinoza whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

30 (d) Compensate Maria Angamarca and Josefina Espinoza for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarter for them.

35 (e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Maria Angamarca and Josefina Espinoza and the written warnings issued to them on February 5, 2015, and within 3 days thereafter notify the them in writing that this has been done and that the discharges and written warnings will not be used against them in any way.

40 (f) Provide relevant and necessary information to the Union regarding its unilaterally implemented rule regarding the cessation of its practice of allowing employees to leave work early for child care purposes with supervisory approval at its Niles, Illinois facility, and the discipline and discharge of Maria Angamarca pursuant to that rule.

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(g) Provide relevant and necessary information to the Union regarding a list of the employees who received uniform reimbursements and the calculations of those amounts for each employee.

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

15 (i) Within 14 days after service by the Region, post at its facilities in Morton Grove, Skokie, and Niles, Illinois, copies of the attached notice marked "Appendix" in both English and Spanish.<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices  
20 to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 25, 2014.

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

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

Dated, Washington, D.C. , December 21, 2015

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Mark Carissimi  
Administrative Law Judge

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<sup>15</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally implement a rule at our Niles, Illinois facility ceasing our practice of allowing employees to leave work early for child care purposes with supervisory approval and requiring employees to provide a medical excuse if they need to leave work early.

WE WILL NOT enforce a unilaterally imposed rule at our Niles, Illinois facility regarding the cessation of our practice of allowing employees to leave work early for child care purposes with supervisory approval and requiring employees to provide medical excuse if they need to leave work early, by disciplining and discharging employees.

WE WILL NOT refuse to provide relevant and necessary information to the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO-CLC, Local Union No. 1 (the Union) regarding our unilaterally implemented rule regarding the cessation of our practice of allowing employees to leave work early for child care purposes with supervisory approval at our Niles, Illinois facility, and the discipline and discharge of Maria Angamarca pursuant to that rule.

WE WILL NOT delay the provision of relevant and necessary information to the Union regarding our unilaterally implemented rule regarding the cessation of our practice of allowing employees to leave work early for child care purposes with supervisory approval at our Niles, Illinois facility, and the discipline and discharge of Josefina Espinoza pursuant to that rule.

WE WILL NOT refuse to provide relevant and necessary information to the Union regarding a list of the employees who received reimbursement for amounts deducted from their paychecks for uniform rental and cleaning and the calculations of those amounts for each employee.

WE WILL NOT threaten employees with retaliation for making protected concerted complaints about the conduct of a supervisor.

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

WE WILL give notice and an opportunity to bargain to the Union regarding ceasing our practice at our Niles, Illinois facility of allowing employees to leave work early for child care purposes with supervisory approval and requiring employees to provide a medical excuse if they need to leave work early. The appropriate unit is:

All full-time and regular part-time time production/maintenance, production, maintenance, and shipping/receiving employees employed by the Employer at its facilities currently located at 7645 North Austin Avenue, Skokie, Illinois and 6431 West Oakton, Morton Grove, Illinois, and 6101 West Grosse Point Road, Niles, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL within 14 days from the date of the Board's Order, offer to Maria Angamarca and Josefina Espinoza full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Maria Angamarca and Josefina Espinoza whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL compensate Maria Angamarca and Josefina Espinoza for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarter for them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Maria Angamarca and Josefina Espinoza and the written warnings issued to them on February 5, 2015, and within 3 days thereafter notify them in writing that this has been done and that the discharges and written warnings will not be used against them in any way.

We WILL provide relevant and necessary information to the Union regarding our unilaterally implemented rule regarding the cessation of our practice of allowing employees to leave work early for child care purposes with supervisory approval at our Niles, Illinois facility, and the discipline and discharge of Maria Angamarca pursuant to that rule.

WE WILL provide relevant and necessary information to the Union regarding a list of the employees who received reimbursement for amounts deducted from their paychecks for uniform rental and cleaning and the calculations of those amounts for each employee.

LIFEWAY FOODS, INC.

(Employer)

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

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

The Rookery Building, 209 South LaSalle Street, Suite 900, Chicago, IL 60604-5208  
(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/13-CA-108215](http://www.nlr.gov/case/13-CA-108215) 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.



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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.