

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges**

**California Cartage Company, LLC; Orient
Tally Company, Inc.; And Core Employee
Management, Inc.**

and

**Cases 21-CA-190500
21-CA-207939
21-RC-188813**

International Brotherhood of Teamsters

**California Cartage Company, LLC; Orient
Tally Company, Inc.; NFI California
Cartage Distribution, LLC; California
Transload Services, LLC; and Core
Employee Management, Inc.,**

and

International Brotherhood of Teamsters

**California Cartage Company, LLC; and
Orient Tally Company, Inc., a Single
Employer, and Nexem Allied LLC d/b/a
Core Employee Management, Inc., A Joint
Employer,**

Employer,

**NFI California Cartage Holding Company,
LLC; California Cartage Distribution,
LLC; California Transload Services, LLC.,**

Successor Employer

and

International Brotherhood of Teamsters

Petitioner

**BRIEF OF COUNSEL FOR THE GENERAL COUNSEL
To The Honorable Dickie Montemayor, Administrative Law Judge**

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I. Introduction

At all relevant times through about July 2017, California Cartage Company LLC (hereinafter “Respondent Cal Cartage”) and Orient Tally Company, Inc. (hereinafter “Respondent Orient Tally”), a single employer, along with its staffing company Core Employee Management, Inc. (hereinafter “Respondent Core”) (collectively hereinafter “Respondents”) ¹ jointly staffed and operated a Container Freight Station located at 2401 East Pacific Coast Highway, Wilmington California (hereinafter “Wilmington Facility”). At the Wilmington Facility, Respondents provided warehousing, transloading, and shipping services for a variety of retail customers, such as Amazon, Lowe’s, and Sears. To sustain its operations Respondents relied on a low wage work force consisting of hundreds of permanent and temporary employees.

Around September of 2015, the International Brotherhood of Teamsters through Teamsters Local 848 (collectively hereinafter “Union”) began a comprehensive campaign to organize Respondents’ workforce. As part of this campaign, the Union spoke to employees, distributed Union literature, and held regular Union meetings. On September 22, 2015, the Union even organized a strike at the Wilmington Facility to protest the working conditions at the Wilmington Facility. By November 2016, the Union began collecting signed Union authorization cards from employees. After achieving overwhelming employee support, the Union filed a petition on November 28, 2016 seeking to represent approximately 250 permanent full-time, part-time, and temporary employees at the Wilmington Facility. Following a hearing, a directed election was set for December 22, 2016.

¹ Respondents Cal Cartage, Orient Tally and Core, will be collectively referred to as, “Respondents” for the remainder of this brief.

In November 2016, Respondents responded to the Union's increased activity by launching its own anti-union campaign. As part of their campaign, Respondents engaged in a series of unlawful actions to discourage their employees' support for the Union.

First, following the Union's filing of the representation petition and in the week preceding the election, Respondents' anti-union campaign ramped up to include an unlawful ban on employees discussing the Union during work hours.² The promulgation of this no-Union talk rule was made in spite of Respondents never previously prohibiting and continuing to allow conversations about other non-work related topics during work hours.

Second, Respondents' anti-union campaign reached its zenith on December 20, 2016, a mere two days before the election, when Respondent Cal Cartage's former CEO Robert "Bob" Curry³ (hereinafter "Curry") called a mandatory meeting of all employees on the first shift. During this mandatory meeting of all first shift employees, Curry unlawfully threatened employees by telling them that if the Union won the NLRB election that he would probably have to close, sell, or move the Wilmington Facility. Curry further threatened employees by stating that if the employees wanted to keep their jobs, they needed to vote no in the NLRB election. Curry also told employees, many of whom worked in the Amazon department, that because of the employees' continued involvement with the Union, he had lost the Amazon business and would have to close that department.

² During the trial, the General Counsel withdrew the allegations set forth in paragraphs 18, 21 (a) – (c), and 23 of the Consolidated Complaint. Paragraphs 21 and 23 were withdrawn pursuant to the ALJ acceptance of a Board settlement reached by the General Counsel and Respondents' counsel as admitted in General Counsel Exhibit 2. Consistent with the withdrawal of paragraph 21, the General Counsel at the hearing amended the Consolidated Complaint on page 11 of General Counsel Exhibit 1(bb) to strike the language stating that "the General Counsel seeks an order requiring that Respondents reimburse the discriminatee for reasonable consequential damages incurred by him as a result of Respondent's unlawful conduct." The withdrawals and the amendment were granted.

³ Robert Curry served as the CEO of Respondent Cal Cartage and President of Respondent Orient Tally until about October 1, 2017, when Respondent NFI acquired the assets of Respondents Cal Cartage and Orient Tally. (G.C. Ex. 1(ff)).

To ensure that all employees understood Curry's message, Operations Manager Freddy Rivera (hereinafter "Rivera") translated Curry's speech for the Spanish speaking employees and made virtually identical threats of closure, relocation, and job loss to the Spanish speaking employees.

On December 22, 2016, two days after Curry's speech, the NLRB held the election at the Wilmington Facility. The tally of ballots prepared at the conclusion of the election showed that of 689 eligible voters, 124 voted in favor of the Union, 283 voted against the Union, with 7 void ballots, and 113 challenge ballots. After the election, the Union filed timely objections to certain Respondents conduct, including Curry and Rivera's unlawful threats to employees.

Despite the result of the December 22, 2016 election, Respondents remained hostile to employees' exercise of their Section 7 rights. In January 2017, during a seasonal downturn in business, Respondents began turning some temporary employees away who showed up to the facility to work. During this time, African-American employees believed and complained that Respondents' wrongfully discriminated against them by denying them work. When an employee began to film this perceived discrimination with a cell phone, Respondents threatened to call police on the employee for engaging in this protected concerted activity.

Respondents, by creating and disparately enforcing an unlawful no-Union talk rule; making unlawful threats of plant closure, plant sale, plant relocation, loss business, account closure, and job loss; and interfering with their employees protected concerted activity violated Section 8(a)(1) of the Act.

Since the above unfair labor practices have occurred, between July 2017 and October 2017, a new group of entities, including: Respondent Nexem-Allied LLC, dba Core Employee

Management (hereinafter “Respondent Nexem-Allied”), Respondents NFI California Cartage Holding Company, LLC. (hereinafter “ Respondent NFI”), California Cartage Distribution, LLC, (hereinafter “Respondent Cal Cartage Distribution”), California Transload Services, LLC (hereinafter “Respondent California Transload”), have taken the over the operations of the Wilmington Facility and since that time have affirmatively assumed liability for the unfair labor practice allegations at issue as *Golden State*⁴ successors.

II. Statement of Facts

A. The Legal Relationships between Respondents

a. The Unfair Labor Practices Were Committed by Respondents Cal Cartage, Orient Tally, and Core

Although there are numerous respondents named in these matters, the unfair labor practices alleged were committed by the following three entities: (1) Respondent Cal Cartage; (2) Respondent Orient Tally and (3) Respondent Core. These three entities were in charge of the operations at the Wilmington Facility during the time period when the unfair labor practices occurred, from November 2016 through January 2017, and it was the supervisors and agents of Respondent Cal Cartage, Respondent Orient Tally, and Respondent Core that committed the unfair labor practices at issue during that time period. (Jt. Ex. 1).⁵

b. The Relationships between Respondents Cal Cartage, Orient Tally and Core

In the Answer to the Consolidated Complaint (hereinafter “Complaint”), Respondent Cal Cartage and Respondent Orient Tally admitted that during the period of time in which the unfair labor practices were committed, they operated together as a single-integrated business enterprise

⁴ *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

⁵ Throughout this brief, all citations to the transcript will be referred to as “Tr.” followed by the appropriate page number. General Counsel's exhibits will be referred to as “G.C. Ex.” followed by the appropriate exhibit number. Joint exhibits will be referred to as “Jt. Ex.” followed by the appropriate exhibit number. Respondent’s exhibits will be referred to as “R. Ex.” followed by the appropriate exhibit number. Union’s exhibits will be referred to as “U. Ex.” followed by the appropriate exhibit number.

and were a single employer within the meaning of the Act. Moreover, they admitted in the Answer that during the time period that the unfair labor practices occurred, Respondent Cal Cartage operated the business at the Wilmington Facility and Respondent Orient Tally provided labor services for Respondent Cal Cartage at the Wilmington Facility. (G.C. Ex.1(bb) and (ff)). During this same time period, Respondent Cal Cartage and Respondent Orient Tally were affiliated business enterprises with common officers, ownership, directors, management, and supervision; administered a common labor policy; shared common premises and facilities; provided services for and made sales to each other; interchanged personnel with each other; had interrelated operations with common insurance, purchasing and sales; and held themselves out to the public as a single integrated business enterprise. (G.C. Ex.1(bb) and (ff)).

In addition to the admissions Respondents proffered in their Answer to the Complaint, the parties submitted written stipulations on the record which further described the relationships among Respondents. Pursuant to these stipulations, Respondents admitted that Respondent Cal Cartage, Respondent Orient Tally, and Respondent Core were joint employers, within the meaning of the Act, of the employees of Core assigned to work at the Wilmington Facility. In this regard, Respondents were parties to a contract, during the November 2016, through January 2017 time period that the unfair labor practices occurred, pursuant to which Respondent Core provided temporary staffing services to the Wilmington Facility. (Jt. Ex. 1). Respondents also stipulated that during the relevant time period, Respondent Cal Cartage, Respondent Orient Tally, and Respondent Core jointly controlled and administered the labor relations policies applicable to the employees of Respondent Core who were assigned to work at the Wilmington Facility and that they shared or codetermined essential terms and conditions of Core's employees assigned to work at the Wilmington Facility. (Jt. Ex. 1).

c. The Successor Respondents and their Relationships

Between the months of July 2017, through October 2017, after the unfair labor practices at issue had already taken place, a new group of entities took over the operations of the Wilmington Facility and since that time have affirmatively assumed liability for the unfair labor practice allegations at issue as the successor employers.

In this regard, on about July 23, 2017, Respondent Nexem-Allied took over and continued the operations of Respondent Core in basically unchanged form. Respondent Nexem-Allied has stipulated and agreed that it is the successor to Respondent Core and has assumed liability for all relevant purposes under the National Labor Relations Act. (Jt. Ex. 2).

On about October 1, 2017, Respondent NFI, Respondent Cal Cartage Distribution, Respondent California Transload (collectively hereinafter “Respondents NFI Group”) assumed the operations at the Wilmington Facility from Respondent Cal Cartage and Respondent Orient Tally. (Jt. Ex. 1). Since about October 1, 2017, Respondents NFI, Cal Cartage Distribution, California Transload, and Respondent Nexem-Allied have jointly controlled and administered the labor relations policies applicable to the employees of Respondent Nexem-Allied, assigned to work at the Wilmington Facility. (Jt. Ex. 1).

In the Answer to the Complaint, Respondents NFI Group admitted that Respondent Cal Cartage Distribution, Respondent California Transload, and Respondent NFI are a single employer within the meaning of the Act. (G.C. Ex.1(bb) and (ff)). In support of that admission, Respondents NFI Group also admitted that since about October 1, 2017, Respondents NFI Group has been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have administered a common labor policy; have shared common premises and facilities; have provided services for each other; have interchanged personnel with

each other; have had interrelated operations with common insurance; and have held themselves out to the public as a single-integrated business enterprise. (G.C. Ex.1(bb) and (ff))

Respondents NFI Group in the Answer and in the parties' stipulation admitted that it is a joint employer with Respondent Nexem-Allied within the meaning of the Act. (Jt. Ex.1; G.C. Ex.1(bb) and (ff)). Respondent Nexem-Allied and Respondents NFI Group additionally stipulated to the joint employer status of these entities. (Jt. Ex. 1). The record reflects that since about October 1, 2017, Respondents NFI Group and Respondent Nexem-Allied have jointly controlled and administered the labor relations policies applicable to the employees of Respondent Nexem-Allied assigned to work at the Wilmington Facility. (Jt. Ex. 1).

In addition since October 1, 2017, Respondents NFI Group and Respondent Nexem-Allied have shared or codetermined essential terms and conditions of Respondent Nexem-Allied's employees assigned to work at the Wilmington Facility, specifically, the day-to-day supervision and direction of the workforce. In addition since about October 1, 2017, Respondents NFI Group, Cal Cartage Distribution, California Transload, and Core have been joint employers of the employees of Core assigned to work at the Wilmington Facility.

Finally, in addition to assuming liability for the unfair labor practices at issues in this matter, the parties have stipulated that with respect to any re-run election that may be ordered in Case No. 21-RC-188813, Respondents NFI Group and Respondent Nexem-Allied stipulate and agree that they are now the Employers of the unit employees at issues in that case. (Jt. Ex. 2).

B. Respondents' Business and Operations

Respondent Cal Cartage, Respondent Orient Tally, and Respondents NFI Group provide warehousing, transloading, and shipping services for a variety of retail customers, such as Amazon, Lowe's, and Sears, out of Respondents Wilmington Facility. (Tr. 351:5-12, 143:13-14, G.C. Ex. 1(ff)). Specifically, Respondent Cal Cartage, Respondent Orient Tally, and

Respondents NFI Group business consists of receiving their customers' inbound import containers, unloading the containers, either into storage or directly into outbound containers, and shipping the outbound containers to the customers' distribution center. (Tr. 351:5-24).

Respondent Core, and its successor, supports Respondent Cal Cartage, Respondent Orient Tally, and Respondents NFI Group's operations by supplementing the Wilmington Facility's regular employees with temporary employees. Respondent Core and its successor's temporary employees perform essentially the same work as Respondent Cal Cartage, Respondent Orient Tally, and Respondents NFI Group's regular employees with the same job titles. (Tr. 62:14-20, 176:1-10). However, contrary to regular employees, temporary employees are not guaranteed work. In fact, Respondent Core and its successor's temporary employees often will not know whether they have work until they have arrived at the Wilmington Facility, proceed through a double-fenced hall-way waiting area, and check-in with a supervisor who sits at a security check-point outside of the Wilmington Facility's working area. (Tr. 58:25-59:23, 75:3-7).

The Wilmington Facility is a fenced in warehousing facility that consists of several large warehouses organized by departments named after Respondent Cal Cartage, Respondent Orient Tally, and Respondents NFI Group's customers. (Tr. 143:7-15, G.C. Ex. 7). The warehouses typically have a large open area in the middle for unloaded goods. (Tr. 61:21-23). Flanking either side of the storage area are two external docks, one used for loading and the other for unloading. (Tr. 62:1-7). During normal operations, containers and trucks park about one foot apart at the docks while their contents can be loaded or unloaded. (Tr. 62:8-13).

C. The Union Campaigns to Organize Respondents' Employees at the Wilmington Facility

The Union began its campaign to organize Respondents' regular and temporary employees at the Wilmington Facility on or around September 2015. (Tr. 251:15-20, 357:18-358:9, GC Ex. 1(a)). As a part of its campaign, the Union held regular Union meetings, passed out Teamsters' protective vests to employees, hand billed, mailed out Union literature, had Union supporting employees and Union staff speak to employees, organized employee delegations, and organized strikes and pickets. (Tr. 120:11-12, 122:22-25, 143:4-6, 172:22, 357:18-358:9, 252:4-253:23, 254:22-256:2).⁶ As a result of these actions, Respondents became aware of the Union's campaign by no later than September 21, 2015, which was when Respondents first learned about a planned Union strike at the Wilmington Facility to protest working conditions at the plant taking place the following day. (Tr. 357:18-22).

The Union's campaign continued after the strike, and by November 2016, the Union started collecting signed Union authorization cards, and based on its overwhelming employee support, filed a petition on November 28, 2016 seeking to represent approximately 250 full-time and part-time employees at the Wilmington Facility. (Tr. 251:21-25, G.C. Ex. 1(a)). As the parties could not reach a stipulated election agreement, a hearing was held and on December 9, 2016, the Regional Director issued a Decision and Direction of Election setting December 22, 2016 as the date for the election at the Wilmington Facility for a voting unit of approximately 689 employees consisting of:

All full-time, regular part-time, and temporary Lumpers, Forklift Drivers, Chalkers, Mechanics, Yard Goats, Equipment Control employees, and Maintenance Workers jointly employed by California Cartage Company, LLC/Orient Tally Company, Inc., and

⁶ As a substantial portion of Respondents employees were monolingual Spanish speakers, the Union's campaign was in both English and Spanish. (Tr. 255:2-7).

Core Employee Management, Inc., at California Cartage Company, LLC's facility located at 2401 East Pacific Coast Highway, Wilmington, CA 90744; and

All full-time, regular part-time, and temporary Lumpers, Forklift Drivers, Chalkers, Mechanics, Yard Goats, and Maintenance Workers employed solely by California Cartage Company, LLC/Orient Tally Company, Inc. at California Cartage Company, LLC's facility located at 2401 East Pacific Coast Highway, Wilmington, CA 90744[.] (G.C. Ex. 1(dd)).

From the time of the filing of the petition to the election held on December 22, 2016, the Union ramped up its campaign by utilizing sixteen to twenty three organizers to reach out to all 689 eligible voters by either visiting them at home or speaking to them over the phone. (Tr. 257:17-259-:10).

Many employees openly supported the Union's campaign. Some employees, such as Victor Gonzalez (hereinafter "Victor") and Miguel Rodriguez (hereinafter "Miguel"), openly supported the Union's organizing efforts by being a part of delegations to management and attending strikes and pickets. (Tr. 172:20-22, 214:8-18). Other employees, including Michael Johnson (hereinafter "Johnson"), Alberto Carbajal (hereinafter "Carbajal"), and Jose Rodriguez (hereinafter "Employee Rodriguez")⁷, openly supported the Union by regularly wearing Union apparels to work, including a t-shirt and a vest with the Union logo, and by talking with their coworkers about the Union. (Tr. 65:9-16, 120:11-123:10, 191:14-24, 233:4-11). Johnson especially made his support for the Union apparent, as even when asked by a supervisor about how he would vote about two weeks prior to the election Johnson unequivocally told the supervisor that he would vote in favor of the Union. (Tr. 86:5-88:19).

⁷ Two individuals named Jose Rodriguez testified during the hearing. The first individual named Jose Rodriguez was an employee and a witness of the General Counsel. The second individual named Jose Rodriguez (hereinafter "Supervisor Rodriguez") was a supervisor and a witness of Respondents.

D. Respondents React by Launching Their Own Staunch Anti-Union Campaign

Once the Union started collecting authorization cards in or around November 2016, Respondents launched their staunch anti-union campaign. Respondents' campaign consisted of creating and distributing various pieces of anti-union literature and holding regular anti-union meetings with employees. (Tr. 65-8, 71-2, 148, 173).

Respondents distributed literature; such as U. Ex. 1, G.C. Ex. 4, 6, & 9; often relied on stoking fear in employees to discourage their support of the Union's organizing efforts. For instance, on November 3, 2016, Respondent Cal Cartage's CEO Robert Curry and Vice-President Luke Lynch issued a flyer discouraging employees from signing Union authorization cards by stating that "these cards may be used to force California Cartage to provide information about you to the federal government and the Union . . . [including] home address, personal telephone numbers (home and cell), and personal email address." (G.C. Ex. 4). Likewise, in a December 16, 2016 flyer Respondents stated that:

As you know, our job is to meet our customers' needs. If there is a strike here, we have the right to run our business and meet our customers' needs, even if:

- You are picketing in front of the dock
- Not getting a paycheck
- Unable to draw unemployment or food stamps. (G.C. Ex. 6).

To ensure that both English and Spanish speaking employees understood Respondents' messages about the Union, Respondents' literature were produced in both English and Spanish. (G.C. Ex. 4 & 9).

E. Respondents Bar Employees from Discussing the Union during Work Hours

Both prior to and after December 2016, employees on the docks, such as lumpers who often work in pairs and in close proximity to one another, spoke freely to each other about a wide

range of topics while working. These topics included both work and non-work related matters. (Tr. 62:11-63:9, 64:1-14, 144:22-23). For example, while working, employees regularly engaged in conversations about sports, the weather, and their activities outside of work. (Tr. 64:1-2, 144:22-23). While Respondents were aware of and allowed employees to talk about non-work related topics, as Respondents managers themselves would often join these conversations, when the Union's organizing campaign ramped up in December 2016, Respondents sought to ban employees from talking about the Union during work hours. (Tr. 64:3-7, 69:13-70:12, 71:11-22, 144:24-145:2, 146:15-147:9).

Specifically, around the week of December 12 or 19, 2016, Amazon supervisor Enrique Gonzalez (hereinafter Enrique) held a morning anti-union meeting to discuss the Union, its constitution, and employee concerns. During this meeting employee Johnson voiced his opinion that Respondents discriminated against African-American employees, including by not training African-American employees to be forklift drivers. (Tr. 70:15-21, 105:14-106:10, 109:2-10).

After the anti-union meeting employees Johnson, Dwayne Wilson (hereinafter "Wilson"), Michael Morris (hereinafter "Morris"), and Pacifico Bungato (hereinafter "Bungato") proceeded to their work area on the Amazon warehouse dock. (Tr. 146:2-8). While working, Bungato asked Wilson about how Union dues worked. (Tr. 146:17-18). As Wilson talked to Bungato, Johnson and Morris who were working in the next container joined the conversation. (Tr. 105:2-4, 146:18-20). During their conversation the employees discussed how much Union dues they would have to pay as compared to how much they already paid to Respondent Core to work at the Wilmington Facility. (Tr. 146:21-22).

While the employees discussed Union dues, Enrique came out of the management office area and saw the employees talking to one another. (Tr. 146:25-147:3). When Enrique saw the

employees talking to each other, he approached them, and upon hearing the topic of their conversation told them to stop talking about the Union and get back to work. (Tr. 70:11-12, 106:19-25, 147:6-11).⁸

After telling the employees to stop talking about the Union, Enrique then asked Johnson to get into Enrique's golf cart because Enrique wanted to speak to him. (Tr. 69:15-17, 147:16-18). Enrique then drove Johnson in the golf cart to a forklift driver training area to show Johnson that Respondents do not discriminate against African-American employees because one of the six employees receiving forklift training at the time was African-American. (Tr. 107:3-5). Johnson told Enrique that he disagreed with Enrique and thought that the fact that there was only one African-American employee being trained showed the discrimination that Johnson talked about during the morning meeting. After some discussion, Enrique decided to take Johnson to see Respondent Core on-site supervisor Marco Gonzalez (hereinafter "Marco"). (Tr. 110:19-20).

When Johnson and Enrique arrived at Marco's office, Enrique told Marco that Johnson was doing something wrong and told Johnson to tell Marco about what Johnson had said about the company during the morning anti-union meeting and about what he and his coworkers were discussing with one another. (Tr. 71:3-10, 110:17-24). Obeying Enrique's instruction, Johnson told Marco that he and his coworkers were discussing the Union and what the Union could do for employees. (Tr. 71:2-13). Johnson also told Marco that he believed that Respondents discriminated against certain races. (Tr. 71:3-10). When Johnson stated his belief about racial discrimination, Enrique called Johnson a liar. (Tr. 110:25-11:6). At this point, Marco ended the meeting and told Johnson to stop talking to other employees about the Union during work hours.

⁸ While Wilson did not recall supervisor Enrique saying anything about the Union specifically, Wilson did recall Enrique interrupting the employees conversation by telling the employees to stop talking and that there is a time and place for everything, and that the employees either shouldn't be talking at that moment or that they were not allowed to talk right then. (Tr. 147:6-11).

(Tr. 71:11-15). Marco and Johnson then walked out of Marco's office together to a meeting that Marco needed to attend. Before Marco and Johnson separated, Marco again told Johnson that he needed to stop talking about the Union during work hours. (Tr. 71:17-19).

Enrique during his direct testimony, in response to leading questions from Respondents' counsel, denied that he ever told Johnson, Wilson, Morris, or Bungato as a group or individually to not talk about the Union. (Tr. 406:14-407:15). In fact, Enrique was so unwilling to admit to any facts regarding his interaction with Johnson, that he even denied taking Johnson to see Marco. (Tr. 406:19-407:6, 408:3-7). Respondents did not call Marco as a witness during the hearing.

F. Respondent Cal Cartage CEO and Respondent Orient Tally President Robert "Bob" Curry and Cal Cartage Operation Manager Freddy Rivera Threaten Employees with Plant Closure, Plant Relocation, Plant Sale, and Job Loss if Employees Vote in Favor of the Union and if the Employees Continue to be Involved with the Union

At the zenith of Respondents' anti-union campaign on December 20, 2016, a mere two days before the NLRB election on December 22, 2016, Respondent Cal Cartage CEO and Respondent Orient Tally President Curry and Operation Manager Freddy Rivera held a mandatory meeting with employees where they threatened that they would close, relocate, sell, or lose business at the Wilmington Facility if the Union wins the NLRB election and if the employees continued to be involved with the Union.⁹

a. Respondents Call Employees to a Mandatory Meeting

On the morning of December 20, 2016, supervisors and leads went around the Wilmington Facility and told each employee, individually, that they had to go to the Sears' warehouse for a mandatory meeting. (Tr. 72:16-73:16, 148:7-149:14, 173:10-174:8, 192:4-193:6; 214:23-215:20, 233:17-234:12). Several hundred employees, consisting of the all of the first shift

⁹ The record reflects that on December 20, 2016, CEO and President Curry spoke at two separate meetings, one during the morning (first) shift and another during the evening (second) shift. (Tr. 339).

employees, and members of management attended the morning meeting. (Tr. 73:19-20, 149:17-23, 174:24-175:2, 192:17-20, 215:16-17, 234:20-21). Respondents structured the December 20, 2016 meeting to allow Curry to first deliver his speech in English and then have Operations Manager Rivera translate Curry's speech into Spanish. (Tr. 74:16-20, 151:4-7, 175:19-23, 193:10-24, 215:21-216:22, 235:1-236:14). Curry and Rivera spoke to employees using a microphone and speaker system to ensure that all employees could hear their speeches clearly. (Tr. 328:24-329:4).

b. Curry Threatens Employees with Plant Closure, Plant Relocation, Plant Sale, and Job Loss

When the employees gathered, Rivera, speaking in English and Spanish, introduced Curry and told employees that management would not take any questions during the meeting. (Tr. 235:3-7, R. Ex. 2). After Rivera's introduction, Curry talked about himself, the history of Respondent Cal Cartage, how the Teamsters broke him in the past, and how the Teamsters were a dictatorship that would only get in the way of the company's relationship with the employees. (R. Ex. 2, 113:9-13, 150:10-13, 158:7-19; 164:14-168:1).

Not merely satisfied with speaking about the past, towards the end of Curry's speech, Curry threatened employees that if the Union was to win the election and return to the plant, he would probably have to close, move, or sell the company. (Tr. 74:8-10, 113:16-18, 150:16-17, 175:12-13, 178:25-179:19). Curry also threatened employees "that if [they] wanted to keep [their] jobs, [they] needed to vote no." (Tr. 182:22-23). Curry told employees that if they failed to vote no in the NLRB election, "[they] would lose [their] jobs because the company's competitor will undercut the company, and the company would have to cut prices and lose business." (Tr. 182:23-183:1). Curry told employees, many of whom worked in the Amazon department, that because of the Teamsters' organizing campaign, the company had lost the

Amazon contract, and that he would close the Amazon account. (Tr. 74:6-8, 113:13-16, 115:22-23, 150:18-23, 165:16-20, 166:18-22).

While Curry had notes prepared to use in his speech, he largely spoke extemporaneously and did not rely on his notes. (Tr. 175:8-10, 195:7-9, 216:6-18, 235:23-236:6). In fact, Rivera who was responsible for translating Curry's speech, and who had received a Spanish version of Curry's speech, admitted that even he tried to take notes of Curry's unscripted comments, but found that Curry's comments veered so off-script that it was impossible for him to keep up. (Tr. 341:7-17). Curry spoke for about fifteen minutes to forty five minutes. (Tr. 74:23-75:2, 112:5-7, 151:11-15, 166:12-14, 175:24-176:4, 194:22-25, 216:19-20, 236:7-8).

c. Rivera Translated Curry's Threats of Plant Closure, Plant Relocation, and Job Loss

After Curry finished with his threatening remarks, Operation Manager Rivera then told employees in Spanish that "he was going to explain to [the employees] into Spanish what the owner had said in English." (Tr. 194:3-4). Rivera then spoke in Spanish about Curry, why the Union was bad for employees, and how the Union bankrupted the company back in 1985. (Tr. 194:6-8, 217:3-7, 236:16-21). Similar to Curry and as corroborated by all three Spanish speaking employees who testified, Rivera toward the end of his own speech threatened employees that if the Union won the election and returned to the company, the company would have to close or change location, and "that everyone was going to be left without a job." (Tr. 194:8-10, 217:21-218:4, 236:21-137:6).

Similar to Curry, employees recalled that Rivera generally spoke extemporaneously without extensively relying on his notes. (Tr. 218:11-19, 237:8-14, 246). Rivera spoke for about ten to thirty minutes. (Tr. 74:23-75:3, 175:24-176:4, 194:24-25, 218:5-6, 237:6-7).

d. Respondents' Blanket Denials that Curry Made Any Threats is Not Supported by the Evidence

Contrary to the employees very specific narrative recollection of Curry and Rivera's threats of closure, threats to move, threats to sell, threats of job loss, and threats to close certain accounts, Respondents rely on incomplete evidence and leading and self-serving testimonies of supervisors and managers to contradict the employees' recollection. Importantly, while Respondents called many supervisors and managers at the hearing to testify to Curry's threats, Respondents did not call Curry as a witness during the hearing.

During direct examination of its witnesses, Respondents' counsels primarily relied on leading questions to recount, almost verbatim, the employees' testimonies of specific threats Curry made during his speech. Unsurprisingly, Respondents representatives denied all of the threats attributed to Curry. (Tr. 325:2-326:1, 378:23-379:19, 399:9-400:11). To support these denials, all of Respondents managers and supervisors, except for one,¹⁰ testified that Curry spoke only for about ten minutes, which is convenient as Respondents introduced a seven minute incomplete video recording of Curry's speech at the hearing. (Tr. 301:13-302:20, 348:19-20, 378:21-2).

The recording that Respondents introduced, and admitted as Respondent Exhibit 2, was created by employee Chris Vasquez (hereinafter "Vazquez") who is now deceased. (Tr. 301:13-302:20). Respondent Exhibit 2, the incomplete recording of Curry's speech, includes two videos with the first video, named 2061220_090337, showing approximately the first three minutes and thirty seconds at the start of Curry's speech, and the second video, named 2016120_090747, showing an additional three minutes and forty-two seconds of some unknown middle part of Curry's speech. (Tr. 301:15-302:20, R. Ex. 2). Respondents' representatives could not explain

¹⁰ Supervisor Rodriguez is the only Respondents representative that testified Curry spoke for "ten to fifteen minutes" during his speech. (Tr. 399:7-8).

why the two videos were not continuous. (Tr. 304:21-25). Respondents did not provide any explanation about the gap between the two videos or what was said during that gap. Similarly, Respondents also did not provide any testimony about why the recording conveniently ended before the end of Curry's speech, where Respondents admit certain statements, such as those about lost Amazon business, were made. (Tr. 305:17-21, 312:9-313:1, 350:10-16, 380:4-6).

Respondents maintain that Vasquez' videos are the only videos it has and know about of the morning speech, despite the first Vasquez' video clearly showing at approximately the thirty-five second mark, another employee was also making a recording of the speech with his phone. (Tr. 306:5-7, 307:13-310:14, R. Ex. 2). When questioned about the other employee's recording, Rivera, who obtained Respondent Exhibit 2, could not recall the unknown recording employee's name or even if Respondents made any specific attempt to obtain this unknown employee's recording of Curry's speech. (Tr. 307:22-308:15, 310:9-14).

Rivera testified that the two videos in Respondent Exhibit 2 were the exact videos provided to Respondents by Vasquez, in format (two separate videos files) and in form (filmed vertically), and that he had not edited or changed the videos in anyway. (Tr. 305:1-5, 305:22-23, 329:8-331:17). During cross examination Rivera admitted that he, personally, previously provided a copy of the same video footage in Respondent Exhibit 2 to the NLRB on a DVD. (Tr. 329:8-332:19).¹¹ Rivera further admits that the DVD he provided to the NLRB during the investigation contained the exact video that he received from Vasquez, and that he had not edited or changed the videos in anyway. (Tr. 329: 8-17, 337:4-8). However, when shown the video on the DVD and the videos in Respondent Exhibit 2, Rivera admitted that the DVD video footage differed in both format and form, from the ones admitted as a part of Respondent Exhibit 2.

¹¹ Rivera refused to authenticate the physical DVD that he, himself, provided to the NLRB when giving his Board Affidavit. (Tr. 332:3-23).

Specifically, Rivera admitted that the DVD he provided in the investigation contained only one video file when Respondent Exhibit 2 contained two video files. (Tr. 331:7-23, 332:24-333:1). Rivera also admitted that there was a “glitch” where the two video files in Respondent Exhibit 2 had been connected to each other to create the single file in the DVD. (Tr. 336:18-337:3). Lastly, Rivera admitted that the DVD video was shot horizontally instead of vertically. Respondent Exhibit 2 was shot vertically. (Tr. 333:2-22, 334:5-8). Rivera was unable to explain why the footage that he provided during the investigation differed, in format and form, from the footage in Respondent Exhibit 2.

e. Respondents Deny Rivera Made Any Threats with Blanket Denials

Similarly, in contrast to the employees’ recollection of Rivera’s Spanish speech, Respondents representatives during direct examination, through leading questions, denied all of the threats attributed to Rivera. (Tr. 326:5-17, 401:21-402:12). Rivera, in fact, maintains that he did not even translate Curry’s speech, but merely read from a script provided to him by management with some minor adjustments. (Tr. 319:3-4).

Rivera’s testimony about merely reading the speech given to him was made in spite of his admission that during the pre-speech meeting with labor consultant Norm Weissman (hereinafter “Weissman”) he was told “that [Curry is] going to add a few things to his speech” and that Rivera needed to “make sure [to] write [the changes down] so [he] can translate it.” Rivera admitted that per Weismann’s instructions, he took notes on Curry’s changes during the pre-speech meeting and also contemporaneously when Curry spoke. Rivera admitted that he took notes of Curry’s non-scripted comments so that he could add them to the Spanish translation that he delivered. (Tr. 318:8-10, 341:7-17).¹²

¹² During the investigation Rivera testified that he had lost his notes from the December 20, 2016 morning speech. (Tr. 341:20-22). However, at the hearing Rivera authenticated R. Ex. 4 as the notes that he created during the

f. Respondents Admit that Against the Advice of Respondents' Outside Labor Consultant, Curry Made Off-Script Comments During his Speech that Worried even Members of Management

Beyond Respondents representatives' blanket denials of the specific threats Curry made, Respondents admit that Respondents created a speech for Curry to use. (Tr. 338:1-23, G.C. Ex. 11, G.C. Ex. 12, G.C. Ex. 13, Jt. Ex. 3). While it is unclear when Curry first saw the speech prepared for him, (G. C. Ex. 11), it is very clear that on December 20, 2016 while reviewing the speech with members of management and labor consultant Weismann, Curry expressed his dissatisfaction with the written speech he was given and wanted to make radical changes and additions to the speech. (316:9-317:12). Curry's desired changes were so radical that even Weissman told Curry not to say them. (Tr. 317:16-25). Nonetheless, because Curry was the "boss" and "he just felt like he wanted to say it[,] against the advice of his own outside consultant, Curry ultimately incorporated many of his proposed changes into the speech he delivered to employees. (Tr. 317:8-318:19).

While Respondents retained several versions of Curry's proposed speech as evidenced by General Counsel Exhibits 11 through 13, the finalized notecards that Curry ultimately used for his morning speech was not produced during the trial as inexplicably and despite Curry having a second planned speech later that day, had been discarded by Curry or his secretary shortly after the morning speech. (Tr. 339:5-24, Jt. Ex. 3).

Ultimately, even Respondents admitted that the speech Curry delivered to employees did not follow any of the versions of the speech prepared for him. (Tr. 340:2-341:17). As previously noted, Rivera who was tasked to translate Curry's speech and was given a Spanish version of Rivera's remarks admitted that he tried to take notes of Curry's unscripted comments, but found

meeting with Weismann and contemporaneously during Curry's December 20, 2016 speech. (Tr. 313:7-315:18). When questioned about his notes, Rivera admitted that "3 strikes" was the *only* note he took contemporaneously during Curry's speech. (Tr. 314:11-14, 318:3-19, 340:24-341:19).

that Curry veered off so much that it was impossible for Rivera to take notes. (Tr. 341:7-17). In fact, Curry's unscripted comments were so outrageous that even Rivera admitted that for the comments that he did make notes of, even he "wasn't sure if it was okay for [him] to say" when he translated for Curry. (Tr. 324:24-325:1).

Notably, Curry's threat regarding lost Amazon business was particularly threatening and even caused management and Weismann, who attended the meeting, to become concerned about what Curry had said to employees. (Tr. 312:14-313:2, 350:10-16, 380:14-20, 399:16-19). In fact, after the meeting ended, Respondent Core's regional vice-president Lisa Lyons (hereinafter "Lyons") admitted that she became so concerned when Curry told employees that Respondents had lost Amazon business that she spoke to Weismann immediately after the meeting. (Tr. 380:14-20). Weismann who shared Lyon's concerns, explained to Lyons about what business he believed Curry was referring to and asked Lyons to "go back to the [Amazon] department and, . . . , discuss [the lost Amazon business] with the labor that were working there." (Tr. 380:17-20).¹³ Lyons then went to the Amazon department with Marco and Enrique to meet with employees about Curry's statements about the lost Amazon business. (Tr. 380:23-382:11).

Lyons did not recall specifically what Respondents told employees during the post-speech Amazon meeting, because she relied on Enrique to do the talking. (Tr. 381:14-20). While Enrique testified at trial, Respondent Counsel did not inquire about Enrique's recollections about Curry's comment about the Amazon business or about what Enrique told employees during the post-speech Amazon department meeting. Outside consultant Weismann did not testify at the hearing.

¹³ At trial, Respondents presented evidence showing that in 2015 Amazon approached Respondents about potentially having Respondents do some additional holiday based work on top of the work that Respondents already did for Amazon. (Tr. 352:6-14). However, Amazon ultimately decided against working with Respondents for the holiday work. (Tr. 357:5-359:3).

G. Results of the December 22, 2016 NLRB Election

On December 22, 2016, the NLRB conducted an election at the Wilmington Facility. The tally of ballots prepared at the conclusion of the election showed that of 689 eligible voters, 124 voted in favor of the Union, 283 voted against the Union, with 7 void ballots, and 113 challenge ballots. (G.C. Ex. 1(dd)). On December 29, 2016 the Union timely filed objections to certain Respondents conduct, including the threats that Curry and Rivera made during the December 20, 2016 mandatory meeting.

H. Supervisor Marco January 2017 Threat to Call the Police on an Employee Engaged in Protected Concerted Activity

Despite the results of the December 22, 2016 NLRB election, Respondents did not end their crusade against its employees' exercise of Section 7 rights. In fact, Respondents continued to suppress their employees' exercise of their rights, including by threatening to call the police on employee Johnson when it observed him engaging in protected concerted activity.

As explained above, temporary employees provided by Respondent Core are not guaranteed work at the Wilmington Facility. Rather, they show up in the morning and check-in with a Respondent Core supervisor who would tell them whether there is or is not work for them. (Tr. 58:25-59:23, 75:3-7). When there is work for an employee, the employee is allowed inside the Wilmington Facility's working area. When there is no work for an employee, the employee is turned away. (Tr. 81:23-82:8; 88:20-90:3). When temporary employees are denied work they may stay inside the double-fenced hall-way waiting area for several hours, as they may still be called into work later if additional work became available. (88:20-91:7).

On January 17, 2017, when temporary employee Johnson arrived at the Wilmington Facility he was denied work by Respondent Core supervisor Marco. (Tr. 81:23-82:8). At this time, Johnson and other temporary employees, who noticed that most of the employees being

denied work were non-Hispanic, complained loudly to Marco and to each other that they believed Respondents were racially discriminating against them by denying them work and pay. (Tr. 75:3-77:7). Johnson, in fact, yelled out “this is blunt discrimination, and if y’all don’t do something about it, I will start filming.” (Tr. 126:12-14). When Marco did not respond to the employees’ complaints, Johnson began to film with his phone the hallway waiting area to show how African-American employees were being denied work. While Johnson was doing this, Marco checked in for work Hispanic employees who showed up at the warehouse later than Johnson and other African-American employees. (Tr. 77:8-10).

On January 18, 2017 when Johnson arrived at the Wilmington Facility, he and other African-American employees were again denied work. (Tr.75-7, 126). Johnson again yelled out that the he believed that Respondents were discriminating against African-American employees, and that he would start filming. (Tr. 12-23). As he did not get a response from supervisor Marco, Johnson took out his cell phone and started recording the perceived discrimination. As Johnson held up his phone and recorded the employees who were standing in the waiting area, Marco approached Johnson and instructed him to stop recording. Marco told Johnson that he could not record because it is illegal for Johnson to record people without their permission in California. (Tr. 125:6-18). Johnson complied with Marco’s instruction and stopped recording. (Tr. 124:5-6).

However, immediately after his conversation with supervisor Marco, Johnson talked with several coworkers and got their permission to record them. (Tr. 124:7-8). After getting permission from his coworkers, about five minutes after Johnson had initially stopped recording, Johnson preceded to record with his phone a second time that day. (Tr. 124:7-9). Johnson then recorded several employees who were talking about what they experiencing and how they believed Respondents discriminated against certain racial groups and how this perceived

discrimination affected their ability to provide for their families. (G.C. Ex. 7). As soon as Johnson finished recording his coworkers, Marco approached Johnson and threatened Johnson by telling him that if he wanted to film he needed to leave because he was causing trouble, and if he did not stop recording Respondents would call the police on him. (Tr. 85:14-21, 124:21-15).

Respondents did not present any evidence to rebut employee Johnson's testimony.

Marco did not testify at the hearing.

III. Argument

A. Respondents, through Enrique Gonzalez and Marco Gonzalez, Unlawfully Promulgated and Disparately Enforced an Unlawful No Union Talk Rule

a. Board Law Recognizes that Isolated Communication of a Specific Prohibition on Union Talk Constitutes a Violation of Section 8(a)(1) of the Act

In *Boeing Co.*, 365 NLRB No. 154, slip. op. at 3-4 (Dec. 14, 2017), the Board while overruling *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) established a new standard for evaluating the validity of employer rules and policies. Under the *Boeing* standard, employer rules and policies can fall into one of three categories:

- Category 1 [includes] rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .
- Category 2 [includes] rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- Category 3 [includes] rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse

impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another. *Boeing Co.*, 365 NLRB at slip. op. at 3-4.

Generally, Board jurisprudence treats a no-discussion rule that only prohibit union discussions during work hours, but not other non-work related discussions, as a Category 3 rule that is unlawful to maintain because its interference with employees' rights outweigh any justifications for the rule.

Namely, the Board has consistently held that a no-discussion rule that only restricts employees from talking about union related topics during work hours, but allows employees to talk freely about non-work related topics, violates Section 8(a)(1) of the Act. *See, e.g., Teledyne Advanced Materials*, 332 NLRB 539 (2000) (holding that a rule that forbid employees from discussing unionization while working, but did not prohibit talking about non-work related matters during working time violated Section 8(a)(1) of the Act); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986) (holding that a rule that prohibit employees from talking about the union but allow employees to freely discussed other topics not related to work is a violation of Section 8(a)(1) of the Act); *Liberty House Nursing Homes*, 245 NLRB 1194 (1979) (holding that “[a] rule which restricts only conversations related to unions is discriminatory and therefore unlawful”). The Board further emphasized it views a no-discussion rule promulgated as a response to employees' activities during an organizing campaign, especially when no previous prohibition on non-work related discussions existed, as particularly suspect. *See, e.g., Altercare of Wadsworth Ctr. for Rehab. & Nursing Care, Inc.*, 355 NLRB 565, 573 (2010) (holding that a prohibition on union talk announced during a union organizing campaign as particularly

suspect); *Teledyne*, 332 NLRB at 539 (recognizing that an Employer’s prohibition on unionization discussion “announced in specific response to the employees’ activities in regard to the union organizational campaign” made the prohibition suspect); *Olympic Med. Corp.*, 236 NLRB 1117, 1122 (1978) *enfd.* 608 F.2d 762 (9th Cir. 1979) (holding that an Employer announcing a rule that “forbade only that conversation and distribution of literature relating to the Union[,]” in response to several employees circulating an anti-union petition during work time violated Section 8(a)(1) of the Act). Importantly, to violate the Act an employer prohibition on union discussion does not have to be widely disseminated, rather even isolated communication of this prohibition to just *one* employee is sufficient to violate Section 8(a)(1) of the Act. *Larid Printing, Inc.*, 264 NLRB 369, 374 (1982) (holding that an operation manager telling *one* employee, a week before an NLRB election, that “[the manager] didn’t want to hear union talk in the shop” is an institution and discriminatory application of a no-solicitation rule in violation of the Act); *Teksid Aluminum Foundry*, 311 NLRB 711, 713 (1993) (holding that a maintenance supervisor telling *one* employee, during an active union campaign, that the employee “can’t hold meetings on company property” is a promulgation and application of no union talk rule in violation of the Act.).

b. Respondents’ Supervisor Enrique Gonzalez and Marco Gonzalez Statements to Employees Constituted an Unlawful Promulgation and Application of a No-Union Talk Rule

There is no dispute that prior to the Union campaign, Respondents did not maintain any rule or prohibition on employees talking about non-work related topics during working hours. There is also no dispute that during and after the Union campaign Respondents did not maintain any rule or prohibition on employees talking about non-work, and non-union, related topics during working hours. Both employee Johnson and employee Wilson testified that employees at the Wilmington Facility regularly spoke to one another about a variety of non-work related

topics, such as sports and the weather, while they worked. Respondents knew that its employees regularly engaged in these types of non-work related conversations while working, as managers themselves often joined in on these non-work related conversations, but never sought to prohibit or curtail employees from engaging in these non-work, and non-union, related conversations.

However, in December 2016, at the height of the Union's and Respondents' respective campaigns, Amazon supervisor Enrique upon seeing and hearing outspoken Union supporter Johnson talking to employees Wilson, Morris, and Bungato about the Union, Enrique deliberately approached the employees during their conversation, interrupted their conversation, and told them to stop talking about the Union and get back to work. Enrique's directive to Johnson and his fellow coworkers had the effect of immediately ending their conversation about the Union and effectively prohibited them from further discussing the Union. Enrique further magnified the disruptive effect of his directive by taking Johnson away from the other employees ensuring that the employees' conversation about the Union came to a definitive end.

While Enrique's conduct alone would have violated the Act, when Enrique took Johnson away from his coworkers, Enrique brought Johnson to meet with Respondent Core supervisor Marco. During a meeting between Johnson, Enrique, and Marco, Marco told Johnson in no uncertain terms, not once, but twice, that he needed to stop talking to other employees about the Union during work hours.

The Board has consistently held that conduct analogous to Enrique and Marco's directive to well-known Union supporter Johnson, and his coworkers, to not talk about the Union during work hours while leaving employees free to discuss other non-union related topics, in the middle of an active union campaign and in response to employees' conversation about the Union, violates Section 8(a)(1) of the Act as it directly prohibit employees from exercising their NLRA

rights to talk to one another about the Union. *See, e.g., Teledyne*, 332 NLRB at 539; *Orval Kent*, 278 NLRB at 407; *Larid Printing, Inc.*, 264 NLRB at 374; *Liberty House*, 245 NLRB at 1194.

c. Michael Johnson and Dwayne Wilson’s Testimonies about the Promulgation and Enforcement of a No-Union Talk Rule Should be Credited over Enrique Gonzalez’s Testimony.

At the hearing, Michael Johnson testified credibly and consistently both during direct and cross examinations regarding Enrique Gonzalez’ and Marco Gonzalez’ statements to him and his coworkers. Johnson provided detailed and consistent testimonies about: (1) what happened during the day he was told not to talk about the Union, (2) how Enrique approached him and his coworkers when Enrique noticed the employees discussing the Union, (3) how Enrique unlawfully told him and his coworkers to stop talking about the Union, (4) how Enrique took him to go see Marco Gonzalez, and (6) how Marco unlawfully told him again not to speak about the Union while at work.

Employee Dwayne Wilson also provided significant corroboration of Johnson’s recollection of the day when Johnson was told to stop talking about the Union. Specifically, Wilson corroborated Johnson’s testimony about: what happened during the day Johnson was told not to talk about the Union, how Enrique approached Johnson and his coworkers during their discussion on union dues, how Enrique told Johnson and other employees to stop talking, and how Enrique took Johnson to the management office. Wilson’s testimony, as a current employee of the Employer, is particularly reliable as the Board recognizes that current employees make “testimony adverse to the Respondents at considerable risk of economic reprisal, their testimony was contrary to their best interests and therefore not likely to be false.” *House of Good Samaritan*, 319 NLRB 392, 396 fn. 12 (1995) (citing *Georgia Rug Mills*, 131 NLRB 1304 (1961)). *See also PPG Aerospace Industries*, 355 NLRB 103, 104 (2010) (Board affirming the principle that “the testimony of current employees which contradicts statements of their

supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest.” (citation omitted)); *Portola Packaging, Inc.*, 361 NLRB 1316, fn. 2 (2014).

On the contrary to the employees’ testimonies, Enrique’s testimony merely consisted of a slew of blank and self-serving denials. Enrique, other than admitting that he supervised employees Johnson, Wilson, Morris, and Bungato, denied ever telling any of the employees individually or collectively not to talk about the Union, or any other topics, during work hours. In fact, Enrique was so adamant in denying all potential wrongdoings that, in spite of Johnson and Wilson’s specific recollection about how Enrique came and took Johnson to the management office, Enrique denied ever bringing or being in a meeting with Johnson or Marco. In fact, on redirect Enrique was only willing to admit that he had sent Johnson to meet with Marco once in September of 2016, months before when employees were told not to talk about the union during work, for a wholly unrelated matter. Enrique’s denials are not surprising, considering that as a 2(11) supervisor he had an incentive to not tell the truth to protect himself and Respondents. *See Wabash Transformer Corp.*, 215 NLRB 546, 549 (1976) (a witness’ motive to promote their own self-interest is relevant when determining the credibility of a witness).

Notably, Respondents did not call supervisor Marco to testify at the hearing. If Supervisor Marco had been called to testify Marco could have reconciled the factual differences between Johnson’s and Enrique’s recollections about whether Marco had a meeting with Enrique and Johnson and whether during that meeting Marco told Johnson to stop talking about the Union during work hours. Importantly, Marco would also have been the *only* person, other than Johnson, who could have testified about whether he told Johnson after the meeting to stop talking about the Union during work hours. The Board has held that “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.” *Automated Business Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* 861 F.2d (6th Cir. 1988). This adverse inference is particularly appropriate “when that witness is the party's agent and thus within its authority or control.” *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Accordingly, Respondents’ failure to call Marco leads to an adverse inference that his testimony would have been adverse to the Respondents interest by supporting Johnson’s recollection of the December 2016 meeting and that Marco, in fact, did tell Johnson to stop talking about the Union during working hours.

B. Respondents, through Curry and Rivera, Unlawfully Threatened their Employees in their December 20, 2016 Speeches

a. Threats of Economic Reprisals and Predictions about Unionization That Could Reasonably be Construed as Coercive, Especially when Made by High-Level Managers During Captive Audience Meetings, Violates Section 8(a)(1) of the Act.

Section 8(c) of the Act protects the expression of views, arguments, or opinions that do not contain any “threat of reprisal or promise of benefit.” 29 U.S.C. §158(c) (2017). In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), the Supreme Court held that Section 8(c) provides an employer with the freedom “to communicate to his employees any of his general views about unionism or any of his specific views about a particular union” and “even make a prediction as to the precise effects he believes unionization will have on his company.” However, an “employer is free only to tell ‘what he reasonably believes will be the likely economic consequences of unionization that are outside his control,’ and not ‘threats of economic reprisal to be taken solely on his own volition.’” *Id.* at 619 (citing to *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (C.A.2d Cir. 1967)).

Specifically, when an employer makes predictions about the potential effect of unionization “the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control[.]” *Id.* at 618. However, “[i]f there is *any* implication that an employer may or may not take action solely *on his own initiative for reasons unrelated to economic necessities and known only to him*, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion. . . .” *Id.* (Emphasis added). The Board holds that “[t]he test of whether a statement is unlawful [under Section 8(a)(1)] is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.” *W. Ref. & Richard Topor*, 366 NLRB No. 83 (May 8, 2018) (citing *Flagstaff Med. Ctr., Inc.*, 357 NLRB 659, 663 (2011)).

b. Curry’s Threat to Close, Move, or Sell the Company Leading to Job Loss if the Union Won the NLRB Election Violates Section 8(a)(1) of the Act.

The Board has consistently held that an employer’s explicit threats to close, move, or sell due to unionization violates Section 8(a)(1) of the Act. *See, e.g., Abramson, LLC*, 345 NLRB 171, 186 (2005) (supervisor saying company owner would “probably fold down (close the business) if the Union was to take effect” violated the Act); *Seville Flexpack Corp.*, 288 NLRB 518, 530 (1988) (threat that regulatory problems and unionization, without specific facts, may cause it to relocate plant an unlawful threat of closure); *Custom Coated Prod.*, 245 NLRB 33, 37 (1979) (threats to move plant to Florida if union won election violated the Act); *Yerger Trucking, Inc.*, 307 NLRB 567, 571 (1992) (threat to sell business because of unionization violated the Act). *See also Homer D. Bronson Co.*, 349 NLRB 512, 514 (2007) (holding that even implicit threats of plant closure due to unionization violate the Act.) In *Electro-Wire Truck*, 305 NLRB 1015, 1016 (1991) the Board found that a supervisor violated the Act when she told several

employees about another company plant that had unionized and “how it wasn’t no good and how it didn’t help them any . . . [and] that if the union was voted in at Electro Wire that supervision wouldn’t go for it and that the plant would close.” Similarly, in *Reeves Bros., Inc.*, 320 NLRB 1082, 1084 (1996) the Board found that a supervisor’s comment to two employees in two separate instances, that “if the Union came in, the plant would probably shut down” and “if the Union was voted[] in[,] the place would close down and the Respondent would not be competitive with other companies . . .” violated the Act because the statements were made in the “absence of any . . . arguably objective fact and were not couched in terms of the possible consequences of unionization.” See also *LRM Packaging*, 308 NLRB 829 (1992) (employer president violated the Act by telling employees that if the Union won there was a “probability” of a strike, which may force closure when there was “no basis of objective fact” to show that there “probably” would be a strike upon unionization); *Marathon Le Tourneau Co.*, 208 NLRB 213 (1974) (managers violated the act by constantly reminding employees of other unionized facilities that had to close, when there was no evidence of a causal relationship between unionization and closure, and by telling employees that if the union made high demands the company would be uncompetitive and close, when the union has not yet made any demands).

In the current case, employees Wilson and Victor both testified that Curry threatened to close the company if the Teamsters won the election. Specifically, Wilson testified that Curry told employees that if the Teamsters come back in “[Curry will] *probably* have to close down the warehouse” and Victor testified that Curry told employees “if the Teamsters came in, [Curry] *would* have to close the company down.” (Tr. 150:14-16, 175:11-13). Additionally, employees Victor and Johnson also testified that Curry told employees he “was going to either move the company or they’ll have to sell the company if the Teamsters come back in.” (Tr. 74:8-10).

While making these statements Curry told employees in no uncertain terms that “that if [they] wanted to keep [their] jobs, [they] needed to vote no. . . [because they] would lose [their] jobs because the company’s competitor will undercut the company, and the company would have to cut prices and lose business.”

By these statements Curry conveyed to his employees that the closure, relocation, or sale of the Wilmington Facility was not only a possible outcome but *the probable outcome* of unionization. Curry made it clear that employees must vote no in the election if they wanted to keep their jobs and wanted to avoid these outcomes. The record does not show that Curry presented any objective facts to employees explaining why the closure, sale, or relocation of the Wilmington Facility reflects the “likely economic consequences of unionization that are outside his control.” *Gissel*, 395 U.S. at 619.

Insofar as Curry discussed his old company and his competitors without any substantive evidence, “such as [with] wage scales, benefits, and total costs and efficiency[.]” *Crown Cork & Seal Co., Inc.*, 308 NLRB 445, 446 fn. 3 (1992) (employer’s failure to substantiate with objective evidence its predictions that unionization would lead to loss of competitiveness, vis-à-vis a sister plant, renders the predictions unprotected), such discussions do not render his threat of closure, sale, or relocation protected as the predictions failed to be “carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control[.]” (citation omitted). See *Electro-Wire Truck*, 305 NLRB at 1016; *Reeves Bros.*, 320 NLRB at 1084. See also *Kawasaki Motors Mfg. Corp.*, 280 NLRB 491 (1986) (Board holding that there was no unlawful threat of plant closure where employer contemporaneously presented employees with financial figures and diagrams to explain its poor financial situation).

Accordingly, Curry's threats about the probable closure, sale, or relocation of the Wilmington Facility, which would lead to job loss, due to unionization violate the Act.

c. Curry's Threat to Close the Amazon Account Because of the Union's Organizing Activities or if the Union Won the NLRB Election Violates Section 8(a)(1) of the Act.

“[T]he Board has consistently held that predictions of adverse consequences of unionization arising from sources outside the employer's control violate Section 8(a)(1) if they lack an objective factual basis.” *Tawas Indus., Inc.*, 336 NLRB 318, 321 (2001) (citing *Laidlaw Transit, Inc.*, 297 NLRB 742 (1990); *Long-Airdox Co.*, 277 NLRB 1157 (1985)). *See also* *Contempora Fabrics, Inc.*, 344 NLRB 851 (2005) (predictions by company vice president that unionization would cause company to lose customers and risk plant closure unlawful where no objective basis for the predictions were provided to employees); *Wake Electric Membership Corp.*, 338 NLRB 298, 299 (2002) (threat that other companies would not work with company if union succeeded unlawful); *Metalite Corp.*, 308 NLRB 266, 272 (1992) (threat that some customers would take away equipment if the plant organized, which would lead to loss of business and jobs unlawful when unaccompanied by objective evidence). Specifically, applying the *Gissel* test, the Board maintains that when an employer makes predictions based on information communicated to it by a customer, the prediction must be “carefully phrased on the basis of objective fact[,]” *Gissel*, 395 U.S. at 618, and to not be “conscious overstatements [that the employer] has reason to believe will mislead [its] employees.” *Reeves Bros.*, 320 NLRB at 1083. Specifically, in *Reeves Bros.* the Board found that an employer who told its employees that if the Union was voted in that two customers “*would* remove their business” when the customers only, in fact, stated “that they would *consider* taking away work” violated the Act because its statements “went well beyond the statements actually made by the customers.” *Id.* (Emphasis in original). *See also* *Abramson, LLC*, 345 NLRB at 178 (employer statement that it would be hard

for the employer to get work if the Union came in because “*most* general contractors do not want union workers on the job” violated the Act because only two general contractors had expressed this view to the employer).

In the instant case, as admitted by Respondents’ own representatives, Curry made unscripted comments during his antiunion speech about the Employer losing Amazon business. Employees Johnson and Wilson, who both worked in the Amazon department at the time of the speech, specifically testified, consistently during their direct and cross examinations, that Curry told employees that due to the Union’s organizing activity the company had lost the Amazon contract and that he had to close the Amazon accounts. Acknowledging that evidence showed that Respondents allegedly lost some Amazon business in 2015, the record is unequivocal that when Curry spoke about the Amazon account, he did not provide *any* evidence about why Amazon business had been lost or why he would need to close the account. Notably, considering that manager Lyons admitted that Curry’s statement about Amazon even caused her to be concerned about the loss of the account, it seems unlikely that Curry’s statement would have been one sufficiently “carefully phrased” under *Gissel* to not be a violation of the Act.

Additionally, to the extent that Lyons and other managers sought to remediate the effects of Curry’s statement about Amazon, Lyons’ remediation efforts fail as she and the other managers only spoke to employees in the Amazon department and *not* all the other employees who also heard the threats. Ultimately, Curry’s failure to provide any evidence to support his claim of lost business and probable need to close the Amazon account, even if they were true, makes his statement at best a conscious overstatement of the status of the Amazon account and at worst a direct threat about what he would volitionally do if the Union prevails in its campaign.

Under both views, Curry's statement constitutes an unlawful threat under the Act. *See e.g., Reeves Bros.*, 320 NLRB at 1083; *Tawas Indus., Inc.*, 336 NLRB at 321.

d. Rivera's Translation of Curry's Threat to Close or Relocate the Company Leading to Job Loss If the Union Won the NLRB Election Violates Section 8(a)(1) of the Act.

To ensure to that all employees understood Curry's message, Operation Manager Rivera translated Curry's speech and toward the end of Rivera's own Spanish speech he translated Curry's threats of plant closure, plant relocation, and job loss. Specifically, employee Carbajal testified that Rivera told employees that "if the Union came back, the company was going go to bankruptcy and that it was going to have to close; that everyone was going to be left without a job." (Tr. 194:8-10). Likewise, employee Miguel testified Rivera told employees that "if the Union came back, the company would have to close or change location." (Tr. 217:24-25). Lastly, corroborating both Carbajal and Miguel's recollection, employee Rodriguez testified that Rivera stated that "if the Union came in, the company would have to close or move to a different location and all the employees would be left with no work." (Tr. 236:21-24).

Rivera's statements, once again, indicated that the closure and relocation of the Wilmington Facility, which would lead to job loss, was not merely a possible outcome of unionization but rather *a probable outcome* of unionization. Again, the record demonstrates that Rivera made these statements without providing any objective evidence to explain why plant closure, relocation, and job loss reflect the "likely economic consequences of unionization that are outside his control." *Gissel*, 395 U.S. at 619. Accordingly, Rivera's statements regarding the probable outcome of unionization constitute unlawful threats proscribed by the Act.

e. Curry and Rivera's Positions and the Context Surrounding the Threats made the Threats Particularly Coercive to Employees

When considering the legality of antiunion statements both the context and source of the statements must be considered. *Aldworth Co., Inc.*, 338 NLRB 137, 141 (2002) (holding that both the immediate and broad contexts surrounding an antiunion statement must be considered). Namely, the Board recognizes that the coercive effects of unlawful threats can be enhanced when they are made during antiunion captive audience meetings, such as in this case. *Id.* Additionally, Curry's status as the CEO of Respondent Cal Cartage and the President of Respondent Orient Tally and Rivera's status as the Operations Manager also make their threats more coercive as they are "unlikely to be forgotten" by employees. *Overnite Transp. Co.*, 329 NLRB 990 (1999) (holding that when an employer's antiunion message is communicated "by the words and deeds of the highest levels of management[,] it takes on an enhanced coercive property as it is "unlikely to be forgotten").

f. Respondents' Denials of Curry's Threats are Not Credible

Respondents through the testimony of its witnesses appear to deny Curry's threats on four grounds: (i) that managers and supervisors who stood close to Curry did not recall any of the threats Curry made, (ii) that Respondent Exhibit 2, which is the partial video recordings of Curry's December 20, 2016 speech, show that Curry did not make the threats attributed to him, (iii) that Curry did not have enough time to make the threats attributed to him, and (iv) that Curry would not have made unlawful threats because his speech was vetted and drafted to ensure that it would not violate the Act. These arguments are all specious and should not be credited over the testimonies of employees.

i. *Employees' Recollection of Curry's Threat are more Credible than Managements' Denials*

During the hearing, a total of three employees, including two current employees, testified to the threats that Curry made during his December 20, 2016 speech. The employees testified consistently and credibly about how Curry threatened employees to deter their support of the Union. These employees' testimonies, which were made against their own pecuniary interest and at great risk of retaliation, are far more credible than the managers and supervisors blanket denials of Curry's threats. *Portola Packaging, Inc.*, 361 NLRB at fn. 2; *PPG Aerospace*, 355 NLRB at 104. As the Board recognizes, the Respondents managers and supervisors to protect their self-interests have great incentive to lie on behalf of the Respondent. *See Wabash Transformer Corp.*, 215 NLRB at 549.

Additionally, considering that the record shows that Curry made comments about Amazon that even concerned management, a blanket denial that Curry did not say anything that could be, at the least, reasonably construed as threatening is simply not credible. Furthermore, an adverse inference regarding the unlawful nature of Curry's Amazon threat is particularly appropriate as the Respondents did not call labor consultant Weismann or have Amazon supervisor Enrique who attended Curry's speech and clarified Curry's statement about Amazon to the Amazon employees later that day, provide any testimony about what Curry said about Amazon or what he and other managers told the Amazon employees after Curry's speech. *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such facts). *See also Roosevelt Memorial*, 348 NLRB at 1022; *Automated Business*, 285 NLRB at 1123. Presumably had Weismann been called and Enrique been examined about Curry's comment on Amazon and what Enrique told employees in

the Amazon department after the fact, Weismann and Enrique would have corroborated employees' recollection that Curry told employees that he would be closing the Amazon account due to the employees' involvement with the Union.

ii. Respondent Exhibit 2 Should be Given Little Evidentiary Weight due to its Incompleteness and Unreliability

With respect to Respondents' proffered video recording of the Curry speech, which was marked as Respondent Exhibit 2, it is undisputed that the video recordings are an incomplete recording of Curry's speech. Operation Manager Rivera, who testified about the recording, could not provide any explanation about why the video was incomplete and stopped at points where the attributed threats would likely have been made. Rivera's failure to explain the incompleteness of the video is particularly concerning when Rivera could not explain why management did not have, or whether they even attempted to obtain, a copy of another recording of the speech created by another employee who could be seen in the Respondent Exhibit 2 recordings to be filming Curry's speech.

Rivera also could not explain why the video recordings in Respondent Exhibit 2 differed, in form and format, from a video recording of the same speech that he provided to the NLRB on a DVD during its investigation. Rivera's failure to explain the differences between the video recordings in Respondent Exhibit 2 and the DVD recording, calls the reliability and probative value of the videos into question as he testified that *both* the recordings in Respondent Exhibit 2 and the recording he provided during the investigation were in their original form and had not been edited or changed in anyway. While the extent of any editing of the recordings cannot be determined, the evidence shows unequivocally that the recordings have been altered in some way.

Due to its incompleteness and unreliability, Respondent Exhibit 2 should be accorded little, if any, evidentiary weight. Accordingly, any argument that relies on Respondent Exhibit 2 to claim that Curry did not make the threat attributed to him should also be similarly discounted.

iii. Curry Spoke for More Than Enough Time to Make the Threats Attributed to Him

Recalling that six employees testified that Curry's spoke for fifteen to forty five minutes, Respondents through Respondent Exhibit 2 and the testimony of its managers and supervisors nonetheless seek to deny that Curry made any of threats attributed to him by arguing that he did not have enough time to make his threats. Specifically, at the hearing all of Respondents witnesses, except for one, conveniently testified that Curry only spoke for about ten minutes. Respondents' counsels elicited this testimony in an attempt to show that Curry had very little time to make the threats attributed to him as Respondent Exhibit 2 captured seven minutes of Curry's speech. However, this claim fails because of the incompleteness and unreliability of Respondent Exhibit 2 and the defective nature of the testimony that Respondents presents.

In terms of the testimony, the employees' testimony about the length of Curry's speech being approximately fifteen to forty five minutes is particularly reliable considering that their testimonies was objective, consistent, and not influenced by the knowledge that a partial recording of the speech exists. The same objectivity and reliability cannot be attributed to management's testimony as at least two managers, Rivera and Lyons, watched the recordings on Respondent Exhibit 2 at the hearing and thereby knew that seven minutes of Curry's speech had been recorded. Also it ought to be noted that the three Respondents representatives who testified on the same day; Rivera, Lyons, and Director of Administration Diane West; conveniently all testified that Curry spoke for ten minutes, while Supervisor Jose Gonzalez who testified the day after was the only supervisor willing to admit that Curry may have spoken for more than ten

minutes. Ultimately, once again the employees, including five current employees, testimonies in regard to the length of Curry's speech should be credited over the self-interested testimonies of managers and supervisors. *Portola Packaging, Inc.*, 361 NLRB at fn. 2; *PPG Aerospace*, 355 NLRB at 104; *Wabash Transformer Corp.*, 215 NLRB at 549.

Based on the defective nature of Respondents' testimony about the length of Curry's speech, employees' testimonies about the length of Curry's speech being from fifteen to forty-five minutes long should be credited over the self-serving testimony of managers and supervisors that the speech was only ten minutes long. Crediting the employees would place the length of Curry's speech at a minimum of fifteen minutes long, which meant that Curry had at least eight, but likely even more, minutes of unrecorded speaking time to make all the threats attributed to him.

In the alternative, even if Respondents witnesses' testimony was credible, Supervisor Gonzalez' admission that Curry spoke for about ten to fifteen minute should be accorded more weight than the testimonies of the three managers who happen to all conveniently remember that Curry spoke for only ten minutes. Crediting Supervisor Gonzalez' admission means that Curry had anywhere from three to eight minutes of unrecorded speaking time to make all the threats attributed to him. Notably, even if Curry only had three minutes of unrecorded time to speak, as Curry's threats were short and concise three minutes would have been more than enough for him to make them.

iv. Curry did not Follow Scripted Remarks, but Rather Spoke Extemporaneously and Without Regards to Legality of His Statements

Lastly, Respondents' apparent defense that Curry would not have made the unlawful threats attributed because his speech was vetted should not be given any weight. The record unequivocally establishes that Curry spoke largely extemporaneously during his speech and did

not rely on his notes. In fact, Rivera admits that even at the last minute Curry wanted to make changes to his speech that even Respondents' outside consultant Weissman did not approve of. Rivera also admits that despite being given a Spanish version of Curry's speech, and being instructed to translate Curry's speech, even he could not keep up with the amount of unscripted comments that Curry made during his speech. Based on Respondents admission that Curry made non-scripted comments during his speech and that the speech was being edited until the last minute, any claim that Curry speech did not contain threats because the statements in the speech were pre-vetted is simply not credible.

g. Respondents' Denials of Rivera's Threats are Not Credible

Despite Rivera readily admitting that he made grammatical changes and one substantive factual change to the prepared speech he received, Rivera maintained that he did not deliver an extemporaneous speech on December 20, 2016, but rather merely read from the speech management prepared for him. Rivera categorically denied that he made any of the threats attributed to him, because they allegedly were never part of the speech that he was given and read to employees. Overall, Rivera's denials should not be credited because Rivera is an interested and demonstrably unreliable witness.

Namely, during the hearing Rivera demonstrated his unwillingness provide candid answers to questions that he believed could harm Respondents' interest. In fact, in certain parts of Rivera's testimony, he refused to even answer foundational questions grounded in incontrovertible facts. For instance, despite being the person who provided the NLRB with the DVD that contained the partial recording of Curry's speech, which he explicitly admitted to in his affidavit, Rivera initially denied that he ever provide *any* recording to the NLRB and even refused to authenticate the physical DVD that he provided to the NLRB.

A close reading of Rivera's testimony will also show that it is often times internally inconsistent and illogical. For instance, Rivera admitted that he tried to take notes during Curry's speech and only stopped when it became impossible for him to keep up. Yet, during direct questioning about Respondent Exhibit 4, the notes that Rivera allegedly created on December 20, 2016, Rivera testified that the *only* note that he took during the meeting was the part that read "3 strikes." It seems difficult to believe that an Operations Manager instructed to translate the Company CEO's speech, including the CEO's unscripted comments, found it impossible to make any more than eight characters worth of notes. A more logical reading of Rivera's testimony would be that Respondent Exhibit 4 may have been some, but most certainly not all, of the notes that Rivera created on December 20, 2016. This reading would make sense in light of Rivera's testimony that he previously testified that the notes he created on December 20, 2016 had been lost and are no longer to be found.

On the contrary to Rivera's interested and unreliable testimony, three current employees testified about the threats that Rivera made during his December 20, 2016 speech. The employees testified consistently and credibly about how Rivera told employees that he would be translating Curry's statement, how he did not extensively rely on his notes, and also how Rivera threatened employees with plant closure, plant relocation, and job loss. Again, these employees' testimonies, which were made against their own pecuniary interest and at great risk of retaliation, ought to be credited over management's blanket and illogical denials of such threats. *Portola Packaging, Inc.*, 361 NLRB at fn. 2; *PPG Aerospace*, 355 NLRB at 104; *Wabash Transformer Corp.*, 215 NLRB at 549.

C. Respondents, through Marco Gonzalez, Unlawfully Interfered with Employee Michael Johnson’s Protected Concerted Activities by Threatening to Call the Police on him if he Did Not Stop Recording the Respondents Potential Discrimination of Certain Employees

a. The Act Protects Employees’ Concerted Efforts to Correct Perceived Racially Discriminatory Employment Conditions, Including by Making Video Recordings of the Perceived Discrimination

It is settled law that an employer violates Section 8(a)(1) when it responds to employees protected activity at its facility by threatening to call the police. *Winkle Bus Co., Inc.*, 347 NLRB 1203, 1218 (2006); *Roadway Package Systems*, 302 NLRB 961, 973-74 (1991); *All Am. Gourmet*, 292 NLRB 1111, 1121 (1989). Section 7 of the Act defines protected activities as including concerted activities employees “engage[] in for the purpose of . . . mutual aid or protection.” 29 U.S.C. §157 (2017).

For an employee action to be concerted, the Board requires that “it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Indus.*, 268 NLRB 493, 497 (1984) (*Meyers I*). The Board emphasizes that its definition of concerted also “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers Indus.*, 281 NLRB 882, 887 (1986) (*Meyers II*). More particularly, it is settled law that “concerted efforts by employees to alleviate[, actual or merely perceived,] racially discriminatory employment conditions are or can be protected activity[.]” *Dearborn Big Boy No. 3, Inc.*, 328 NLRB 705, 710 (1999); *CGLM, Inc. & Alan Kansas*, 350 NLRB 974, 980 (2007) *enfd.* 280 Fed. Appx. 366 (5th Cir. 2008) (holding that employees’ concerted activities to protest perceived racial discrimination is protected).

The Board recognizes that “[p]hotography and audio or video recording in the workplace, . . . , are protected by Section 7 if employees are acting in concert for their mutual aid and

protection and no overriding employer interest is present.” *Whole Foods Mkt., Inc.*, 363 NLRB No. 87 (Dec. 24, 2015) (citing *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (Aug. 27, 2015) *overruled by Boeing Co.*, 365 NLRB No. 154 (overruling “*Rio All-Suites* [only] to the extent the Board [in *Rio All-Suites*] had found the maintenance of [a] no-camera rules unlawful” *Boeing Co.*, 366 NLRB No. 128 (July 17, 2018)). Specifically, the Board stated that “video recording at the workplace are protected under certain circumstances” including, for example, when it is to: “document[] unsafe workplace equipment or hazardous working conditions, document[] and publiciz[e] discussions about terms and conditions of employment, document[] inconsistent application of employer rules, or [create] evidence to preserve it for later use in administrative or judicial forums in employment-related actions.” *Id.* Importantly, the Board has held that when there is no prior rule, practice, or prohibition on employees making recordings or taking photographs, including secret ones, and absent other egregious conduct, an employee’s creation of a recording or taking of photographic evidence in furtherance of a course of protected concerted activities can itself be considered protected concerted activity, as it is a “part of the *res gestae*” of the employee’s other activities. *White Oak Manor*, 353 NLRB 795, 795 fn. 2 (2009), reaffirmed and incorporated by reference at 355 NLRB 1280 (2010) (holding that an employee using her cell phone to take pictures of employees, without permission, to document disparate enforcement of the Employer’s dress code did not lose the protection of the Act). *See Hawaii Tribune-Herald*, 356 NLRB 661, 674-75 (2011) (holding that an employee’s creation of a secret recording to document perceived violations of employees’ *Weingarten* rights is not sufficient to remove her conduct from the protection of the Act where no prior prohibition on secret recording exists); *Opryland Hotel*, 323 NLRB 723, 733 (1997) (holding that an employee’s creation of

secret audio recordings at the workplace is not sufficient to remove his conduct from the protection of the Act where no prior rule, practice, prohibition on secret recording exist).

b. Marco Gonzalez' Threat to Call the Police Unlawfully Interfered with Michael Johnson's Protected Concerted Activities

The record shows that on January 17 and 18, 2017 Johnson and his coworkers, during non-working time and in a non-working area of the Wilmington Facility, engaged in a series of concerted actions due to a genuine belief that the Respondents discriminatorily gave work to Hispanic employees while denying work to non-Hispanic employees. Specifically, Johnson and his coworkers discussed with one another about the perceived discrimination, and that they needed to do something about it. The employees' discussion ultimately evolved into a call to action, where employees, such as Johnson, yelled out to supervisor Marco, who was checking in employees on both days, that they believed Marco was discriminating against non-Hispanic employees and that if Marco did not do anything about it the employees would document the discrimination. As Marco ignored the employees' complaint, in a concerted effort to document the perceived discrimination, Johnson created three video recordings showing the perceived discrimination and showing employees expressing their frustration at the perceived discrimination. No evidence in the record shows or even implies that while engaging in these concerted actions, employees engaged in any disruptive or egregious conduct that would remove their concerted actions from the protection of the Act.

Accordingly, under relevant Board law the employees' concerted efforts to correct racially discriminatory employment conditions, though group discussions and the airing of the joint complaint, constitute protected concerted activities under the Act. *Dearborn*, 328 NLRB at 710; *CGLM*, 350 NLRB at 980. Additionally, since neither the Respondents policies nor any

laws¹⁴ prohibited video recordings, Johnson's video recordings of his coworkers also constitute concerted activity under the Act. *Hawaii Tribune-Herald*, 356 NLRB at 675; *White Oak Manor*, 353 NLRB at fn. 2, *Opryland Hotel*, 323 NLRB at 733. Based on the protected status of Johnson's activities, Marco's threat to call the police on Johnson as a response to these activities was unlawful and patently coercive. *Winkle Bus Co., Inc.*, 347 NLRB at 1218; *Roadway Package Systems*, 302 NLRB at 973-74; *All Am. Gourmet*, 292 NLRB at 1121. In fact, Marco's conduct on January 18, 2017, was so coercive and effective that it caused Johnson to stop recording that day and left because he feared the legal consequences of retaining the recording. Marco's conduct was particularly egregious considering that Johnson's protected concerted activities took place during non-work time and in a non-working area of the Wilmington Facility. *All Am. Gourmet*, 292 NLRB at 1121.

c. Michael Johnson's Uncontested Testimony about Marco's Threat to Call the Police Should Be Credited

At the hearing, Michael Johnson testified credibly and consistently both during direct and cross examinations regarding the events that occurred on January 17 and 18, 2017. Namely, he provided consistent testimony about how he and his coworkers were denied work on January 17 and 18. Johnson also provided consistent testimony about how he and his coworkers discussed with one another and complained to management about the perceived discrimination. In fact, when Respondents counsel sought to get Johnson to admit that Marco might not have known of

¹⁴ While Cal. Penal Code § 632(a) prohibits a person from intentionally and without the consent of all parties recording confidential communication, Cal. Penal Code § 632(c) and the California Supreme Court defined confidential communication to only include conversations where a party to the conversation have an objectively reasonable expectation that the conversation is not being overheard or recorded. *Flanagan v. Flanagan*, 27 Cal. 4th 766, 774, 41 P.3d 575, 580 (2002). In the current case, considering that Johnson made his recordings in a non-work and non-private hallway like waiting area where dozens of employees stood in close proximity to each other, no individual who may have appeared in Johnson's recordings could have had any reasonable expectation that their communications in that hallway area were not going to be overheard or potentially recorded. Therefore, the California proscription against making unconsented recordings of confidential communication in California does not apply to Johnson's recordings of his coworkers.

the employees' complaints or why Johnson was recording, Johnson explicitly testified that Marco knew about the employees' discrimination complaints and his intent to film because he had yelled it out to Marco. Johnson again provided concise and consistent testimony on both direct and cross that on January 18 Marco interfered with his protected concerted activity of trying to record the perceived discrimination, not once, but twice, including by telling him to leave and threatening to call the police on him if he persisted in his protected course of conduct. Much of Johnson's testimony, such as proof of the concerted nature of his action and the discussions that he had with his coworkers, is corroborated by General Counsel Exhibit 7.

As previously noted, Respondents did not call Respondent Core supervisor Marco Gonzalez to testify at the hearing. As Marco would have been able to testify factually to what happened on January 17 and 18, 2017 and whether or not he threatened Johnson, Respondents failure to call Marco implies that Marco's testimony would have been contrary to the Respondents interests and corroborated Johnson's recollection of events. *Roosevelt Memorial*, 348 NLRB at 1022; *Automated Business*, 285 NLRB at 1123.

D. Respondents Acted Together to Commit the Unfair Labor Practices at Issue

a. During the Relevant Time Period, Respondent Cal Cartage and Orient Tally were a Single Employer under the Act

In *Cimato Brothers, Inc.*, 352 NLRB 797, 798 (2008), the Board stated that “[i]n determining whether two nominally separate employing entities constitute a single employer, the Board examines four factors: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common control of labor relations. No single factor is controlling, and not all need be present. Rather, single-employer status ultimately depends on all the circumstances. It is characterized by the absence of an arm's-length relationship among seemingly independent companies.”

In its Answers to the Complaint, Respondents admitted to all facts necessary to conclude that Respondents Cal Cartage and Orient Tally existed and operated as a single employer under the Act. Namely, Respondents Cal Cartage and Orient Tally during the relevant time were affiliated business enterprises with common officers, ownership, management, supervision, and premises and facilities. Respondents Cal Cartage and Orient Tally during the relevant time also provided services for and made sales to each other, interchanged personnel with each other, had interrelated operations with common insurance, purchasing and sales, and held themselves out to the public as a single integrated business enterprise. Lastly, Respondents Cal Cartage and Orient Tally during the relevant time also administered a common labor policy. Based on these admissions and the record as a whole, at the relevant time Respondents Cal Cartage and Orient Tally existed and operated as a single employer under the Act.

b. During the Relevant Time Period, Respondents Cal Cartage, Orient Tally, and Core were Joint Employers under the Act

In *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015) the Board stated that “the Board may find that two or more statutory employers are joint employers of the same statutory employees if they share or codetermine those matters governing the essential terms and conditions of employment.” Specifically, the Board indicated that it does not require the actual exercise of the authority to control employees’ terms and conditions of employment, rather the mere possession of these authority suffices, to make a finding that two or more statutory employers are joint employers under the Act. *Id.*

In the current matter, Respondents stipulated that during the relevant time period, Respondent Cal Cartage, Respondent Orient Tally, and Respondent Core jointly controlled and administered the labor relations policies applicable to the employees of Respondent Core who were assigned to work at the Wilmington Facility and that they shared or codetermined essential

terms and conditions of Core's employees assigned to work at the Wilmington Facility. (Jt. Ex. 2). Respondents further clarified that they jointly handled the day-to-day supervision and direction of Respondent Core employees who worked at the Wilmington Facility. (Jt. Ex. 2).

Based on the Respondents' admissions that they "share[d] [and] codetermine[d] those matters governing the essential terms and conditions of employment" of the Respondent Core employees assigned to the Wilmington Facility, including the actual authority to supervise and direct these employees, Respondents Cal Cartage, Respondent Orient Tally, and Respondent Core are joint employers under the Act. (Jt. Ex. 2).

E. Respondents NFI Group and Respondent Nexem-Allied Admitted to Being Golden State Successors and Assumed the Liability for the Unfair Labor Practices of Respondent Cal Cartage, Respondent Orient Tally, and Respondent Core

In *Golden State Bottling Co.* the Supreme Court adopted the proposition that "when a new employer . . . has acquired the substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations . . . [,]" the new employer, who have knowledge of the predecessor's potential unfair labor practices violations, assumes the liability for remedying the unfair labor practices. 414 U.S. at 184-85. The Court reached this conclusion after determining that this policy advances various important policies advanced by the NLRB, including: avoidance of labor strife, prevention of deterrent effect, and protection of victimized employee, at "relatively minimal cost" to the new employer. *Id.* at 185.

In the instant case, on July 23, 2017 Respondent Nexem-Allied acquired the operations of Respondent Core and has continued the operations of Respondent Core in basically unchanged form. (Jt. Ex. 2). Accordingly, Respondent Nexem-Allied stipulated that it is the *Golden State* successor for Respondent Core and, therefore, has assumed the liability of Respondent Core to remedy any unfair labor practices proven in this matter.

Similarly, on October 1, 2017, Respondent NFI purchased substantially all of the assets of Respondent Cal Cartage and Respondent Orient. In its Answer to the Complaint, Respondents admitted further that since Respondent NFI's purchase of Respondent Cal Cartage and Respondent Orient Tally's assets, Respondents NFI Group¹⁵ has taken over the operations of Respondent Cartage and Respondent Orient Tally and has continued the operations in basically unchanged form, including by retaining the majority of Respondent Cal Cartage and Respondent Orient Tally's employees. Accordingly, Respondents NFI Group is the *Golden State* successor for Respondent Cal Cartage and Respondent Orient Tally and, therefore, has assumed the liability to remedy any unfair labor practices proven in this matter.

F. Respondents' Egregious and Pervasive Conduct Justifies the Special Remedy of a Notice Reading

The Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct. *WestPac Electric*, 321 NLRB 1322, 1322 (1996). *See also Maramount Corp.*, 317 NLRB 1035, 1037 (1995) (the Board has broad discretion to fashion a "just remedy"). The Board recognized that where an employer made similar threats about unionization during the period before an NLRB, the special remedy of a notice reading is "warranted in order to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices." *Homer*, 349 NLRB at 515. *See e.g., Federated Logistics and Operations*, 340 NLRB 255 (2003), *enfd.* 400 F.3d 920 (D.C. Cir. 2005); *Excel Case Ready*, 334 NLRB 4 (2001).

¹⁵ In its Answer to the Complaint, Respondents admitted that Respondent NFI, Respondent Cal Cartage Distribution, Respondent California Transload are affiliated business enterprises with common officers, ownership, directors, management, and supervision; have administered a common labor policy; have shared common premises and facilities; have provided services for each other; have interchanged personnel with each other; have had interrelated operations with common insurance; and have held themselves out to the public as a single-integrated business enterprise. (G.C. Ex.1(bb) and (ff)). Accordingly, Respondent NFI, Respondent Cal Cartage Distribution, Respondent California Transload exists and operate as a single employer under the Act. *Cimato Brothers*, 352 NLRB at 798.

Ordering a notice reading “will ensure that the important information set forth in the notice is disseminated to all employees including those who do not consult the [r]espondent’s bulletin boards.” *Excel Case Ready*, 334 NLRB at 5. By ordering that the Board notice be read aloud to employees, the Board makes it so that employees “will fully perceive that the Respondent and its managers are bound by the requirements of the Act.” *Federated Logistics*, 340 NLRB at 258. The “public reading of the notice is an ‘effective but moderate way to let in a warming wind of information and, more important, reassurance.’” *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004), *enfd.* 156 Fed.Appx. 386 (2d Cir. 2005).

As demonstrated by the evidence, Respondents harbor a deep seated animus against its employees’ exercise of their Section 7 rights. Acting on this animus, Respondents engaged in a series of unlawful actions to limit and interfere with their employees Section 7 rights, to erode their employees’ support for the Union, and to discourage the employees from engaging in lawful protected concerted activities. By the egregious actions of Curry and Rivera alone, Respondents conveyed to each and every first shift employee that Respondents have zero tolerance for their employees’ exercise of their Section 7 rights. Given the pervasive and egregious nature of Respondents’ conduct, a notice reading will be the only appropriate remedy to ensure that employees will receive the remedial message in the same way that they were threatened and coerced.

IV. Conclusion

Based on the above facts and applicable law, the General Counsel maintains that Respondents violated Section 8(a)(1) of the Act by unlawfully promulgating and disparately enforcing an unlawful no-union talk rule in December 2016. The General Counsel further maintains that during a December 20, 2016 antiunion meeting, Respondents violated Section 8(a)(1) of the Act by: threatening employees with plant closure, sale, or relocation if they voted

for the union, threatening employees with job loss if they voted in favor of the union, threatened employees with loss of work if they voted in favor of the Union, and threatening employees with loss of business and closure of certain departments if employees continued to be involved with the Union. Lastly, the General Counsel maintains that in continuing its course of unlawful conduct, Respondents violated Section 8(a)(1) of the Act by interfering with employees protected concerted activity by threatening to call the police on an employee for recording perceived discrimination in January 2017. Respondents' egregious, pervasive, and continuing unlawful conduct calls for the special remedy of a notice reading to employees during working time.

V. The Appropriate Remedies:

That Respondents, including Respondent Cal Cartage, Respondent Orient Tally, a single employer, with Respondent Core, as joint employers, its officers, agents, successors, and assigns; including Respondent NFI, Respondent Cal Cartage Distribution, Respondent California Transload, as a single employer, with Respondent Nexem-Allied, as joint employers; be ordered to:

1. Cease and desist from:
 - a. promulgating and disparately enforcing an unlawful no-union talk rule;
 - b. threatening employees with plant closure, sale, or relocation if they voted for the union;
 - c. threatening employees with job loss if they voted in favor of the union;
 - d. threatened employees with loss of work if they voted in favor of the Union;
 - e. threatening employees with loss of business and closure of certain departments if employees continued to be involved with the Union;

- f. interfering with employees protected concerted activity, by threatening to call the police on an employee for engaging in protected concerted activity; and/or
 - 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:
- a. within 14 days after service by the Region, post at Respondents' facility in Wilmington, California where notice to employees are customarily posted, copies of the appropriate Notice to employees in English and Spanish,¹⁶ after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities 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 Respondents at any time since November 28, 2016.

¹⁶ A Spanish language notice is warranted because a substantial number of Respondent's employees are Spanish speaking.

- b. Within 21 days of the issuance of the ALJ's order, notify the Regional Director of Region 21, in writing, the manner in which Respondent has complied with the terms of the order, including how they have posted the documents required by the order.

*/s/ **Phuong Do***

Phuong Do
Lindsay R. Parker
Counsel for the General Counsel
National Labor Relations Board, Region 21

Dated at Los Angeles, California, this 28th day of September, 2018

STATEMENT OF SERVICE

I hereby certify that a copy of **Brief of Counsel for the General Counsel** has been submitted by e-filing to the Division of Judges of the National Labor Relations Board on September 28, 2018, and that each party was served with a copy of the same document by e-mail.

I hereby certify that a copy of the **Brief of Counsel for the General Counsel** was served by e-mail, on September 28, 2018, on the following parties:

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Respectfully submitted,

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Aide Carretero
Secretary to the Regional Director
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