UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – WASHINGTON D.C.

COFFMAN SPECIALTIES, INC.

and **Case 28-CA-223779**

VICTOR HERNANDEZ, an Individual

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I. INTRODUCTION

"[T]here is no Union in Arizona. They have no power. The Union has no rights in Arizona, . . . the laws are different in Arizona, and [you] should just be thankful [you] got a job."[1] That was the statement directed at Victor Hernandez (Hernandez) by Coffman Specialties, Inc.'s (Respondent), supervisor Larri Nolan (Nolan). Nolan's next four words to Hernandez sealed Hernandez' fate: "[Y]ou are done here."[2]

Section 7 of the National Labor Relations Act (the Act) provides employees with the fundamental right to raise concerns regarding their terms and conditions of employment. Under the Board's longstanding *Interboro* doctrine, "an individual employee's reasonable and honest invocation of a collective-bargaining right" is considered concerted activity.[3] This remains the case even if the employee turns out to be wrong.[4]

Respondent, out of its San Diego, California office, requested to hire Hernandez from Teamsters Local 986 (the Union). Respondent and the Union have a collective-bargaining agreement (CBA) which covers drivers like Hernandez who are hired by Respondent. Hernandez, a 30-year Teamster truck driver,[5] Hernandez had a good-faith belief that his employment was covered by a Teamster contract. Hernandez repeatedly invoked the contract rights he believed belonged to him and thereby exercised his rights protected under the Act. In response to his blatant expression of protected and Union activity, Respondent quashed any attempt by employees to exert their protected rights by telling Hernandez that seeking to invoke

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[1] Tr. 179. As used herein, the numbers following the abbreviation "Tr." refer to the page numbers of the transcript, "GC" refers to General Counsel's exhibits, "R" refers to Respondent's exhibits, and "Jt." refers to joint exhibits.

[2] Tr. 180.

[3] *Interboro Contractors*, 157 NLRB 1295, 1298 (1966); *Meyers Industries*, 281 NLRB 882, 884 (1986).

[4] See *Omni Commercial Lighting, Inc.*, 364 NLRB No. 54, slip op. at 3 (2016) (citing *Interboro*, above, and *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984)).

[5] Tr. 165.

the Union was futile and, to ensure no further insurrection by activist employees, discharged Hernandez in violation of the Act.

As further discussed below, the Act prohibits employers from retaliating against employees who exert their protected rights. Counsel for the General Counsel (CGC) therefore respectfully requests the Administrative Law Judge (ALJ) find that Respondent committed the unfair labor practices alleged in the Complaint and order all appropriate remedies.

II. STATEMENT OF THE CASE

This case is before ALJ Andrew Gollin upon the CGC's Complaint alleging that Respondent violated Section 8(a)(1) of the Act, by telling employees that it would be futile to select the Union as their collective-bargaining representative and Section 8(a)(1) and (3) of the Act by retaliating against Respondent's employee Hernandez by laying him off and/or discharging him for raising issues regarding safety concerns and claiming the right to per diem, the right to refuse to work under dangerous circumstances, and the right to equal employment opportunity. Hernandez filed the original charge in this case on July 16, 2018.[6] On October 23, 2018, the Regional Director issued a Complaint and Notice of Hearing (the Complaint), scheduling a hearing to commence on January 8, 2019.[7] On November 9, 2018, Respondent filed its answer to the Complaint admitting to the procedural allegations of the Complaint, the Board's jurisdiction over Respondent, the Union's status as a labor organization, that Respondent and the Union maintained in effect a collective-bargaining agreement, and the names, positions, and supervisory status of Nolan, Cyndi Sargent (Sargent), and Steve Rodgers (Rodgers), but denying that it engaged in any of the unfair labor practices alleged.[8] Subsequently, by agreement

[6] GC 1(a) and 1(b).

[7] GC 1(c) and 1(d).

[8] GC 1(e).

of the parties, the hearing was rescheduled to February 20, 2019.[9] The ALJ heard this case on February 20 and 21, 2019, in Phoenix, Arizona. On February 21, 2019, Respondent moved for a directed verdict and the ALJ denied Respondent's motion.[10] That same day, the ALJ granted the CGC's motion to amend Complaint paragraph 5(d) over Respondent's objection to allege: "The claims of Employee Hernandez described above in paragraph 5(c) relate to the agreement and/or another collective bargaining agreement that Hernandez believed governed his terms and conditions of employment."[11]

III. STATEMENT OF THE ISSUES

A. Whether Respondent violated Section 8(a)(1) of the Act by Informing Employees It Would be Futile to Select the Union as Their Collective-Bargaining Representative by Telling Employees That the Union did not Have Any Power in Arizona, That There Was No Union in Arizona, and That the Laws Are Different in Arizona.

B. Whether Respondent violated Section 8(a)(1) and (3) of the Act by Laying Off and/or Discharging Hernandez for Invoking Rights Which He Had a Good-Faith Belief Related to A Collective Bargaining Agreement Between Respondent and the Union.

IV. STATEMENT OF THE FACTS

A. Respondent's Operations

It is undisputed that, at all material times, Respondent has been a corporation with an office and place of business in the State of Arizona and has been engaged as a general contractor in the construction industry doing public and governmental heavy construction, with its main expertise in concrete paving.[12] In addition to conducting operations in Arizona, Respondent also conducts operations in the State of California and maintains its main office in San Diego,

[9] GC 1(f) and 1(g).

[10] Tr. 269.

[11] Tr. 264, 267.

[12] GC 1(e); Tr. 41.

California.[13] It is also undisputed that, in conducting its operations during the 12-month period ending July 17, 2018, Respondent performed services valued in excess of $50,000 in States other than the State of Arizona and that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.[14] At all material times, Respondent and the Union have maintained in effect and enforced a collective-bargaining agreement covering wages, hours, and other terms and conditions of employment of certain employees of Respondent at its locations in southern California (the Agreement) with effective dates from July 1, 2016 to June 30, 2019.[15] The agreement includes provisions that protect employees from having to work in unsafe conditions[16] and from discrimination based on Union activity.[17] The CBA further provides for subsistence pay or room and board.[18]

Respondent hires Union drivers in California out of the Union hall in Southern California[19] and "[a]ll of [Respondent's] truck drivers are Teamsters."[20] Respondent houses all out-of-town drivers in the Comfort Inn in Phoenix, Arizona.[21] During all of 2018, Respondent operated at its Connect 202 Project, also referred to as Loop 202 project, in Arizona.[22] In addition to operations at the Connect 202 Project, Respondent also conducted operations in

[13] Tr. 41, 43, 82.

[14] GC 1(e).

[15] *Id.*; Tr. 60-61.

[16] See Jt. 1 at 12, 32.

[17] See *Id.* at 11.

[18] See *Id.* at 49.

[19] Tr. 74, 78, 103-104; GC 2 at 1.

[20] Tr. 286.

[21] Tr. 54; GC 2 at 1.

[22] Tr. 48-49, 271.

Arizona at its Picacho Project on State Route 87 and Interstate 10, the San Tan Canal, and the highway Loop 101, during some or all of 2018.[23, 24]

B. Hernandez' Background and Employment with Respondent

Hernandez has been a Teamster driver for over 30 years.[25] During his extensive 30-plus year career as a Teamster driver, Hernandez has been a member of different Teamster locals under both construction and freight contracts.[26] During his time as a Teamster driver, Hernandez has also served as a steward and has filed grievances related to employee rights under Teamster contracts and other local agreements between Teamsters and employers.[27]

1. Hernandez was Dispatched by the Union and Hired out of California by Respondent

In April, Nolan and Hernandez discussed the possibility of Hernandez being employed by Respondent.[28] However, Nolan was not able to hire Hernandez at that time, so Nolan took Hernandez' information and told him to wait until Respondent's project started.[29]

In June 2018, Nolan, whose office is in San Diego, requested Hernandez to be dispatched from the Union's hall in San Diego on June 6.[30] As is the normal process for Union drivers dispatched to Respondent,[31] Hernandez was dispatched by the Union and hired out of Respondent's San Diego office as a Super 10 dump truck driver.[32] Hernandez first assisted

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[23] Tr. 44, 48-49.

[24] Unless otherwise indicated, all dates hereafter occurred in 2018.

[25] Tr. 165.

[26] Tr. 165, 177-78, 237.

[27] Tr. 251.

[28] Tr.108.

[29] Tr. 109.

[30] Tr. 101, 109; GC 2 at 14.

[31] Tr.78-79, 277-78.

[32] Tr. 107-8; 277-78, GC 2 at 14.

Respondent by taking a Super 10 dump truck from Victorville, California to Phoenix, Arizona.[33] During his employment, Hernandez was transported several times from California to Arizona by Respondent and he was housed at the Comfort Inn Hotel in Phoenix, Arizona.[34] Hernandez was paid travel time for traveling back and forth from California to Arizona.[35] While in Arizona, Hernandez drove a Super 10 dump truck for Respondent and worked on Respondent's Connect 202 Project with Nolan as his foreman.[36]

When Hernandez was hired in June, he was provided Respondent's California Orientation Manual which is the general handbook given to Respondent's new employees in California.[37] Respondent also has a separate manual provided to employees in Arizona which contains information regarding to employee health insurance and non-California specific regulations.[38] Hernandez, because he was a California employee, Employer did not provide Hernandez, and he did not receive, the Arizona manual and only received the California Orientation Manual.[39]

2. Hernandez Engaged in Protected and Union Activity by Raising Concerns Regarding Safety and Invoking Contractual Rights

On June 10, Hernandez called Respondent's office in San Diego and spoke to Sargent regarding his inability to rest because of his roommate.[40] Given the long hours Hernandez worked, which sometimes meant working nights, Hernandez was concerned that his inability to

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[33] Tr. 168.

[34] Tr. 167-171; see also GC 2 at 23.

[35] Tr. 332-333.

[36] Tr. 54-55, 101-02, 215-16,

[37] Tr. 273-77.

[38] Tr. 277.

[39] *Id.*

[40] Tr. 174-75.

sleep would create unsafe working conditions.[41] After speaking with Sargent, Hernandez sent her an email message, copying the Union on the message, and raised his safety concerns regarding Respondent's vehicles and equipment as well as possible Department of Transportation (DOT) violations.[42] That same day, Hernandez also sent separate email messages to the Union and copied Sargent to raise safety concerns and concerns that he was being targeted and retaliated against because of his Union sympathies.[43] In both his message to Sargent and his message to the Union, Hernandez requested assistance to be transferred to a safer jobsite.[44]

The following afternoon, on June 11, Hernandez sent Sargent another email message in which he again sought assistance with safety issues, sought a transfer to a safer jobsite, and raised concerns regarding per diem paid to Union drivers.[45] Hernandez again copied the Union on the message.[46]

That evening, around 9:00 p.m., Nolan approached Hernandez and demanded to talk.[47] Hernandez was worried he was going to be disciplined and requested to have another Union driver named Greg Sealy present.[48] As they walked, Nolan's nephew Kraig Smith followed Hernandez and Nolan.[49] When Hernandez saw Smith, he asked Nolan whether Smith was his supervisor or foreman because he did not want Smith present if the meeting was a Union

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[41] Tr. 218.

[42] Tr. 174-75; GC 2 at 24.

[43] GC 2 at 26, 27.

[44] GC 2 at 24, 26. 27.

[45] GC 2 at 28.

[46] *Id.*

[47] Tr. 144, 178-79.

[48] Tr. 118, 178-79.

[49] *Id.*

matter.[50] Upon hearing this, Nolan said to Hernandez, "[T]here is no union in Arizona. They have no power. The Union has no rights in Arizona, that the laws are different in Arizona, and [you] should just be thankful [you] have a job."[51] Nolan continued talking about the drivers' rooms, and Hernandez asked about the per diem paid to drivers.[52] Because Nolan was upset, Hernandez began to walk away and he noticed that Smith was following him so Hernandez asked Nolan who Smith was and whether Smith was his foreman.[53] Smith then replied that he was a man and that Hernandez should act like a man too.[54] Hernandez tried to ignore Smith and walk away, but Smith told Hernandez that he was going to pray for Hernandez.[55] When Hernandez heard this he told Smith that he took Smith's comments as an insult and told Smith not to pray for him.[56]

After the exchange between Nolan, Smith, and Hernandez, Nolan told Hernandez that he was done with Respondent and that he was unfit to be at Nolan's jobsite.[57]

3. Respondent Laid-Off and Terminated Hernandez

After the altercation on July 11, Nolan told Hernandez that he needed to get ready to leave Respondent's jobsite at the Connect 202 Project and that he was leaving the project.[58] At about 10:51 p.m., Nolan sent Hernandez a text message to tell him that he would not need

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[50] *Id.*

[51] Tr. 179.

[52] Tr. 179-80.

[53] Tr. 180.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Tr. 180-81.

[58] Tr.122.

Hernandez for the rest of the week and that the van left the following morning at 6:30 a.m.[59] Hernandez responded by pleading for his job, but Nolan did not respond to Hernandez that night.[60] Before the night was over and just past midnight, after being told that he was no longer going to be employed at the Connect 202 Project, Hernandez sent another email message to Sargent.[61] Hernandez' email message to Sargent explained what had just occurred with Nolan and Smith and let her know that he was being sent back to California.[62] The following morning, Nolan drove Hernandez back to California in Respondent's van.[63] After Nolan dropped Hernandez off in California on July 12, Nolan sent Hernandez a text message telling him that he would call Hernandez if he needed him.[64]

That same morning, Sargent forwarded the message that Hernandez had sent her about the incident between Nolan, Smith, and Hernandez to Rodgers and Nolan.[65] Within a few hours, Rodgers responded to Sargent's message, copied Hernandez on the message, and directed Hernandez to refrain from sending Sargent email messages and to contact his Union representative if he had a problem.[66] Rodgers also mentioned that Respondent was not a signatory with the Union in Arizona and that Respondent had verified that all of Respondent's

[59] GC 6 at 1, 2.

[60] GC 6 at 2.

[61] Tr. 186; GC 2 at 29.

[62] GC 2 at 29

[63] Tr. 122, 181.

[64] GC 6 at 2.

[65] GC 2 at 33.

[66] *Id*.

vehicles were in good working condition.[67] This was the first email response Hernandez received from Respondent.[68]

On Sunday, July 15, Hernandez sent Nolan a text message to ask if there was work in California available.[69] However, Nolan responded by saying that he would not need Hernandez for the week of July 16.[70] A few days later, on July 15, Hernandez sent Rodgers an email message in response to Rodgers' directive not to contact Sargent and asked Rodgers whether he was terminated.[71] Rodgers never responded.

On Saturday, July 21, Hernandez again sent Nolan a text message asking for work available in California, to which Nolan responded, "No."[72] Hernandez was never sent back to work and was laid-off and terminated.[73]

V. ARGUMENT

A. When in Conflict with that of Respondent's Witnesses, the ALJ Should Credit the Testimony of the Charging Party

Significant weight is given to an ALJ's credibility determinations because the ALJ actually sees and hears the witnesses when they testify. It is for this reason that a witness's demeanor, including their expressions, physical posture and appearance, manner of speech, and non-verbal communication, may convince the ALJ that the witness is testifying truthfully or falsely. Credibility determinations may also be based on the weight of the respective evidence

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[67] *Id.*

[68] Tr. 247.

[69] GC 6 at 4.

[70] *Id.*

[71] GC 3.

[72] GC 6 at 4.

[73] Tr. 54, 131, 152, 281, 323.

(established or admitted), inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole.[74]

The testimony of the CGC witness Hernandez, during both direct and cross-examinations, was straightforward and consistent with his prior statements and admitted documentary evidence.

Hernandez' testimony was neither embellished nor exaggerated and provided foundational and other details undercutting a claim of guile, deceit, or exaggeration. Unlike Hernandez, who was highly credible and whose testimony was consistent with the record evidence, Respondent's supervisors contradicted their prior statements and admitted documentary evidence. Respondent's supervisors at times appeared to formulate their responses to avoid direct responses and testified inconsistently at hearing.

1. Respondent's Witness Stephen Rodgers Should Not be Credited

While Hernandez' testimony was consistent with his prior statements, Rodgers' testimony was inconsistent and evasive. Rodgers testified that the statement which he provided dated September 10, was accurate.[75] In his statement, Rodgers provided a singular reason for removing Hernandez from Respondent's jobsite in Arizona, namely, that Respondent was slowing down and did not need more trucks.[76] Additionally, Rodgers mentioned in his statement that it considered Hernandez' request to transfer when deciding to remove him from the Arizona jobsite.[77] However, at hearing, Rodgers mentioned that the decision to remove Hernandez was

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[74] *Medeco Security Locks*, 322 NLRB 664 (1996); *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996). Accord *V&W Castings*, 231 NLRB 912, 913 (1977), enfd. 387 F.2d 1006 (9th Cir. 1978).

[75] Tr. 56; GC 2 at 1, 2.

[76] GC 2 at 1.

[77] *Id.*

also made on account of other issues at the Comfort Inn hotel.[78] Specifically, Rodgers testified that Hernandez had locked his roommate out the hotel room and had been sharpening a large knife while making "off-the-wall comments."[79] Rodgers went on to testify that after he and Nolan discussed the hotel incident with the knife that Rodgers decided to take Hernandez back to San Diego.[80]

The incredible and dangerous incident that Rodgers described in testimony, however, was not mentioned at all in his prior statement.[81] Not only was this incident not mentioned in Rodgers' written statement, but the clearly alarming and dangerous incident was not reported to the police, was not reported to the hotel, and no safety report was done.[82]

Notably, Respondent's counsel also did not question Hernandez about an incident with a knife during cross-examination. Hernandez was not disciplined, and the incident was not otherwise noted in Hernandez' employee file.[83] The reason that the event had not been previously noted, recorded, or disclosed is evident: it did not happen and only serves as a red herring to attack Hernandez' character.

Rodger's testimony on direct further demonstrates his evasiveness and willingness to provide inconsistent statements. During cross-examination, the following exchange occurred:

> Q. And prior to that, what was your conversation with Mr. Jean [sic] Brewer?
>
> A. The prior one was I called him and asked him if he could give me the information where -- how long it had been before Victor Hernandez

[78] Tr. 73.

[79] *Id.*

[80] *Id.*

[81] See GC 2 at 1, 2.

[82] Tr. 80.

[83] *Id.*; see also GC 2.

was -- from the day we laid him off to the day he went back to work, and if he was working at that time.

Q. What date did you lay off Mr. Hernandez?

A. Excuse me?

Q. What date did you lay off Mr. Hernandez?

A. I don't know that he was laid off. I think it explains in my letter that I wrote to you that we didn't lay him off.

JUDGE GOLLIN: You just said you laid him off. So he's asking you when you laid him off because you just said you laid him off.

THE WITNESS: Oh, well, yeah, I called Jean -- or yeah. So that was the answer.

Given the above, only one of two conclusions regarding Rodgers' testimony can be made: either he was lying under oath or his memory is so inconsistent, fluid, and/or interchangeable that he cannot be believed.

2. Respondent's Witness Cyndi Sargent Should Not be Credited

Sargent sought to avoid responsibility by minimizing her role in Respondent's operations. Sargent testified that her role as Office Manager is to manage accounting and administrative employees in Respondent's corporate office.[84] She further testified that as corporate secretary her duties were to attend Respondent's board meetings, attest and witness documents, bid papers, and bonds.[85] Though Sargent categorically denied being the human resources manager,[86] Rodgers testified that in addition to being Respondent's Office Manager, Sargent was also Respondent's human resources manager.[87] Moreover, Sargent testified that she is in charge of

[84] Tr. 88.

[85] *Id.*

[86] *Id.*

[87] Tr. 49.

all employee benefits, health insurance, 401(k), profit sharing, vacation, and sick days.[88] She also equated her position with the Union's human resources by testifying that Union employees do not call her, but instead they contact the Union for their human resources needs.[89] Sargent also grudgingly admitted that employees in Arizona would need to contact her for their human resources needs.[90]

3. Respondent's Witness Larri Nolan Should Not be Credited

While Hernandez testified with certitude and provided direct responses, the same cannot be said of Nolan. Like Rodgers, Nolan testified about the incredible story regarding the knife incident.[91] Nolan, however, added details that made the story more fantastical by adding that Hernandez made a menacing threat to another employee that was something along the lines of "I don't know where you're sleeping tonight, but you're not sleeping in the room."[92] Though Nolan was the supervisor onsite, he did not report the incident to the police.[93] As with Rodger's rendition of the event with the knife, Nolan's story appears nonsensical and only serves to divert attention from the case at hand.

Nolan's testimony was evasive and self-serving. During cross-examination, in addition to speculating about employee Ray Parra's fear during the above-mentioned knife fiasco,[94] Nolan went on to speculate that his nephew Smith would get into a physical altercation with

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[88] Tr. 94.

[89] Tr. 95.

[90] *Id.*

[91] Tr. 139-140

[92] Tr. 139.

[93] Tr. 150.

[94] *Id.*

Hernandez because, "Well, in the fact that the natural response from a human if someone hits you, you want to hit them back."[95]

Nolan's testimony regarding the reason for removing Hernandez from the Arizona jobsite was similarly nonsensical. Nolan described that the operations and need for drivers in Arizona fluctuated.[96] When Nolan was asked why he had chosen to remove Hernandez from the Arizona project, Nolan simply responded, "[W]e just didn't need him."[97] Notwithstanding the fact that Nolan testified that on July 11 Hernandez had threatened another employee, locked an employee out of his hotel room, and nearly got into a physical fight with Nolan's nephew, when asked why he decided to remove Hernandez when operations slowed down, he responded, "I just didn't need him."[98]

Moreover, while some of Nolan's responses on cross-examination did not make sense, he simply avoided responding by equivocating and stating that he did not recall during a significant part of his testimony. Rodgers testified that he had completed the statement he provided during the investigation after speaking with Nolan. When asked about his discussions with Rodgers regarding Hernandez' charge, Nolan responded the following way:

> Q Did you talk to Mr. Rodgers regarding this charge after it was filed by Mr. Hernandez?
>
> A. I can't remember.
>
> Q. Did you give this charge to Mr. Rodgers?
>
> A. Did I give this charge? I can't remember.

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[95] Tr. 151.

[96] Tr. 137.

[97] Tr. 138.

[98] *Id.*

Q. Now, did you talk to Mr. Rodgers about the allegations that Mr. Hernandez was raising in this charge?

A. I can't remember.[99]

When asked about his discussions regarding July 11, Nolan responded:

Q. And Mr. Hernandez had told you that he could not stay in the same room because that other individual was not part of the Union?

A. I don't think the words that I was saying to him was he can't stay in the room. Yeah, I think he said -- I think it was, yeah, he said he couldn't stay in the room, and I'm trying to figure out exactly how the words were, that Victor Hernandez was complaining about the room situation and that he didn't want to stay with Mr. Parra.

Q. And he didn't want to stay with Mr. Parra because Mr. Parra was not union?

A. I think the conversation was more or less like Mr. Hernandez was complaining that he did not want to stay in the room with Mr. Parra because of the non-union -- because it's a non-union -- because it's a union room. I think that's the words I put. But I have to, I have to really think about that conversation because when we spoke, it was he was complaining that they're, they're union rooms and that he doesn't want Ray Parra in there because it's a union room. I have to think about that one because the words -- I mean because I said to him -- I have to, I have to think about it a little bit.

Q. Okay. When Mr. Hernandez told you that those are union rooms, you told him that Coffman paid for those rooms, right?

A. Yes.

Q. Now, you told Mr. Rodgers that Mr. Hernandez had been emailing Cyndi Sargent, right?

A. Say that again.

Q. You told Mr. Rodgers that Mr. Hernandez had been emailing --

A. No.

Q. -- Cyndi Sargent?

A. No.

[99] Tr. 133.

Q. You told Mr. Rodgers that Mr. Hernandez had been complaining or started complaining on Wednesday, July 11th.

A. Well, the words -- like I said, I have to think about that conversation because that night I got the information from Ray Parra about the things that Victor Hernandez was saying. So it was -- that night of July 11th is -- I explained to Steve that he's complaining that he doesn't want to stay in the room because it's a union room and he didn't want to stay with Ray Parra.[100]

The evasive manner in which Nolan responded to straightforward questions highlight the fact that Nolan should not be found credible and that when in conflict with Hernandez' testimony, the ALJ should credit Hernandez' testimony.

B. Respondent Threatened That Union Representation Is Futile in the State of Arizona

Employer statements which signal to employees that their union representation is futile violate Section 8(a)(1) of the Act.[101] Threats to employees that it would be futile for them to elect a union as their collective bargaining representative and threats to unduly delay collective bargaining are unlawful.[102]

Here, Hernandez had repeatedly raised his concerns about working conditions, including his not receiving benefits to which he believed he was contractually entitled as a Union driver. One day, when Hernandez was trying to assert his rights in this manner, Nolan snapped at Hernandez' mention of the Union, saying, "[T]here is no union in Arizona. They have no power. The Union has no rights in Arizona, that the laws are different in Arizona, and [you] should just

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[100] Tr. 134-36.

[101] See, e.g. Hi-Tech Cable Corp., 318 NLRB 280, 282 (1995) (finding statement that employer would not give represented employees benefits that it did not give its unrepresented employees unlawful because it indicated the futility of union representation).

[102] *W.E. Carlson Corp.*, 346 NLRB 431, 431 n.2, 444 (2006) (threat to delay bargaining); *Equipment Trucking Co.*, 336 NLRB 277, 283 (2001) (threat of futility); *Garvey Marine, Inc.*, 328 NLRB 991, 1004, 1018 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001) (threat of futility); *Kona 60 Minute Photo*, 277 NLRB 867, 869 (1985) (threat to delay bargaining); *Airtex*, 308 NLRB 1135 fn. 2 (1992) (statement by president and owner that he had only to negotiate with the union, not sign a contract, and negotiations could last a year, in context was a threat that employee support for the union would be futile).

be thankful [you] have a job."[103] In context, this statement went beyond merely conveying that Hernandez was covered by any collective-bargaining agreement (something Respondent never clearly conveyed to him despite his repeated attempts to assert contractual rights). It also suggested that, by law, employees could not have a union in Arizona and that unions had no power in Arizona. The statement therefore conveyed that having union representation in Arizona would be futile, and it thereby interfered with employees' rights under Section 7 of the Act.

C. Respondent Discharged Hernandez for Engaging in Union and Protected Concerted Activities, Including Asserting Rights He Believed in Good Faith He Possessed under a Collective-Bargaining Agreement

1. Hernandez Engaged in Union and Protected Concerted Activities

Section 7 of the Act guarantees the right of employees to engage in "concerted activities for the purpose of . . . mutual aid or protection . . . ."[104] The right to engage in concerted activities is protected by Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 . . . ."[105] Accordingly, an employer violates Section 8(a)(1) of the Act by disciplining employees for engaging in concerted activities protected by the Act.[106]

The Supreme Court has indicated that Section 7's "mutual aid or protection" clause should be liberally construed to protect concerted activities directed at a broad range of employee concerns.[107] As the Supreme Court has explained, "an individual employee may be engaged in concerted activity when he acts alone."[108] Such circumstances include an employee's "assertion

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[103] Tr. 179.

[104] 29 U.S.C. § 157.

[105] 29 U.S.C. § 158(a)(1).

[106] *NLRB v. Air Contact Transport, Inc.*, 403 F.3d 206, 208, 213 (4th Cir. 2005).

[107] See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-68, 567 n.17 (1978).

[108] *NLRB v. City Disposal System*, 465 U.S. 822, 831 (1984).

of a right grounded in a collective-bargaining agreement."[109] This is so because, "a single employee's invocation of such rights affects all the employees that are covered by the collective-bargaining agreement . . . [which] is sufficient to bring the actions of an individual employee within the 'mutual aid or protection' standard, regardless of whether the employee has his own interests most immediately in mind."[110]

Under the Board's *Interboro* doctrine, an individual employee's attempt to enforce the provisions of a collective-bargaining agreement qualifies as protected concerted activity.[111] That action is protected because an employee's invocation of a collectively bargained right is "unquestionably an integral part of the process that gave rise to the agreement," and affects the rights of all employees covered by the agreement.[112] An employee need not initiate the formal grievance procedure to invoke the rights of the agreement, but may do so through a complaint to the employer.[113]

As the Supreme Court further explained, such employee conduct falls within Section 7 where "the employee's statement or action is based on a reasonable and honest belief that he is being . . . asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right."[114] Protected activity can be found even if the employee does not explicitly reference the collective-bargaining agreement.[115]

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[109] *Id.* at 829.

[110] *Id.* at 830.

[111] See, e.g., *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966); *NLRB v. City Disposal Systems*, 465 U.S. at 831-32.

[112] *NLRB v. City Disposal Systems*, 465 U.S. at 831-32.

[113] *Id.* at 836.

[114] *Id.* at 837.

[115] *Id.* at 839-40.

Accordingly, "an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated."[116] The Board has specifically found that this protection extends to encompass employees' attempts to assert rights that they believe in good faith they possess under a contract, even when, in fact, they do not have those rights under the contract,[117] and employees attempts to assert contractual rights under a contract that they believe in good faith covers them, even when, in fact, they are not covered by the contract.[118] Moreover, discrimination against employees for asserting a contract right is an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act. [119]

In this case, both Hernandez and Respondent's supervisors testified that Hernandez had been dispatched from the Union hall in San Diego, California. In fact, all of Respondent's supervisors were clear that Hernandez had been dispatched from the Union, that he was a Union driver, and that he was hired in California. The CBA between Respondent and the Union applies to employees in southern California. Moreover, though Respondent had separate employee

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[116] *Id.* at 840 (single employee refusing to drive truck he believed was unsafe, pointing to provision in collective-bargaining agreement giving him right of refusal, engaged in protected, concerted activity); *accord U.S. Postal Serv.*, 332 NLRB 340, 343–44 (2000), *enforced*, 25 F. App'x 41 (2d Cir. 2001); *Monongahela Power Co.*, 314 NLRB 65, 69-71 (1994), *enforced*, 62 F.3d 1415 (4th Cir. 1995); *NLRB v. P*I*E* Nationwide, Inc.*, 923 F.2d 506, 515 (7th Cir. 1991) (asserting honest and reasonable—but mistaken—contractual right to refuse work assignment is protected); *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir.1967). Accord *OPW Fueling Components v. NLRB*, 443 F.3d 490, 496 (6th Cir. 2006) (asserting contractual right to file grievance is protected); *NLRB v. Hale Container Line, Inc.*, 943 F.2d 394, 400 (4th Cir. 1991) (asserting contractual right to reimbursement of travel expenses is protected); *NLRB v. Howard Elec. Co.*, 873 F.2d 1287, 1291 (9th Cir. 1989) (asserting contractual requirement that only electricians move electrical wire is protected). See, e.g., *Stephens Media*, 677 F.3d 1241, 1252 (D.C. Cir. 2012) (attempted participation in meeting with management to question employee was protected, concerted activity); *Crown Central Petroleum Corp.*, 177 NLRB 322, 322 (1969) (participation in grievance meeting was protected conduct), enforced, 430 F.2d 724 (5th Cir. 1970).

[117] See *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 2-3 (2016), enfd. 859 F.3d 23 (D.C. Cir. 2017).

[118] See *Omni Commercial Lighting, Inc.*, 364 NLRB No. 54, slip op. at 3-4 (2016).

[119] See *Crown Wrecking Co.*, 222 NLRB 958, 962 (1976).

handbooks for Arizona and California, Respondent provided Hernandez a copy of the California handbook because he was a California employee.

In addition to all the evidence demonstrating that Respondent considered Hernandez a California Union driver, Hernandez credibly testified about his extensive experience as a Teamster driver. For over 30 years, Hernandez has been working as a Teamster driver and getting dispatched to work for employers throughout California and other states while being under a Teamster CBA. Hernandez further testified that he had served as a union steward and that while serving as a steward he had filed grievances over issues like per diem.

When considering that Respondent requested Hernandez from the Union hall, hired Hernandez out of Respondent's San Diego office after being dispatched by the Union, issued Hernandez Respondent's California employee manual instead of the Arizona employee manual, and paying Hernandez travel time from California to Arizona and back to California, it is reasonable for an employee like Hernandez with an extensive history as a Teamster driver to have a good faith belief that his employment would be subject to the terms of a collective-bargaining agreement.

The *Interboro* doctrine does not require that an employee have an actual contract from which to cite. Indeed, constricting the doctrine to that minimal level renders the doctrine meaningless. The circumstances surrounding a case helps to guide whether an employee has a good-faith belief that she is entitled to the contract right she invokes. Here, the circumstances demonstrate that Hernandez, though mistaken, was under the impression that he was employed as a Union driver for an employer who was a Union signatory. Only once Respondent decided to terminate Hernandez, did Respondent notify him in an unequivocal manner that he was not employed subject to the terms of a collective-bargaining agreement.

Under all these circumstances, including all the circumstances indicating to Hernandez that he was being treated as a California driver and including Respondent's failure to correct Hernandez' mistaken belief when he repeatedly tried to assert contractual rights, Hernandez' attempts to assert contractual rights that in reality he did not have were made in good faith and were not so unreasonably based that they were not protected under the Act.

2. Respondent Discharged Hernandez for Engaging in Union and Protected Concerted Activities

In assessing whether an action has been taken against an employee for unlawful reasons or for other reasons cited by an employer, the Board applies the framework set forth in *Wright Line*.[120] Under that framework, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee.[121]

An employer's animus or discriminatory motive can be established by the timing of the adverse action, the presence of other unfair labor practices, statements and actions showing the employer's hostility toward protected concerted activity, and evidence that the rationale

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[120] 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)

[121] *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Mgt.*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB at 1089. The *Wright Line* standard upheld in *Transportation Mgt.* and clarified in *Greenwich Colleries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. *See Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 142-43 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the context of the Act, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

advanced by the employer in support of its adverse action is pretext.[122] Pretext can be evidenced by disparate treatment, shifting defenses, false reasons, and failure to investigate.[123]

Once the General Counsel has met this burden, the burden shifts to the employer to show, by a preponderance of the evidence, that it would have taken the same action, even in the absence of the employee's protected activities.[124] When the General Counsel has established that the reasons given for an adverse action were pretext, the employer cannot meet this burden.[125]

Applying these standards to the facts of this case, Hernandez engaged in union and protected concerted activities, though his various statements about the Union and Respondent's non-Union employees, his copying the Union on his communications with Respondent, and his attempt to assert rights he believed he had under a collective-bargaining agreement covering his terms and conditions of employment by asking for contractual benefits to which he in good faith believed he was entitled. Respondent unquestionably knew of these union and protected concerted activities because all of Hernandez' protected communications were addressed directly to supervisors and agents of Respondent. The evidence establishes that hostility toward these protected activities contributed to the decision to discharge Hernandez because: Respondent made a threat of futility in response to Hernandez' protected activities; Hernandez was

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[122] *See, e.g., Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999) (timing); *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 251 n.2, 260 (2000) (other unfair labor practices), *enfd. mem*. 11 Fed. Appx. 372 (4th Cir. 2001); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999) (anti-union statements); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992) (pretext).

[123] *See, e.g., Lucky Cab Company*, 360 NLRB 271, 276-77 (2014)*; Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) (disparate treatment); *Seminole Fire Protection, Inc.*, 306 NLRB 590, 592 (1992) (shifting defenses); *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (timing). An employer's unexplained failure to call a witness who would reasonably be assumed to be favorably disposed toward it can also give rise to an adverse inference with respect to the employer's conduct. *Douglas Aircraft Co.*, 308 NLRB 1217, 1217 n.1 (1992); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 n.1 (1977).

[124] *Wright Line*, 251 NLRB at 1089.

[125] *SFO Good-Nite*, 352 NLRB 268 (2008). *See also Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004); *Case Farms of N. Carolina, Inc.*, 353 NLRB 257, 259 (2008).

discharged immediately after a confrontation where Hernandez engaged in union and protected concerted activities; Nolan made statements suggesting that he was getting rid of Hernandez after the confrontation because of what he had said; Respondent has given vague and shifting reasons for discharging Hernandez, thus evidencing pretext; and Hernandez was the only employee laid off at the time, thus evidencing disparate treatment and pretext. Because the reasons given for Hernandez' discharge are pretextual, Respondent cannot meet its burden of establishing that it would have discharged Hernandez, even if not for his union and protected concerted activities

VI. CONCLUSION

CGC respectfully submits that the record evidence and testimony demonstrate that Respondent violated Sections 8(a)(1) and (3) of the Act as alleged. As such, CGC urges the Administrative Law Judge to issue a recommended Order providing for all necessary and appropriate relief, including a requirement that Respondent cease and desist from engaging in the types of unfair labor practices alleged or like or related unfair labor practices; post the proposed notice to employees attached as an Appendix to this brief; offer Hernandez immediate reinstatement; expunge all records related to the discharge of Hernandez; and make Hernandez whole for the loss of earnings he has suffered as a result of his unlawful discharge, including through compensation for reasonable search-for-work and interim employment expenses and compensation for any consequential economic harm that has resulted from his discharge.[126]

[126] Under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *E.g.*, *Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), enfd. as modified 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require Respondent to compensate Hernandez for all consequential

Dated at Phoenix, Arizona, this 19th day of April 2019.

Respectfully submitted,

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economic harms he sustained, prior to full compliance, as a result of Respondent's unfair labor practices. Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB 101, 102 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v. Co.*, 304 U.S. 333, 348 (1938). Compensation for employees' consequential economic harm would further the Board's charge to "adapt [its] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly," provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB 709, 718-719 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent's unlawful conduct.

CERTIFICATE OF SERVICE

I hereby certify that GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE in *COFFMAN SPECIALTIES, INC.*, Case 28-CA-223779, was served via E-Gov, E-Filing, and Electronic Mail, on this 19th day of April 2019, on the following:

Via E-Gov, E-Filing:

Honorable Andrew Gollin
Administrative Law Judge
National Labor Relations Board
Division of Judges
1015 Half Street SE
Washington, DC 20570-0001

Via Electronic Mail:

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APPENDIX – PROPOSED NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT threaten that selecting a union as your collective-bargaining representative in Arizona would be futile, including by suggesting that employees do not have a legal right to be represented by a union in Arizona or that unions have no power under Arizona state law.

WE WILL NOT fire you because you exercise your right to:

- bring issues and complaints about wages, hours, or other terms and conditions of employment to us on behalf of yourself and other employees;
- assert rights you believe you have under a collective-bargaining agreement with a union; or
- join, support, or engage in activities in support of a union.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer **VICTOR HERNANDEZ (HERNANDEZ)** immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent positions, without prejudice to his seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay **HERNANDEZ** for the wages and other benefits he lost because we fired him.

WE WILL remove from our files all references to the discharge of **HERNANDEZ**, and **WE WILL** notify him in writing that this has been done and that the discharge will not be used against him in any way.

Coffman Specialties, Inc.

_____
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

2600 North Central Avenue
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Telephone: (602)640-2160
Hours of Operation: 8:15 a.m. to 4:45 p.m.

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

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.